

May 15, 2003

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File 12468

***Via Same Day Courier
And Email***

Mr. Paul B. Pudge
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
26th Floor
Toronto, ON M4P 1E4

Dear Mr. Pudge:

Re: RP-2003-0044

Pursuant to Procedural Order No. 4 in the above-noted proceeding, the following constitute the submissions of the Power Workers' Union ("PWU") on the jurisdictional issue identified by counsel for Hydro One in her letter dated May 8, 2003.

The PWU respectfully submits that the Ontario Energy Board has no jurisdiction to make an Order which would have the effect of transferring a distributor's existing customers to another distributor on a Licence Amendment Application.

The powers of the Board are set out in the *Ontario Energy Act 1998*. As a statutory tribunal, the Board has only those powers which are given to it under Statute, either expressly or by necessary implication. Statutory Tribunals do not possess inherent jurisdiction: see *Brown and Evans Judicial Review of Administrative Action in Canada*, para. 13, 1100.

The *OEB Act* sets out the Board's powers on licence applications in some considerable detail. No provision expressly authorizes the Board to order that a customer be transferred. Further, there are indications in both the *OEB Act* and the *Electricity Act 1998* that this kind of Order was not contemplated by the legislature. These indications include the following:

- 1) The *OEB Act* expressly provides in section 70(13) that a licence shall not require a person to dispose of assets. In many situations, an Order that an existing customer be transferred would implicitly require such a transfer. Likewise Section 86 restricts a distributor's power to dispose of distribution assets without Board approval.

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- 2) None of the very detailed examples of licence conditions which appear in Section 70(2) suggest that such an Order can be made. The statutory interpretation principles of *ejusdem generis* and *expressio unius est exclusio alterius* apply.
- 3) The *OEB Act* does contain very specific provisions (in s. 59) detailing the specific circumstances where the Board may force a distributor to surrender possession and control of some or all of the distributor's business, including the assets thereof. However, these provisions deal with the very specific circumstances of an emergency, or where the distributor is failing to meet its obligations under s. 29 of the *Electricity Act*. Moreover, s. 59 contains specific and explicit provisions with respect to the nature of the compensation that the distributor is entitled to receive upon the surrender of its business (i.e. none). It is submitted that similarly specific language would be required in order for there to be a power in the Board to enable it to force a distributor to divest an existing customer and related assets to another distributor.
- 4) The legislature previously enacted detailed and specific provisions for the transfer of both customers and distribution assets, in the "Bill 185" provisions of the former *Power Corporation Act*. Those provisions are no longer in force. Had the legislature intended similar results to be possible under the current legislative regime, it would have included similarly detailed provisions.

For example, Bill 185 contained specific provisions regarding the mechanism for how the incumbent distributor would be compensated by the acquiring distributor for the assets transferred to the acquiring distributor. Such provisions were consistent with the statutory presumption that there shall be no expropriation of private property without compensation unless there is very explicit statutory authority to do so [*Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101].

- 5) Sections 28 and 29 of the *Electricity Act* oblige a distributor to connect and sell electricity to a customer that lies along any of the lines of the distributor's distribution system. It does not make sense that a distributor could be required to connect and serve a customer, only to face the prospect that they be transferred to another distributor at any time.
- 6) In many, if not all cases, the transfer of an existing customer from one distributor to another would result in the breach of the contract

of service between the existing customer and the incumbent distributor. It is submitted that the Board should be very loathe to interfere with existing contractual rights in the absence of explicit statutory authority to do so. Note that in cases where the legislature contemplates the abrogation of existing contracts, it has provided for that in very explicit language, for example s. 26 of the *Electricity Act, 1998*.

- 7) A power to order that existing customers be transferred would lead to difficulties in the treatment of assets previously used to serve the customer. These assets would be stranded, contrary to the purposes of economic efficiency which are expressed in the *OEB Act*.

Even if there is or may be a jurisdiction to order that existing customers be transferred, the PWU respectfully submits that this Board should decline to address the issues that arise in respect of transfer of existing customers in the present combined proceedings. None of the applications forming part of the combined proceedings raise any question or issue as to transfer of existing customers; they all involve new customers only.

Transfer of existing customers may raise complex and difficult questions that differ from those that arise from applications to serve new customers. It would be preferable for the Board to await an application or applications that raise these issues to provide a proper factual context to consider the differences that might arise. The PWU respectfully submits that it has been of great assistance to the Board and the parties to have a range of factual circumstances presented by the current applications, to provide context for the legal and policy issues that arise with respect to new customers. The Board should await a similar opportunity before considering transfers of existing customers, if it should find that it has jurisdiction to consider the matter at all.

All of which is respectfully submitted.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

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cc: Intervenors (see facsimile cover sheet)

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