



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

Docket UE20935
Order UE09-01

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 26th day of February, 2009.

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

IN THE MATTER of an
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IN THE MATTER

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

Reasons for Order

1. Introduction

[1] This matter concerns 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” 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] As was previously noted in Commission Order UE08-08, dated the 31st day of July, 2008, Maritime Electric and the City of Summerside Electric Utility (“Summerside Electric” or “Summerside”) provide all of the electric energy to Prince Edward Island (the “Province”) customers, with the former providing service to 90% of the electrical customers in the Province.

[3] Maritime Electric and Summerside Electric each have the ability to generate its own electrical energy, but neither have the capacity required to meet the demand of customers of the Province. Therefore, additional electric energy is purchased and transmitted to the Province from New Brunswick providers via two 100MW submarine cables that run under the Northumberland Strait (the “Submarine Cables”).

[4] In 1976, Maritime Electric entered into a lease agreement which permits Maritime Electric to operate the Submarine Cables, which run from Murray Corner in New Brunswick, to Richmond Cove in Prince Edward Island. On the Prince Edward Island side, the Submarine Cables come ashore in Richmond Cove, approximately 670 meters from the shore line where the Submarine Cables connect to a series of parallel transmission lines which run from Richmond Cove to an electric substation located in Bedeque. Electric energy which is transmitted across the Submarine Cables is first introduced to the Province's electric transmission grid at the Bedeque substation.

[5] Summerside Electric has previously raised the issue of "*heritage rights*" over the Submarine Cables in the context of the OATT application. However, in Order UE08-08, dated the 31st day of July, 2008, the Commission determined that it is without jurisdiction to consider the matter of the heritage rights to the Submarine Cables.

[6] As part of their intervention on the Maritime Electric OATT application, Summerside Electric is requesting the Commission to consider either a Bypass Equivalent Rate for transmission services between the Bedeque substation and the Sherbrooke substation, or alternatively, the development of its own transmission infrastructure between Summerside's Ottawa Street substation and the Bedeque substation. This latter option would require Summerside Electric be permitted to connect to the Interconnection Facilities at the Bedeque substation.

[7] Subsequent to the Order of July 31, 2008, Summerside Electric raised concerns regarding the geographical boundary location distinguishing federal and provincial jurisdiction as it relates to the Submarine Cables, the parallel transmission lines leading from Richmond Cove, and the Bedeque substation (collectively referred to as the "Interconnection Facilities"). Specifically, Summerside requested that the Commission determine which components of the Interconnection Facilities fall within the jurisdiction of the Federal Government, and those which fall within the jurisdiction of the Province.

[8] The Commission provided notice to all of the interested parties on the 4th day of November, 2008 of the request that had been received from Summerside in relation to this jurisdictional question. Further, the Commission requested that any party who wished to make comments in relation to the jurisdiction of the Interconnection Facilities to file such response with the Commission by the 21st day of November, 2008.

[9] On November 21, 2008, the Commission received both an e-mail response from the solicitor for Maritime Electric as well as a detailed memorandum. This was the only response received by the Commission.

[10] On the 5th day of January, 2009, the Commission requested Maritime Electric provide a technical diagram with a written description of the interconnection between the parallel transmission coming from Richmond Cove to the Bedeque Substation.

[11] On the 15th day of January, 2009, Maritime Electric provided the Commission with two diagrams and a corresponding legend and brief description of the Bedeque Substation, and the Murray Corner and Richmond Cove substations.

[12] No further materials were filed with the Commission.

[13] These reasons address the jurisdictional issue raised by Summerside Electric with respect to the federal and provincial jurisdiction of the Interconnection Facilities.

2. Position of the Parties

[14] Summerside Electric submits that the parallel transmission lines leading from Richmond Cove to Bedeque and the Bedeque substation are within the jurisdiction of the Commission. In its submission to the Commission, Summerside Electric relied on the Summary Report that was issued by the Government of Canada after the completion of the submarine cable project. Summerside Electric notes the last paragraph of this report which reads as follows:

“The Prince Edward Island System connecting the main grid to the terminals of the cables will consist of two parallel transmission lines from the cable terminals at Richmond Cove to the substation at Bedeque where the circuit breakers are located for switching cables.”

[15] Summerside Electric also notes that paragraph 33 of the Commission’s July 31, 2008 Order (UE-08-08) states:

“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.”

[16] Summerside Electric submits that there is no mention of the facilities beyond Richmond Cove to Bedeque or within the Bedeque substation.

[17] Summerside Electric interprets both references as noted above to mean that the provincial system begins at the cable terminals in Richmond Cove and that everything from Richmond Cove, including the Bedeque Substation, is therefore within the Commission’s jurisdiction.

[18] The Commission notes the quotation taken from the Summary Report must be considered in the context of the complete report. Further, the reference in Commission Order UE08-08 is a statement by Maritime Electric and not a decision of the Commission.

[19] Maritime Electric filed a memorandum with the Commission, dated November 21, 2008, in which it sets out the issue to be determined as follows:

“Does the Commission have jurisdiction to regulate the operation of an OATT in respect of Maritime Electric’s system?”

[20] Maritime Electric argues, based upon a pith and substance analysis to determine the dominant purpose of the law, that regulation of the Interconnection Facilities is within the jurisdiction of the Commission. Maritime Electric further states that the federal government has not legislated the inter-provincial interconnection and/or the jurisdictional boundaries for regulatory bodies and a pith and substance analysis supports the Commission’s jurisdiction of the Interconnection.

[21] It is Maritime Electric’s position that the Commission has the requisite jurisdiction to regulate the OATT as applied for, including those aspects of the OATT that have an incidental impact on the Interconnection Facilities.

3. Discussion & Findings

[22] The Commission notes that section 92 of the *Constitution Act, 1867*, states:

“92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subject next hereinafter enumerated; that is to say,

10. Local works and undertakings other than such as are of the following classes:

(a) lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(b) lines of steam ships between the province and any British or foreign country;

(c) such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.”

[23] The Commission notes that the Prince Edward Island Court of Appeal previously considered the jurisdiction of the Commission in relation to the transmission of electrical energy from New Brunswick to Prince Edward Island. Specifically, in *Summerside (Town) v. Maritime Electric Limited* [1983] CarswellPEI 34 (P.E.I.S.C.A.D.), MacDonald J. held that an undertaking connecting one province with another and extending beyond the limits of a province was a matter of federal jurisdiction. MacDonald J. further held that the undertaking being considered involved the transmission of electrical energy from one province to another, and as such, that the undertaking fell within the jurisdiction of the Government of Canada and not within the jurisdiction of the Commission.

[24] Maritime Electric and Summerside Electric have both conceded that the Prince Edward Island Court of Appeal determined the issue of jurisdiction over the Submarine Cables in its 1983 decision. However, as has been noted above, Summerside Electric has subsequently raised the issue of jurisdiction over the transmission lines from Richmond Cove to Bedeque and the Bedeque substation, asserting that these facilities are within the jurisdiction of the Commission.

[25] By way of background to the 1983 Court of Appeal decision, the Commission notes that in the early 1980s, the Town of Summerside brought an application to the Commission seeking an order for “*an energy corridor from Murray Corner, NB via the Interconnection Cable and the Bedeque substation to Summerside to constitute the carrier for New Brunswick Power Economy Energy and mainland unit purchases or entitlements*”. The result of this application resulted in a stated case by the Commission to the Prince Edward Island Court of Appeal.

[26] In his decision, MacDonald J. noted that electricity purchased by Maritime Electric from NB Power is purchased at Murray Corner, carried across the Submarine Cables and is introduced into the Province’s transmission system at a switching station located in Bedeque.

[27] At paragraph 25 of his decision, MacDonald J. states:

“In the present case the undertaking is one connecting one province with another province and extending beyond the limits of Prince Edward Island and I cannot see how anything else can be made of the situation. Based on the Winner case the undertaking falls within s. 92(10)(a) and the jurisdiction of the federal government. The undertaking is the transmission of electrical energy from one province to another thereby providing mutual assistance during emergencies, improving reliability of bulk supply through co-ordinated operations and of providing operating economies by the exchange of surplus power and energy. For one to attempt severance of the interconnection by declaring that the undertaking falls within provincial authority would not result in severance, but a complete destruction of the interconnection. There would be nothing left for federal control.”

[28] In reaching his decision that the Commission did not have regulatory control over the Interconnection Facilities, MacDonald J., at paragraphs 37 and 38, stated:

“The operation of the interconnection, is an indivisible operation in the transportation of electrical energy between two provinces....The operation of the interconnection cannot, in my opinion, be segmented into provincial and interprovincial components. Neither can it be segmented between the two effected provinces.

The Province can have no authority because, in placing regulatory control over the interconnection facilities in the public utilities commission, it would be affecting a vital part of the management and operation of the undertaking. Certainly to say who has the right to use the facilities is a most fundamental control of the undertaking. Having reached a conclusion that the connection falls with the powers of parliament, I am also of the opinion that it is not within the constitutional confidence of this province by reason of section 8 of the Electric Power and Telephone Act to require the connection to be made available to another public utility. The province can have no authority because in placing regulatory control over the interconnection facilities, it would be affecting a vital part of the management and operation of the undertaking.”

[29] The Commission notes that the judgment of MacDonald J. states that the “*province can have no authority because in placing regulatory control over the interconnection facilities, it would be affecting a vital part of the management and operation of the undertaking.*” [Emphasis Added]

[30] The Commission further notes that the decision of MacDonald J. does not define Interconnection Facilities. However, as noted above, the application of the Town of Summerside was for an energy corridor from Murray Corner, NB via the Interconnection Cable *and* the Bedeque substation to Summerside to constitute the carrier for New Brunswick Power Economy Energy and mainland unit purchases or entitlements. [Emphasis Added]

[31] The Commission believes that the jurisdictional decision of MacDonald J. is not limited to the Submarine Cables, but also includes the parallel transmission lines from Richmond Cove to Bedeque and the Bedeque substation.

[32] In his decision, MacDonald J. stated that electricity purchased by Maritime Electric is introduced into the Prince Edward Island transmission system at the Bedeque switching station. The Commission believes that this statement indicates that all of the equipment and infrastructure from Richmond Cove to and including certain components of the Bedeque substation is not part of the Province’s transmission system, and therefore, within the jurisdiction of the Government of Canada. The Commission also believes that the term “*interconnection facilities*,” which is plural, encompasses more than the singular Interconnection Cable (as defined by MacDonald J.).

[33] Therefore, it appears to the Commission that all electrical components from the point at which the Submarine Cables exit the waters of Northumberland Strait to the location of the Bedeque substation is infrastructure dedicated solely for the interprovincial electricity supply and not part of the PEI transmission grid system.

[34] However, it further appears to the Commission that the Bedeque substation infrastructure serves both the interprovincial transfer of electricity and the operation of the PEI transmission grid system, as MacDonald J. determined, it is at this point that electrical energy purchased by Maritime Electric is introduced into the Prince Edward Island transmission grid system.

[35] Therefore, the actual point at which federal jurisdiction ends and provincial jurisdiction begins remains to be determined.

[36] The Commission is of the opinion that this matter has previously been determined by MacDonald J. when he stated that the “*province can have no authority because in placing regulatory control over the interconnection facilities, it would be affecting a vital part of the management and operation of the undertaking.*” Further, the Commission notes that the Supreme Court of Canada refused leave to appeal the decision of MacDonald J. in *Summerside (Town) v. Maritime Electric Limited* [1983] CarswellPEI 34 (P.E.I.S.C.A.D.), and as the decision has not been overruled, the Commission is bound by the decision of the Province’s Court of Appeal.

[37] While the Commission is of the opinion that the decision of MacDonald J., as noted above, is determinative of this matter, it also notes that the Supreme Court of Canada in *United Transportation Union v. Central Western Railway Corp.* [1990] 3 S.C.R. 1112, in an 8 to 1 decision, stated that there were two ways in order to determine whether or not a particular work or undertaking falls within federal or provincial jurisdiction.

[38] The issue to be determined in the *United Transportation* case was whether or not the provincial or federal government had jurisdiction for the purposes of labor relations over a 105-mile section of railway line situated wholly in the Province of Alberta and operated by Central Western Railway Corp. (“Central Western”). Dickson C.J. stated that the railway could be under the jurisdiction of the federal government of Canada if (a) the railway itself constituted a federal work or undertaking, or (b) the railway was integral to an existing federal work or undertaking.

[39] The Commission has previously stated that, based upon the decision of MacDonald J., it is of the opinion that the Interconnection Facilities, being the Submarine Cables, the parallel transmission lines leading from Richmond Cove and the Bedeque substation, are all within the jurisdiction of the Government of Canada. Therefore, the Commission believes that the decision of MacDonald J. in *Summerside (Town) v. Maritime Electric Limited* [1983] CarswellPEI 34 (P.E.I.S.C.A.D.) is in accordance with item (a) as set out by Dickson C.J.

[40] As noted above, both Summerside and Maritime Electric acknowledge that the decision of MacDonald J., at a minimum, states that the Submarine Cables are within the jurisdiction of the Government of Canada.

[41] Therefore, in considering Summerside's assertion that only the Submarine Cables are subject to federal jurisdiction, and assuming that the Commission is incorrect with respect to the decision of MacDonald J. being determinative of this issue, the Commission has also considered whether any of the particular equipment leading from the Submarine Cables up to and including the Bedeque Substation could be considered integral to an existing federal work or undertaking.

[42] In *West Coast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, West Coast Energy Inc. owned and operated a system of gathering and processing pipelines used for the transportation of natural gas. The gathering and processing lines were situated wholly within the Province of Alberta but were connected to a distribution system that was also owned and operated by West Coast Energy Inc. The distribution system transported processed gas to parts of Alberta, British Columbia and the United States.

[43] In considering whether the gathering and processing lines were integral to the distribution system, which had been determined to be a federal undertaking, the Supreme Court noted that its primary concern was not limited to a physical structure or its geographical location, but rather the service provided by the undertaking through the use of its physical equipment was of primary importance.

[44] The Supreme Court further noted that the primary factor to consider is whether the various operations being considered are functionally integrated and subject to common management, control and direction. Other relevant questions, although not determinative, will include whether the operations are under common ownership (perhaps as an indicator of common management and control), and whether the goods or services provided by one operation are for the sole benefit of the other operation and/or its customers.

[45] When applied to the facts of this matter, the Commission notes that:

- Maritime Electric operates, controls and maintains the Submarine Cables, the potheads in Richmond Cove, the transmission lines from Richmond Cove to the Bedeque Substation, and the Bedeque Substation;
- the potheads in Richmond Cove do not alter or step up or down the electric energy being transmitted via the submarine cable;
- electric energy transferred to PEI via the Submarine Cables is first introduced to the PEI transmission system at the Bedeque substation; and
- the Bedeque Substation performs a necessary function so that the electric energy transmitted via the Submarine Cables can be introduced into the PEI transmission grid.

[46] Based upon all of the foregoing, it appears to the Commission that all of the Interconnection Facilities up to and including a portion of the Bedeque substation are under the common management and control of Maritime Electric, and are integral to the operation and maintenance of the Submarine Cables. As such, the Interconnection Facilities are not within the jurisdiction of the Commission but are subject to Government of Canada authority pursuant to section 92(10) of *The Constitution Act, 1867*.

4. Disposition

[47] An Order will therefore be issued 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 reviewing concerns raised by the City of Summerside Electric Utility concerning the geographical boundary location distinguishing federal and provincial jurisdiction of the electrical cable interconnection infrastructure;

AND UPON consideration of the Prince Edward Island Court of Appeal 1983 decision, *Summerside (Town) v. Maritime Electric Ltd.* (1983), where Justice MacDonald clearly concludes that the operation of the Interconnection Facilities on Prince Edward Island is part of the system connecting two provinces and thus not within the jurisdiction of the Commission;

AND UPON reviewing submissions, from both the City of Summerside and Maritime Electric Company Limited concerning jurisdiction, in which the City of Summerside argues, among other things, that the 1983 Court decision did not clearly define the point at which the jurisdiction becomes provincial;

AND UPON it appearing to the Commission that all electrical components from the point at which the submarine cables exit the waters of Northumberland Strait to the location of the Bedeque substation are infrastructure dedicated solely for the inter-provincial electricity supply and not part of the PEI transmission grid system;

AND UPON it appearing to the Commission that the Bedeque substation infrastructure serves both the inter-provincial transfer of electricity and the operation of the PEI transmission grid system;

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

IT IS ORDERED THAT

1. The electrical transmission infrastructure from the submarine cable infrastructure in Richmond Cove to the Bedeque substation is part of the interprovincial interconnection facilities and is subject to the jurisdiction of the Government of Canada; and
2. The circuit breakers and reactors within the Bedeque substation which connect the transmission lines coming from Richmond Cove to the Prince Edward Island transmission system in the Bedeque substation is the location where provincial jurisdiction begins.

DATED at Charlottetown, Prince Edward Island, this 26th day of February, 2009.

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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