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RP-2003-0239

EB-2003-0299

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IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, Sched. B, section 95;

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AND IN THE MATTER OF an Application by Hydro One
Networks Inc., for an Order or Orders granting an exemption
from section 92 of the *Ontario Energy Board Act, 1998* for
construction of a transmission project in the Region of York.

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BEFORE:

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Howard Wetston, Q.C., Chair
Presiding Member

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Paul Vlahos
Member

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DECISION AND ORDER

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The Application

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By application, dated December 5, 2003, Hydro One Networks Inc. (Hydro One) seeks, pursuant to section 95 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 Schedule B, an order granting it an exemption from the requirements of section 92 of the *Ontario Energy Board Act, 1998* (the Act). Section 92 requires a person to obtain an order of the Board before constructing transmission facilities. Hydro One seeks an exemption from the requirement for the construction of a high voltage transformer station (“TS”) and approximately 6.5 km of 230 kilovolt double circuit transmission line from a proposed Parkway TS to Richmond Hill TS, all in York Region and shown in a map attached as Appendix “A” to this order.

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The proposed Parkway TS is located on about 170 acres of Hydro One land located on the Parkway Belt lands on the southwest corner of Warden Avenue and Highway 407 in Markham. This proposed station would include installation of two 750 megavolt-ampere (MVA) autotransformers operating between the 500 kV and 230 kV transmission system levels.

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The proposed 230 kV double circuit transmission line would commence at the proposed Parkway TS and would end at Richmond Hill TS in York Region. The proposed line would be located on an existing Hydro One transmission right-of-way on Parkway Belt land running along Highway 407. The line would commence at Parkway TS and run westwardly to Bayview Avenue on the north side of the two existing 500 kV lines on the existing right of way. At Bayview Avenue the line would cross to the north side of Highway 407 and Highway 7 and run westwardly on the north side of Highway 7 to Richmond Hill TS.

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The proposed project is subject to the Exemption Order OHK-11, Order in Council 2887/76, dated October 14, 1976 under the *Environmental Assessment Act* (the "Parkway Belt Exemption"). The Parkway Belt Exemption applies to planning, designing, construction, operating and maintaining of transmission lines between Parkway TS and Claireville TS. Under the Parkway Belt Exemption approval for the proposed project under the *Environmental Assessment Act* is not required.

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Section 95 of the Ontario Energy Board Act, 1998 is as follows:

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The Board may, if in its opinion special circumstances of a particular case so require, exempt any person from the requirements of section 90 or 92 without a hearing.

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The special circumstances submitted by the applicant are the need for the project to address an anticipated lack of electricity supply in portions of the Greater Toronto Area ("GTA") in the summer of 2005, and the need for Board approval by January 30, 2004 to allow construction of the project to be complete by April 30, 2005. It is Hydro One's contention that a proceeding under section 92 will not allow for a hearing and order to be concluded by January 30, 2004. Therefore, an exemption under section 95 is necessary.

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The anticipated lack of supply in portions of the GTA according to Hydro One's evidence, is a consequence of the planned retirement of the Lakeview generating station ("GS") on April 30, 2005, and the lack of firm plans for the development of new generation in the GTA. Ontario Regulation 396/01 prohibits the use of coal to generate electricity in the Lakeview facility after April 30, 2005. The Independent Power Operator ("IMO") on December 5, 2003 confirmed that there is no intent to operate the plant on an alternative fuel, and that Ontario Power Generation's request to de-register Lakeview GS has been approved by the IMO. The resulting loss of supply to the grid could, according to Hydro One, require a reduction of up to 400 MW of customer load in the GTA, and if not addressed, it may lead to rolling blackouts affecting as many as 132,000 homes in the summer of 2005.

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To avoid such impacts and to address the supply requirement in 2005 resulting from the retirement of Lakeview GS, Hydro One claims that it must advance the completion of a portion of a proposed transmission project originally scheduled for completion by April, 2006, by one year to April 30, 2005. The portion of the proposed project to be completed by April 30, 2005 is comprised of one 500 / 230 kV autotransformer and the 6.5 kilometer line from the proposed Parkway TS to Richmond Hill TS. To complete the project, Hydro One would install the second 500 / 230 kV autotransformer

at Parkway TS before June 2006. The transmission project will insure sufficient supply for the spring of 2005.

The application is supported by the written evidence of the IMO dated December 11, 2003. The IMO submits that the proposed project arises directly from the IMO's identification of emerging and critical constraints on the grid and its request that market participants propose solutions. These constraints involve in part the reliability of supply to loads in York Region and the overloading of auto-transformers at Claireville TS, under certain system conditions after Lakeview GS retirement on April 30, 2005. The IMO identified these specific reliability concerns and requested solutions in its 2002 and 2003 Ten Year Outlooks. The IMO assessed the solutions proposed by market participants and determined that while certain proposed new generation resources for the GTA would, if built, address some of these reliability concerns, the transmission reinforcements that are the subject of this application would nevertheless be required. The IMO submits that Hydro One's proposal will need to address the foregoing reliability and supply concerns in a timely manner, even if new generation resources materialized or the schedule for implementation of planned generation resources was accelerated. The IMO believes that the project does not foreclose new generation or demand reduction resources in the GTA, and if such resources are developed, they will complement the proposed new transmission facilities.

The Board received a "Notice of Intervention" from Sithe Canada Ltd. and Sithe Southdown Ltd. (collectively "Sithe") dated December 11, 2003. Sithe has proposed generation sites to serve the GTA, and therefore has an interest in both the reliability of the transmission system in the GTA and in the impact on the market value of electricity of any modifications to that system. While Sithe has a clear interest in Hydro One's application, it nevertheless accepts that the Board's review must necessarily be expedited.

Analysis

In determining whether to grant an exemption under section 95, the Board must in its opinion determine whether special circumstances exist. The Board may exempt a person without a hearing.

"Special circumstances" is not defined in the Act, nor are there any decisions of the Board or any specific jurisprudence providing an interpretation of the phrase. The preferred approach to statutory interpretation is best encapsulated by E.A. Driedger, *Construction of Statutes* (2nd ed 1983) at page 87:

"Today there is only principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament."

As such, what is the ordinary meaning of the phrase special circumstances in the entire context of the Act, including of course the intention of the legislature? In a different context, i.e., trade marks, the Federal Court of Canada, Trial Division has interpreted the phrase special circumstances to mean circumstances that are "unusual, uncommon or exceptional" (*John Labatt Ltd. v. Cotton Club*

Bottling Co., *ibid* [1976] FCJ No. 11, 25 CPR (2d) 115; *Meredith & Finlayson v. Canada* [1992] F.C.J. No. 604, 55 F.T.R. 241). We believe this interpretation is also appropriate herein.

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With respect to the statutory context, generally, transmission line construction cannot proceed without an order from the Board granting leave to construct. This occurs after notice and hearing under the Act. The decision to not proceed to notice and hearing should occur only under exceptional or uncommon circumstances.

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Furthermore, did Hydro One file the application in a timely manner? The need for this transmission project has been apparent for some time. The regulation requiring cessation of coal-fired generation at Lakeview was gazetted on November 10, 2001, and there has been no indication since that time that the plant would be converted to an alternate fuel. Although generation projects have been proposed for the GTA, none sufficient to remove the need for the Hydro One project has commenced construction. The IMO identified the reliability concerns for the project in its 2002 and 2003 Ten Year Outlooks. The Board is not satisfied that the application for this exemption provides sufficient reasons for the delay in filing for a S. 92 proceeding.

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Nevertheless, the Board must consider the consequences of a failure to not provide an exemption on an expedited basis. One of the stated objectives of the Act, s.1.3, is to protect the interests of consumers with respect to prices and the reliability and quality of electricity service .

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The Board must ensure reliable electricity service to consumers whose supply is threatened. We accept that a decision, on an expedited basis, is required in order to ensure the completion of the construction of the required facilities by April 30, 2005.

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Despite the pressed circumstances herein, the Board has required the applicant to provide additional information on several matters. The Board notes that no outages of existing lines are anticipated, and that the impact of the project on transmission rates should be negligible. The need for the project is undeniable.

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We find the application compelling. Reliable supply to areas of the GTA will be at risk in the summer of 2005 unless the necessary approvals under the Ontario Energy Board Act, 1998 are provided by January 30, 2004. The Board finds that special circumstances, of an unusual, uncommon or exceptional nature, do exist in this particular case, and these circumstances require that an exemption from the requirements of section 92 be granted to the applicant for the proposed project.

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In granting this application, we wish to emphasize that such exemptions should be confined to exceptional cases. Notice and Hearing are also fundamental to the exercise of the Board's mandate. The Board should not be placed in the invidious position of choosing between the risk of unreliable electricity supply and the loss of full regulatory review and public participation in its decision making.

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In granting the application the Board also finds that the requirements it would normally consider in the public interest for the approval of a transmission expansion project have *prima facie* been met.

THE BOARD THEREFORE ORDERS THAT:

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- 1 Hydro One is exempted from the requirements of section 92 of the Act, with respect to the construction of Parkway TS and the 230 kV double circuit transmission line connecting Parkway TS to Richmond Hill TS, subject to the conditions listed in Appendix “B”.

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ISSUED at Toronto, December 23, 2003.

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ONTARIO ENERGY BOARD

Paul B. Pudge
Assistant Secretary

APPENDIX “A”
Map for the Proposed Project
[Parkway Transformer Station (TS) and 6.5 Km of 230 kV double circuit transmission
line from Parkway TS to Richmond Hill TS]

The map is not available electronically, but can be obtained from the Board’s office.

APPENDIX B
Hydro One Networks Inc.
RP-2003-0239/EB-2003-0299
Conditions of Approval

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1 General Requirements

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1.1 Hydro One Networks Inc. ("Hydro One") shall construct the facilities and restore the land in accordance with its application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

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1.2 Unless otherwise ordered by the Board, exemption authorized by the Board shall expire by March 31, 2004, unless construction of the proposed project has commenced prior to then.

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1.3 Hydro One shall advise the Board's designated representative of any proposed material change in the project, including changes in: the proposed route; construction techniques; construction schedule; restoration procedures; or any other impacts of construction. Hydro One shall not make a material change without prior approval of the Board or its designated representative.

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1.4 Hydro One shall obtain all necessary easement rights prior to commencement of construction.

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2	Project and Communications Requirements	44
2.1	The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Facilities.	45
2.2	Hydro One shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfilment of the Conditions of Approval on the construction site. Hydro One shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.	46
2.3	Hydro One shall give the Board's designated representative ten days written notice in advance of the commencement of construction.	47
2.4	Hydro One shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.	48
2.5	Hydro One shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. This written confirmation shall be provided within one month of the completion of construction.	49
2.6	Within fifteen months of the completion of construction, Hydro One shall file with the Board a written Post Construction Financial Report. The report shall indicate the actual capital costs of the project with a detailed explanation of all cost components and shall explain all significant variances from the estimates filed with the Board.	50

3 Monitoring and Reporting Requirements

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3.1 Both during and after construction, Hydro One shall monitor the impacts of construction, and shall file five copies of a monitoring report with the Board within fifteen months of the completion of construction. Hydro One shall attach to the monitoring report a log of all complaints related to construction that have been received. The log shall record the person making the complaint, the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.

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3.2 The monitoring report shall confirm Hydro One's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction and the condition of the rehabilitated land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

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4 System Impact Assessment

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- 4.1 Hydro One shall implement all the recommendations of the Independent Market Operator ("IMO"), as set out in the System Impact Assessment ("SIA") dated November 28, 2003, and the Addendum to the SIA dated December 9, 2005.

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