



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket UE20935
Order UE08-08

IN THE MATTER of an
application by Maritime Electric Company,
Limited for approval of an Open Access
Transmission Tariff.

**BEFORE THE
COMMISSION**

on Thursday, the 31st day of July, 2008.

Maurice Rodgerson, Chair
John Broderick, Commissioner
Anne Petley, Commissioner
Ernest Arsenault, Commissioner

Order

Compared and Certified a True Copy

(Sgd) *Mark Lanigan*

Technical and Regulatory
Services Division

IN THE MATTER of an
application by Maritime Electric Company,
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ORDER	

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Reasons for Order

1. Introduction

[1] This is an application under the *Electric Power Act*, R.S.P.E.I. 1988, Cap. E-4 (the “*Act*”), by Maritime Electric Company, Limited (the “Applicant”, “Maritime Electric”, “MECL”, or the “Company”) seeking, among other things, an order or orders of the Island Regulatory and Appeals Commission (the “Commission”) approving an Open Access Transmission Tariff (the “OATT”).

[2] Electricity provided to customers is transmitted from a source point, where it is either generated or purchased via a system of transmission and distribution lines. The transmission system is comprised of higher voltage lines and equipment of a public utility that run between sources or points of electricity supply. The transmission system also contains points where the electricity is transformed to lower voltages for distribution to customers. Most customers obtain their electricity from lower voltage distribution lines. Electric utilities buy and sell electricity from each other at the transmission line level.

[3] Presently, Prince Edward Island electricity customers receive electricity from two sources, Maritime Electric and City of Summerside Electric Utility (“Summerside Electric” or “Summerside”). Maritime Electric is an investor-owned utility that provides service to 90% of the electrical customers in Prince Edward Island. Summerside Electric, which provides services to the remaining 10% of electrical customers, is owned by the City of Summerside and is essentially unregulated unless customer rates charged in the geographic area beyond Summerside’s municipal limits are above those rates charged to Maritime Electric’s customers.

[4] The historical development of Prince Edward Island's electrical system has resulted in Maritime Electric providing all major electrical transmission services. This evolution occurred for a variety of reasons as the electrical system matured throughout the Island. Both Maritime Electric and Summerside Electric provide electrical distribution services to their customers as required for customer service delivery. In addition, both electric utilities in Prince Edward Island have changed from their own electric generation to purchasing the majority their electricity off-island and transmitting it via interconnection cables with neighboring jurisdictions. In fact, electrical utilities throughout North America have become integrated with electricity transmitted between jurisdictions through interconnected transmission facilities.

[5] These interconnections and the desire to improve the cost of electricity through open market competition have lead the United States to develop a standard tariff structure that all participants would use to facilitate the marketability of electricity. This tariff, the OATT, has been in existence in the United States since 1996. In simple terms, open transmission access means that a utility must provide transmission services over its transmission system to another utility or large customer on similar terms and conditions as available to all utilities. This, in turn, means that, where adequate transmission facilities are already available, there is no need for other utilities or large customers to build additional transmission facilities and equipment. Open transmission access also allows for access to generating facilities that might not otherwise be readily available.

[6] Canadian electric utilities wanting to participate in the United States electrical market are required by the United States Federal Energy and Regulatory Commission ("FERC"), to have a regulator-approved OATT consistent with the principles of the FERC-approved OATT. Most jurisdictions in Canada have already achieved the required regulator-approved OATT. Electric utilities in New Brunswick and Nova Scotia have regulator-approved OATT tariffs which are consistent with FERC requirements.

[7] The requirement for Prince Edward Island's only transmission provider, Maritime Electric, to have an approved OATT has become necessary with the development of independently owned wind power electricity generation facilities, which provide electricity to markets off-island. These wind farm developers require access to transmission services both on and off island and the access must be consistent with FERC requirements to facilitate commerce into the United States.

[8] In addition, it is beneficial for both Maritime Electric and Summerside Electric to have access to the most cost effective electricity generation available for their customers.

[9] In 2003, the Government of Prince Edward Island directed the Commission to inquire into, and report on, the following matters relating to electricity generation and transmission access:

- *Current electricity generation and transmission access opportunities (direct or indirect) open to cities, towns or municipalities as well as large industrial customers within Nova Scotia, New Brunswick and the New England States;*
- *Pending and probable changes to current electrical generation and transmission access within these jurisdictions;*
- *Current or contemplated transmission access opportunities in other jurisdictions which do not now exist on P.E.I.; and*
- *Any other matter the Commission may consider relevant to the issue.¹*

[10] As a result of this Commission investigation and final report to government, the Commission concluded that the establishment of a FERC compliant OATT was necessary for Prince Edward Island. Commission Order UE06-02, dated April 6, 2006, set out the requirement for Maritime Electric to file a proposed OATT by November 30, 2006.

2. Background to Application

[11] Maritime Electric filed for Commission approval an OATT application on December 13, 2006 and subsequently re-filed this application on October 3, 2007 following a stakeholder review process which resulted in several changes to the original application.

[12] In December, 2007, in response to a public notice of application, the Commission received a Notice of Intervention from Summerside Electric stating concerns about the regulatory environment that would be established for the provision of transmission services on the Island if the revised OATT is approved. Summerside Electric expressed concern over Maritime Electric directing the development of the OATT and requested that an independent review be conducted through a Commission hearing.

[13] The Commission held a meeting or pre-hearing conference of all interested parties on January 23, 2008 to further discuss the issues presented by Summerside Electric and to establish filing dates for parties to submit further information. At the meeting, both Maritime Electric and Summerside Electric agreed that certain items related to the jurisdiction of the Commission to hear the issue should be heard first and decided upon before the remaining issues were considered. Dates for filing the jurisdictional arguments were agreed to be February 29, 2008 with rebuttal filings to be made on March 15, 2008.

¹ EC 2003-467

[14] At the January, 2008 meeting, Summerside Electric indicated that it would be presenting several witnesses at a Commission hearing in support of its Notice of Intervention. Subsequently, both parties agreed to file the witness evidence by March 31, 2008 and April 15, 2008 with Maritime Electric providing rebuttal evidence by May 15, 2008. Both parties have provided this evidence as agreed.

[15] At the January, 2008 meeting, wind farm developers expressed concern to the Commission about potential delays that could occur in the implementation of an OATT if a public hearing process became protracted. Present and potential private wind farm developers require an approved OATT to assist with business planning. A significant delay in approving an OATT would also limit the provincial government's renewable energy development plans.

[16] The Commission determined that the best interests of all parties would be served through the interim approval of the refiled OATT application as filed in October, 2007. This interim tariff would then be revised, if necessary, following a Commission hearing. Commission Order UE08-03, dated March 4, 2008, approved the interim tariff.

[17] In its intervention to the Commission dated December 31, 2007, Summerside Electric presented seven policy issues in its intervention and requested an appropriate public hearing process. Of the issues presented, Maritime Electric has requested decisions from the Commission on the Commission's jurisdiction over the following issues:

- whether Maritime Electric has exclusive transmission rights;
- whether Summerside Electric has heritage rights of access to submarine cables connecting the Prince Edward Island electricity transmission system to the New Brunswick electricity transmission system; and
- whether the future planning mechanism proposed by Maritime Electric is adequate to ensure the needed levels of transmission capacity.

[18] These reasons address the three jurisdictional issues raised by Maritime Electric.

3. Discussion & Findings

3.1.1 Exclusive Transmission Rights

[19] Summerside Electric submits that Maritime Electric has argued that it has exclusive transmission rights in the Province based on Section 2.1(1) of the *Act*. Section 2.1(1) of the *Act* reads as follows:

No person other than Maritime Electric Company, Limited shall provide service in the province, or in a part of the province, unless:

(a) the person provides the service using facilities that have been operated by a person other than Maritime Electric Company, Limited continuously, and, in the case of distribution facilities, without extension thereof, from May 1, 1994; or

(b) the person holds a permit authorizing the person to provide such service in the part of the province where the service is provided. 2003,c.3,s.3

[20] Summerside Electric further submits that there is no exclusive transmission right in Section 2.1(1) of the *Act*, but states that the proper interpretation of the *Act* is that the Commission has a general supervisory power of all electric utilities in the Province, including Maritime Electric, under Section 26(1) of the *Act*. Summerside's interpretation of Section 26(1) of the *Act* is that the Commission, in using its supervisory power of all public utilities, has the power to make regulations and orders "for the proper carrying out of this Act". Summerside argues that it is obvious that the proper carrying out of the *Act* must include the ability for the Commission to interpret the possible limits of Section 2.1(1) of the *Act*.

[21] Summerside Electric further submits that the definition of service in Section 1(g) of the *Act* includes the "production, transmission, distribution or furnishing of electric energy". Further, Section 2.1 of the *Act* provides that persons other than Maritime Electric shall not provide service in the Province, or in a part of the Province, unless:

- *the person provides the service using facilities that have been operated by a person other than Maritime Electric Company Limited continuously, and, in the case of distribution facilities, without extension thereof, from May 1, 1994, or,*
- *the person holds a permit authorizing the person to provide such service in the part of the province where the service is provided.*

[22] Summerside further submits that, since it has been producing, distributing and furnishing electricity for more than 130 years over its own facilities, it has the right to provide its own transmission services. In addition, the Summerside points out that, under subsection 2.1(2) and 2.1(3) of the *Act*, it may apply for a permit to provide service in any area of the Province. Finally, under Section 8 of the *Act*, there is a provision for shared use of electric utility's poles and a mechanism to allow the Commission to mediate any disputes as to compensation or use.

[23] Summerside Electric also states that subsection 2.2 enables other persons to apply to the Commission to provide “service” and this enabling provision would not exist if the legislation intended Maritime Electric to have a monopoly.

[24] Maritime Electric submits that the proper interpretation of the *Act* and, in particular Section 2.2 thereof, is that, unless a permit is issued under Section 2.1 of the *Act*, Maritime Electric has exclusive jurisdiction to provide service in all areas of the province except those within the boundaries of the City of Summerside except to the extent that Maritime Electric was providing such service prior to January 1, 2004. Maritime Electric further submits that the legislation [ss.2.1(1)] prohibits Summerside Electric from providing service, including transmission service, outside its stipulated boundaries without a permit from the Commission.

[25] Maritime Electric argues, therefore, that, only in certain well defined circumstances under Sections 2.1 and 2.2 of the *Act*, the Commission may issue a permit to a utility to operate within the service area of another utility. The Company also submits that such a decision may only be made by the Commission after it satisfies itself “the present or future public convenience or necessity of the area requires the service...”. This subsection [2.1(2)] requires the Commission to hold a hearing and provide due notice to the second utility. Maritime Electric concludes that the current application is to consider an OATT and the Commission has no jurisdiction to examine the monopoly rights of Maritime Electric.

[26] Maritime Electric concedes that the Commission does have jurisdiction to consider specific requests to provide service in a specified area, taking into consideration the test “that the present or future public convenience or necessity of the area requires the service...”. However, Maritime Electric states that the Commission does not have jurisdiction to consider the propriety of the legislative directions in the *Act* with respect to Maritime Electric’s authority to provide service.

[27] The Commission has reviewed and considered the submissions made by Summerside Electric and Maritime Electric concerning exclusive transmission rights. The Commission notes that service rights are conveyed to Maritime Electric and Summerside Electric pursuant to Subsections 2.1(1) and 2.2 of the *Act*. Summerside Electric has not provided the Commission with any new information or authorities in its filing that would suggest that Summerside’s interpretation is consistent with the *Act*. The Commission believes that the current operation of both Summerside Electric and Maritime Electric within certain specific geographic areas of Prince Edward Island is consistent with the *Act*.

[28] Commission decisions regarding any services contemplated by the *Act* are subject to the specific words set out in the legislation. The Commission does not have the jurisdiction to change legislation to enable it to hear matters not specifically addressed in legislation. The *Act* provides the Commission with clear direction regarding changes to service areas within Prince Edward Island. The Commission notes that Subsections 2.2(3) of the *Act* does provide the Commission with jurisdiction regarding the provision of service in an area in which another person is already providing service. Any public utility wanting to provide service in an area beyond its geographic boundary as set out in the *Act* must make application to the Commission.

[29] The Commission notes that approval can only be granted if the Commission is satisfied that the present or future public convenience and necessity of the area requires the additional service. The Commission notes, as well, that Summerside Electric has not made any application seeking the authority to provide transmission services beyond the current geographic restrictions contained in the *Act*. Each Utility has the right to apply for a permit varying its geographic area of exclusive transmission. However, this OATT application is not an appropriate forum for this purpose.

3.1.2 Heritage Rights to Submarine Cable

[30] There are two 100 MW submarine cables under the Northumberland Strait. These cables connect the transmission systems of Maritime Electric to those of NB Power. Summerside Electric acknowledges that these cables are owned by the Province of Prince Edward Island and leased to Maritime Electric. However, Summerside contends that it has acquired heritage rights of access to a proportionate share of the transmission capacity of the two cables.

[31] Summerside Electric requests that the Commission allow it to introduce lay and expert evidence in regard to its contention that it has heritage rights of access. According to Summerside, its customers have historically paid a proportionate share of both the capital amortization and operating costs of the cables. Summerside Electric is concerned that, with increasing demand for the cable use and, given the cables' fixed capacity, Summerside may not have access to mainland electricity sources unless its heritage rights are recognized and protected. Summerside believes it should be placed in a protected position because of its historic access to the cables.

[32] Summerside Electric makes reference to the fact that the cables are now reaching their capacity limit and will be used to transmit wind energy generated in PEI to mainland consumers. Summerside Electric notes that the OATT application provides for an "Open Season" bidding process for capacity on the submarine cables and it contends that Summerside should not be subject to this process due to heritage rights. Under the proposed OATT, Summerside Electric would participate in an "Open Season" for any excess capacity as it may be available.

[33] Maritime Electric acknowledges that, in 1976, it entered into a Lease Agreement with the Province of Prince Edward Island to operate the cable connection with the mainland. This interconnection agreement permits it to operate the two-100 MW submarine cables between the inter-connection points at Murray Corner in New Brunswick, and Richmond Cove in Prince Edward Island.

[34] Maritime Electric submits that the Commission has no jurisdiction over the submarine cables as the matter of provincial jurisdiction over the submarine cables was completely disposed of by the Prince Edward Island Court of Appeal in *Summerside (Town) v. The Maritime Electric Limited* (1983), 45 NFLD & PEI Reports 35 (PEISCAD)

[35] The Commission has reviewed and considered the information provided by Summerside Electric concerning heritage rights to submarine cable capacity. The Commission also reviewed the rebuttal information provided by Maritime Electric which describes the finding of the Prince Edward Island Court of Appeal in *Summerside (Town) v. The Maritime Electric Limited* (1983), 45 NFLD & PEI Reports 35 (PEISCAD). The Commission notes the Court of Appeal decision states that any undertaking connecting this Province with another province falls within the exclusive jurisdiction of Parliament. The decision further states that it is not within the constitutional competence of this Province by reason of s. 8 of the *Electric Power and Telephone Act* to require the connection to be made available to another public utility.

[36] The Commission notes that Summerside Electric has not provided additional evidence beyond that which was originally presented to the Court of Appeal in 1983. Summerside has not, as well, described any changes in today's circumstances other than those that existed in 1983.

[37] The Commission notes Summerside's contention that there would be a serious error in law if the Commission did not permit it to present underlying lay and expert evidence on this issue. The Commission is of the view that, before committing parties to the cost of a hearing on the heritage rights issue, the Commission must first be provided with information on changed circumstances that would question the ongoing relevance of the Court of Appeal decision. The evidence filed by Summerside does not provide any such information.

[38] The Commission finds and concludes that it does not have jurisdiction to alter or place further rights or obligations on the parties to the interconnection agreement between Prince Edward Island and mainland Canada.

3.1.3 Future Capacity Planning Requirements

[39] Summerside Electric raises the issue of whether there is an appropriate planning and review mechanism to ensure that there would be the needed levels of both medium and long term capacity for both the submarine cables and on Island transmission facilities. Summerside has indicated that it wishes to lead expert evidence to demonstrate that the planning mechanisms as set out in Sections 1.50 and 12.7 of the OATT are inadequate for medium and long-term planning, and that that they do not provide appropriate input and representation from all OATT “stakeholders”.

[40] Maritime Electric responded by indicating that Maritime Electric is required to provide electrical service to most of Prince Edward Island. Under Section 3(a) of the *Act*, Maritime Electric, as a public utility, is required to provide “reasonably safe and adequate facilities for services as changing conditions require”. As such, Maritime Electric submits that it has an obligation to plan for future capacity requirements and the Commission has a duty to oversee and supervise this planning. Maritime Electric further submits that a complete revision to the *Act* would be required to vest in a body other than Maritime Electric the duty of ensuring reasonably safe and adequate electrical service. Maritime Electric submits, as well, that it is beyond the jurisdiction of the Commission to establish additional supervisory requirements beyond those outlined in the *Act*.

[41] The Commission is required to exercise general supervision of all public utilities under Section 26(1) of the *Act*. The Commission notes that Maritime Electric has an obligation to provide reasonably safe and adequate service and facilities throughout most of Prince Edward Island, with the exception of the area served by Summerside. The Commission has supervisory duties and powers which provide it with the authority to ensure that Maritime Electric’s transmission system is safe and adequate and that Maritime Electric fulfills its obligation. This includes transmission planning services.

[42] Summerside Electric has indicated in its filing that the transmission planning mechanisms contained in the OATT are not sufficient to ensure that future transmission planning occurs appropriately. Summerside, however, did not provide any additional evidence concerning the inadequacy of the OATT in terms of transmission planning.

[43] The Commission finds that the transmission planning activities of Maritime Electric are within its jurisdiction. The Commission will entertain further transmission planning submissions from Summerside concerning the sufficiency or otherwise of the OATT.

4. Disposition

[44] An order will therefore issue implementing the findings and conclusions contained in these reasons.

IN THE MATTER of an
application by Maritime Electric Company,
Limited for approval of an Open Access
Transmission Tariff.

Order

UPON receiving an application by Maritime Electric Company, Limited (“Maritime Electric”) for approval of an Open Access Transmission tariff;

AND UPON considering the application as well as the arguments of Maritime Electric and the City of Summerside Electric Utility (“Summerside Electric”) concerning certain matters of jurisdiction of the Commission;

NOW THEREFORE, for the reasons given in the annexed Reasons for Order;

IT IS ORDERED THAT

1. the *Electric Power Act* provides the Commission with jurisdiction over the provision of service in an area in which another utility is already providing service. Any public utility wanting to provide service in an area beyond its geographic boundary must make application to the Commission as required by the *Act*. The parties shall not present evidence on the issue of “exclusive transmission rights” in this OATT application;
2. the Commission is without jurisdiction to consider the matter of heritage rights to the submarine cables; and
3. the Commission has jurisdiction to consider the evidence that Summerside Electric may wish to file concerning the provisions of transmission planning to be contained in the OATT.

DATED at Charlottetown, Prince Edward Island, this 31st day of July, 2008.

BY THE COMMISSION:

(Sgd) Maurice Rodgerson

Maurice Rodgerson, Chair

(Sgd) John Broderick

John Broderick, Commissioner

(Sgd) Anne Petley

Anne Petley, Commissioner

(Sgd) Ernest Arsenaault

Ernest Arsenaault, Commissioner

NOTICE

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13.(1) and 13(2) of the *Act* provide as follows:

13.(1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.

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