



Docket UE30402
Order UE10-02

IN THE MATTER of an
application by City of Summerside for a permit to
provide transmission services from its Ottawa
Street substation to Maritime Electric's Bedeque
substation.

**BEFORE THE
COMMISSION**

on Friday, the 7th day of May, 2010.

Maurice Rodgeron, 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
application by City of Summerside for a permit to
provide transmission services from its Ottawa
Street substation to Maritime Electric's Bedeque
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IN THE MATTER of an application by City of Summerside for a permit to provide transmission services from its Ottawa Street substation to Maritime Electric's Bedeque substation.

Reasons for Order

1. Introduction

[1] This is an application under Section 2.1(2) of the *Electric Power Act*, R.S.P.E.I. 1988, Cap. E-4 (the "*Act*"), by the City of Summerside Electric Utility (the "City of Summerside or COS"), seeking a permit from the Island Regulatory and Appeals Commission (the "Commission") to construct a transmission line from its Ottawa Street substation to Maritime Electric Company Limited's ("Maritime Electric or MECL") Bedeque substation.

[2] Currently, the City of Summerside pays Maritime Electric for transmission service in accordance with the rate schedule as set out in the Company's interim Open Access Transmission Tariff (the "OATT"), which was developed by Maritime Electric in accordance with the Commission's direction in 2006. Prior to the approval of an interim OATT tariff, Maritime Electric and the City of Summerside negotiated a price for transmission services.

[3] The City of Summerside is seeking a permit to construct a transmission line in order to reduce its cost of transmission by either utilizing its own transmission line or, alternatively, arguing for a discounted or by pass equivalent rate from Maritime Electric's interim OATT rate.

[4] The electrical system on PEI has evolved over the years from an industry that had numerous entities generating, transmitting and distributing electrical energy to today's system that has all electrical energy in PEI transmitted and distributed to Island customers by either Maritime Electric or the City of Summerside. Maritime Electric transmits electrical energy to all areas of the Province and distributes electrical energy to all areas of the Province except those areas served by COS. COS provides electrical energy to customers who

reside within the municipal boundaries of the City of Summerside and to a small pocket of customers who reside outside the municipal boundaries. As will be considered in greater detail, the relevant legislation concerning the distribution and transmission of electrical energy has also experienced significant changes, especially in the last fifteen (15) years. It is against this revised legislative framework that this current application must be considered.

2. The Application

[5] By application dated November 7, 2008 (the “Application”), the City of Summerside, pursuant to section 2.1(2) of the Act, applied to the Commission for a permit to allow for the construction of a 138 kV transmission line between the City of Summerside’s Ottawa Street substation and Maritime Electric’s Bedeque substation, and, for a permit allowing COS to connect to that portion of Maritime Electric’s Bedeque substation under Commission jurisdiction. The Application states *“that the present and future public convenience and necessity of the citizens of the City of Summerside and any other members of the public who receive electrical services from the City of Summerside, requires that a permit be issued”*.

[6] Section 2.1(2) of the Act states:

“The Commission may, on application by any person, and following a hearing in respect thereof, issue a permit authorizing the holder to provide service in any area of the province if the Commission is satisfied that the present or future public convenience and necessity of the area requires or will require the service that the applicant proposes to provide. 2003,c.3.s3.”

[7] In June of 2009, Commission staff and legal counsel for the parties interested in this Application met, discussed and agreed upon a process for proceeding with the Application. Commission staff issued a Direction on Procedure outlining the Application process, and published a copy of the Directions on its website.

[8] The COS Notice of Application was published in July of 2009 and two parties, namely Maritime Electric and the Province of Prince Edward Island (the “Province”) registered as interveners to the Application. In accordance with the public notice instructions, both parties filed interrogatories of the City of Summerside along with other written materials.

3. Process and Filings

[9] In accordance with the Commission's Direction on Procedure, COS, MECL and the Province all filed initial written materials, interrogatories and responses with the Commission as required. On or about October 15, 2009, the Commission informed COS, MECL and the Province that it had identified an issue relating to its jurisdiction in applying the "*public convenience and necessity test*," as referred to in section 2.1(2) of the Act.

[10] Specifically, the Commission noted that COS and MECL had contrary positions with respect to whose interests the Commission was to consider when applying the public convenience and necessity test, and that the Commission viewed the scope of the public convenience and necessity test as a fundamental issue with respect to the Application. Specifically, the Commission determined that it would be prudent to identify whose interests it should consider in applying the public convenience and necessity test, prior to hearing any evidence in the main Application.

[11] In short, the Commission determined that it would be prudent to determine, firstly, who could be considered within the scope of the public convenience and necessity test so that, secondly, only evidence with respect to those particular groups need be considered.

[12] The Commission determined that it would delay hearing the COS Application until the jurisdictional issue was considered, and directed that COS, MECL and the Province file any additional submissions that they wished to present with respect to the application of public convenience and necessity test.

[13] All parties filed written submissions with respect to the application of the public convenience and necessity test on or about October 28, 2009, with COS and MECL providing written rebuttal responses on or about November 4, 2009. The Province did not file any rebuttal materials.

[14] Subsequent to receiving and reviewing all of the initial and rebuttal written materials from COS, MECL and the Province, the Commission, by letter dated January 4, 2010, requested comments from COS, MECL and the Province with respect to the object, purpose and effect of various amendments that had been made to the *Electric Power and Telephone Act* (now the *Electric Power Act*). Specifically, the Commission stated as follows:

"In the 1994 reference case, Justice McQuaid stated that the purpose and object of the Electric Power and Telephone Act was to "provide for the regulation of each public utility, only to the extent that each utilities decision have an impact on its customers and not on the customers of other public utilities of a similar nature."

Since the 1994 decision, the Electric Power and Telephone Act (now the Electric Power Act) has undergone substantial legislative revision, including the introduction of a preamble and the introduction of sections 2.1 and 2.2, which are the subject of the current Application. Considering the substantive legislative changes to the Electric Power and Telephone Act, the Commission would like the parties to provide oral submissions with respect to the following questions:

- 1. What is the object, purpose and effect of section 2.1?*
- 2. What is the object, purpose and effect of section 2.2?*
- 3. How do sections 2.1 and 2.2 interact and relate to one another?*
- 4. Have the various legislative amendments enacted since 1994 with respect to the Electric Power Act altered the purpose and object of the Electric Power Act from that which was stated by Justice McQuaid in the 1994 decision?*
- 5. If the object and purpose of the Electric Power Act have been altered from that stated in the 1994 decision, what is the current purpose and object of the Electric Power Act?*
- 6. If the object and purpose of the Electric Power Act has changed, how does this change impact on the application of the public convenience and necessity test in so far as to whom the test should be applied in the current COS application?"*

[15] Following the January 4, 2010 letter from the Commission, MECL and the Province each filed written submissions on February 2, 2010, and COS provided its written submissions on February 3, 2010.

[16] On February 9, 2010, counsel for COS, MECL and the Province provided oral arguments to the Commission in relation to the application of the public convenience and necessity test. On or about February 16, 2010, MECL and COS filed rebuttal materials with the Commission in relation to the oral arguments presented on February 9, 2010. The Province did not provide rebuttal submissions, but did deliver a letter to Commission staff also dated February 16, 2010.

4. Issues

[17] As a result of all of the written filings and the oral hearing held in relation to this Application, the Commission has identified the following issues that require determination. The issues for consideration are:

1. Is the procedure adopted by the Commission in this matter appropriate?
2. Is this particular matter *res judicata* in so far as the courts of Prince Edward Island have already considered the legal issues involved in this Application?
3. Does the Commission apply the public convenience and necessity test to the customers of COS only?
4. Does the Commission apply the public convenience and necessity test to only those customers of COS that reside outside the municipal corporate limits of the City of Summerside?
5. What consideration, if any, must be given to the customers of MECL? and
6. Does COS require Commission approval to build the proposed transmission line, and is Commission approval required for COS to connect to the Maritime Electric transmission system?

[18] The Commission intends to deal with each of the above noted issues.

5. Position of the Parties

[19] With respect to issues 1 and 2 as set out above, COS has indicated throughout the Application process that it takes issue with the procedure and process adopted by the Commission. Specifically, COS has submitted that caution should be taken against hearing a matter “*by installment*,” and that hearing preliminary issues separate and apart from the main hearing should be avoided. COS has further submitted that it has the right to be heard in this Application, which includes a full hearing of evidence and argument on all the issues, and not merely a hearing “*in installments*” by written submissions. Specifically, COS has stated:

“SE submits that the Commission ought to first hear the oral evidence of the parties in order to properly appreciate the full context and holistically/intelligently apply the statutory test to the facts. The full hearing must still proceed later, – regardless of the findings of the Commission on this preliminary issue. Essentially, having this issue heard in a preliminary fashion accomplishes nothing in terms of shortening the trial or disposing of the Application.”

[20] With respect to issue 2, COS has submitted that the Commission's jurisdiction with respect to who it can consider when applying the public convenience and necessity test has already been considered and determined by the courts of Prince Edward Island, and as such, need not be considered again by the Commission.

[21] MECL has taken the position that the procedure adopted by the Commission in this Application will facilitate a timely determination of the scope of the Commission's authority under the Act. MECL has also taken the position that the process adopted by the Commission in this Application has afforded all parties with the right to be heard, and that there has been no violation of COS' right to be heard by hearing this matter "*in installments.*" MECL has also indicated that it does not believe that the issue with respect to the application of the public convenience and necessity test is *res judicata*.

[22] With respect to issues 1 and 2, the Province has not provided the Commission with any submissions setting out its position in this regard.

[23] With respect to issues 3, 4 and 5, and specifically, who the Commission is to consider in applying the public convenience and necessity test, COS has indicated that the public convenience and necessity test should be applied to the customers of COS, including customers that reside inside and outside the municipal boundaries of the City of Summerside. COS also contends that the interests of the customers of MECL should not be considered.

[24] MECL has indicated that when applying the public convenience and necessity test, the Commission should directly consider the interests of the customers of MECL. With respect the customers of COS, MECL has drawn a distinction, and has stated that the public convenience and necessity test should be applied to those customers who reside outside the municipal boundaries of the City of Summerside, but not to those customers who reside within the City's municipal boundaries.

[25] MECL has stated the public convenience and necessity test only applies to those served by a public utility as defined in the *Act*, and that COS is not a public utility insofar as it provides electrical service to its customers that reside within the corporate boundaries of the City of Summerside. Therefore, MECL's position is that only the customers of COS that are located outside the City of Summerside's municipal boundaries can be considered in applying the public convenience and necessity test.

[26] With respect to the application of the public convenience and necessity test, the Province has indicated that the interests of the COS customers who reside outside the municipal boundaries of the City of Summerside should be considered, but not the interests of those customers that reside within the City's municipal boundaries. Further, the Province has also indicated that in applying the public convenience and necessity test, the Commission should consider the interests of the MECL customers.

[27] With respect to issue 6, COS has stated that it does not need a permit to construct the proposed transmission line but that a permit is required in order to interconnect with MECL's Bedeque substation. Specifically, COS states that transmission through an area where no customer in that area is being provided

with production, transmission, distribution or furnishing of electrical energy is not service in that area but is merely “*passing through*.” Where no service is being provided, COS states that no permit under section 2.1(2) of the *Act* is required to construct the transmission line.

[28] Both MECL and the Province are of the position that COS requires a permit in order to construct the proposed transmission line and to interconnect with the MECL Bedeque substation.

[29] Each of the parties has relied upon various legislative provisions, including the detailed history and amendments to the Act, as well as previous case law to support their positions. In considering this matter, the authorities relied upon by each of the parties will be considered in detail in order to determine and illustrate the reasons for the Commission’s decisions.

6. Findings and Conclusions

Issue 1 – Is the Procedure Adopted Appropriate?

[30] As noted earlier, COS has taken issue with respect to the procedure and process adopted by the Commission in this matter. Specifically, COS has stated that determining the jurisdiction of the Commission, prior to hearing evidence, amounts to a “*hearing in installments*.” COS has also stated that it is inappropriate to make a determination on a preliminary issue that involves mixed questions of fact and law.

[31] The Commission notes that pursuant to Section 8 of the *Island Regulatory and Appeals Commission Act*, R.S.P.E.I. 1988 Cap. I-11 (the “IRAC Act”), the Commission is given broad discretion to determine the process and procedures in matters before it. Specifically, Section 8 of the IRAC Act states:

“In the exercise of its jurisdiction the Commission

- (a) may require a party to provide such records, books or information as the Commission considers necessary to decide the matter in issue;*
- (b) may decide all matters and procedure not otherwise provided for in the rules made under subsection 3(7) or (8). [Emphasis Added]*

[32] Sections 3(7) and (8) of the *IRAC Act* state:

“3(7) The Executive Committee may prescribe the forms to be used by the Commission and make rules and regulations governing administration and general procedure, including:

- (a) *authorizing the Commission to establish panels to exercise the powers of the Commission; and*
- (b) *the imposition of time constraints on parties appearing before the Commission where time constraints are in the interest of speedy resolution of matters before the Commission.*”

“3(8) The Executive Committee may make rules governing practice and procedure at hearings and may impose time constraints on the parties appearing before the Commission where time constraints are in the interest of a speedy resolution of matters before the Commission.”

[33] Based upon Section 8 of the *IRAC Act*, and subject to the provisions of 3(7) and 3(8), the Commission is vested with legislative authority to determine matters of procedure and process in matters before it.

[34] As was noted by MECL, Sara Blake, in her text *Administrative Law in Canada*, 4th ed. (Markham, Ont.): Lexis Nexus, 2006, states:

“A tribunal may determine the scope of its own powers and must do so when its authority to act is questioned. It cannot refuse to act simply because it is uncertain whether it has the necessary power. It need not defer the question to a court. It should decide for itself whether it has the authority. Questions as to the scope of a tribunal’s powers should be resolved before the powers are exercised.” [Emphasis Added]

[35] In accordance with the above noted excerpt, the Commission finds that it does have legislative authority to develop its own processes and procedures. Further, the Commission believes that determining the scope of the Commission’s jurisdiction, with respect to the application of the public convenience and necessity test, is a question of law for which the consideration of evidence is not required. Determining the Commission’s jurisdiction as a preliminary matter may result in a determination which will shorten the overall COS Application and potentially limit the evidence required to be presented by all parties. The Commission believes that determining its jurisdiction, prior to proceeding with the COS Application in its entirety, will clarify the evidence that the Commission is able to consider. The Commission is of the opinion that COS will still be afforded with the opportunity to be heard, and that the process adopted does not amount to a hearing “*in installments*.”

[36] For all of the reasons as noted above, the Commission finds that the procedure that has been adopted is within its legislative authority, is a determination of a question of law, and may serve to shorten the overall COS Application.

Issue 2 – Is this Particular Matter “res judicata”?

[37] Throughout this process, COS, MECL and the Province have all referred to and cited three previous cases from the Prince Edward Island Supreme Court (these cases will be discussed and set out in more detail below). Based upon these three cases, COS has submitted that the issue currently being considered, being the application of the public convenience and necessity test, has already been decided by the Supreme Court of Prince Edward Island, and as such, need not be considered by the Commission.

[38] The Commission notes that of the three cases cited by all parties, the most recent decision is a 1994 decision from the Prince Edward Island Supreme Court Appeal Division. Since that time, there have been numerous amendments and revisions to the *Act*. Specifically, several sections have been revised, repealed and added. Particularly, COS' Application is being made pursuant to Section 2.1 of the *Act*, which did not exist when the three previous cases were considered and was only added to the *Act* in 2003.

[39] It is based upon the substantive legislative revisions to the *Act* that the Commission requested in its January 4, 2010 correspondence additional submissions from all of the parties with respect to whether or not scope and purpose of the *Act* has changed from the time when the three previous cases were considered.

[40] Although the Commission recognizes that the issue currently being considered was, to some extent, examined by the Supreme Court of Prince Edward Island, the Commission finds that, due to the substantive legislative amendments made to the *Act*, this issue should not be considered “*res judicata*.”

[41] With the greatest respect to the previous decisions and comments of the Supreme Court of Prince Edward Island, section 2.1 of the *Act* has never before been considered by the Commission, or the Courts of Prince Edward Island. As such, the Commission believes that it is required to determine whose interests it may consider in the application of the public convenience and necessity test in considering the COS Application.

Issues 3, 4 and 5 – Who Can the Commission Consider in Applying the Public Convenience and Necessity Test?

[42] COS, MECL and the Province all cited three previous decisions of the Prince Edward Island Supreme Court in support of their positions to the Commission. The three cases cited by all of the parties in this matter are as follows:

- *Prince Edward Island (Public Utilities Commission) v. Summerside (Town)*, [1983] CarswellPEI 59 (P.E.I.S.C.);

- *Summerside (Town) v. Maritime Electric Ltd.*, [1983] CarswellPEI 55 (P.E.I.S.C.A.D.); and
- Prince Edward Island (Island Regulatory and Appeals Commission) Re, [1994] CarswellPEI 90 (P.E.I.S.C.A.D.).

[43] Each of the above noted cases were stated cases by the Commission (and/or its predecessor the Public Utilities Commission) to the Prince Edward Island Supreme Court. Each of the above-noted cases, to some extent, considered the jurisdiction of the Commission in regulating the electrical system and its participants in the Province of Prince Edward Island. As such, the Commission recognizes that each of the three cases noted above, are, to some extent, relevant to the issues currently before the Commission in the Application and are certainly binding upon the Commission to the extent that the legislation and its principles remain the same or are applicable.

[44] As the above-noted cases are relevant to the present Application, the Commission has set out below some of the principles arising from the three cases insofar as they are relevant to the facts of the present matter. The relevant principles are as follows:

- Based upon the definition of public utility in 1983, the Commission has authority to supervise and regulate the Summerside Electric Utility, but only insofar as it pertains to customers outside the corporate limits of the town;
- Actions taken by the Summerside Electric Utility that can be isolated from affecting customers outside the town boundaries are decisions and actions that do not fall within the Commission's jurisdiction;
- Public interest, as it relates to section 8 of the *Electric Power and Telephone Act* (as it was in 1983) is confined to the public being served by the public utility;
- Section 8 of the *Electric Power and Telephone Act* (as it was in 1983) is not a section that empowers the Commission to be the watchdog for the general public or all citizens of Prince Edward Island, but only for those who are being served by the public utilities in question;
- Based upon the definition of public utility (as it was in 1994) the Summerside Electrical Utility can make decisions which would impact only on its customers that reside within the City's municipal boundaries and the Commission does not have any regulatory authority, even if it is determined that these decisions have an impact on customers of Maritime Electric, or on the public of Prince Edward Island generally;

- The purpose of the *Electric Power and Telephone Act*, as found by the Prince Edward Island Supreme Court Appeal Division in 1994, is to provide for the regulation of each public utility, only to the extent that each utilities decisions have an impact on its customers and not on the customers of other public utilities of a similar nature; and
- When considering the safety, convenience, or service to the public, and when generally supervising public utilities under section 26 of the *Electric Power and Telephone Act* (as it read in 1994) or otherwise, the Commission may consider only the special interests of the utility involved, and, more importantly, the interests of that utility's customers.

[45] COS, MECL and the Province have all cited each of the three cases for various reasons, and have relied on each of these cases to some extent to support the positions they are advancing to the Commission. MECL has indicated that the facts of each case must be considered when attempting to ascertain the relevant principles flowing from each case. Specifically, MECL states that cases relating to activities occurring wholly within the boundaries of the City of Summerside are distinguishable from those cases which involve COS operating outside of the town boundaries, as is the case of the present Application with COS seeking to construct a transmission line from Bedeque to Summerside.

[46] As was noted earlier herein, the Commission is aware that the *Act* has undergone substantial revision since the three cases were considered. Specifically, the particular section to which COS is currently applying under was added to the *Act* in 2003. Further, an application under this section has never before been brought to the Commission, nor has it been considered by the Prince Edward Island Courts.

[47] While the Commission is mindful of the decisions and reasoning of the Prince Edward Island Supreme Court in the three previous cases, the Commission does not believe that it is bound by the previous court decisions due to the fact that the Act and its stated purpose have been altered substantially since the 1983 and 1994 decisions were released, and section 2.1(2) was only added to the *Act* in 2003.

[48] Since 1994, approximately three (3) sections of the Act have been repealed, twenty (20) sections amended, fourteen (14) sections have been added and three (3) sections have been repealed and substituted. Further, a preamble was added to the *Act* in 2003, which states:

"WHEREAS the rates, tolls and charges for electric power should be reasonable, publicly justifiable, and not discriminatory;

AND WHEREAS the regulation of public utilities supplying electric power should be conducted in a manner that is efficient;

AND WHEREAS the system of regulation of such public utilities should allow public input whenever the rates, tolls and charges for electric power seem, in any respect, to be unreasonable or unjustly discriminatory;”

[49] Sections 2.1 and 2.2 of the Act were added in 2003 and read as follows:

“2.1 (1) 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.

(2) The Commission may, on application by any person, and following a hearing in respect thereof, issue a permit authorizing the holder to provide service in any area of the province if the Commission is satisfied that the present or future public convenience and necessity of the area requires or will require the service that the applicant proposes to provide.

(3) The Commission may, when issuing a permit, include in the permit such conditions as the Commission considers to be required in the public interest.

(4) The Commission may, on its own motion or on the application of any person and following a hearing in respect thereof, cancel or amend a permit if the permit holder contravenes

(a) a provision of this Act or the regulations; or

(b) a condition of the permit. 2003, c.3, s.2.

2.2 (1) Maritime Electric Company, Limited shall provide service in all areas of the province, except in those areas of the province in which another person provides service in accordance with this Act.

(2) Maritime Electric Company, Limited shall not provide service

(a) within the boundaries of the City of Summerside except to the extent that it was providing such service immediately before January 1, 2004; or

(b) in any other area of the province in which another person is already providing service in accordance with this Act without either the consent of that person or the approval of the Commission.

(3) The Commission may, on application by a public utility, grant its approval for the public utility to provide service in an area in which another person is already providing service if the Commission is satisfied that the present or future public convenience and necessity of the area requires, or will require, the additional service, but no such approval may be granted until after a hearing has been held, of which due notice has been given to the other person.

(4) The Commission may, on granting an approval under subsection (3), include such conditions as the Commission considers to be required in the public interest.

(5) The Commission may, on its own motion or on the application of any person and following a hearing in respect thereof, cancel or amend an approval granted under subsection (3) if the public utility contravenes

(a) a provision of this Act or of the regulations; or

(b) a condition of the approval. 2003, c.3, s.2.” [Emphasis Added]

[50] Section 2.2(3) is similar to section 2.1(2) insofar as it contemplates an application being made to the Commission for a permit authorizing the holder to provide service in any area of the Province; however, section 2.2(3) entitles a public utility to apply to the Commission whereas section 2.1(2) relates to an application by a person.

[51] The Commission is of the opinion that, when sections 2.1(2) and 2.2(3) of the *Act* are read together, these sections recognize the geographical monopolies that both COS and MECL currently have with respect to the distribution of electricity to customers in Prince Edward Island. Specifically, MECL and COS are the only two entities currently providing electrical energy to residents of Prince Edward Island, and have been for some time, with each providing service in well defined and recognized areas of the Province.

[52] The *Act* recognizes that MECL provides service to all areas of the Province, except for those areas currently being served by COS. Sections 2.1 and 2.2 of

the *Act* specifically require a permit by any party wishing to provide service in a manner that differs from the current system.

[53] The Commission is of the opinion that the inclusion of sections 2.1 and 2.2 of the *Act* in 2003, combined with the inclusion of the preamble, can be interpreted as the legislature recognizing that the Province of Prince Edward Island now has a mature electric system with only two entities, MECL and COS, providing service in well defined areas of the Province. The Commission also views the substantive legislative changes made to the *Act* in 2003 as recognition of the manner in which each of MECL and COS have been providing service to their customers in defined geographical areas for many years.

[54] The Commission is of the opinion that sections 2.1 and 2.2 of the *Act* specifically require a permit, issued by the Commission, in the event that there is to be any deviation from the geographical monopolies in which electrical energy is currently provided to customers in the Province of Prince Edward Island. Specifically, if MECL, as a public utility, wishes to provide service in an area in which another person is already providing service, a permit is required. Similarly, if COS, as a person, wishes to provide service in any area of the Province, a permit is required.

[55] COS, MECL and the Province have all submitted that the Commission can consider the interests of those residents residing outside of the municipal boundaries of the City of Summerside when applying the public convenience and necessity test. Therefore, it remains to be determined whether or not the inside customers of COS, as well as the customers of MECL, can be considered when applying the public convenience and necessity test in the Application.

[56] If the Commission was bound by the three previous cases as noted herein, the Commission is of the opinion that the result would be that it would not be allowed to consider the interests of MECL's customers, including approximately 600 MECL customers residing within Summerside's municipal boundaries. Neither would the Commission be entitled to consider the interests of the inside customers of the City of Summerside. In both of the 1983 decisions, the Supreme Court of Prince Edward Island determined that in relation to COS' customers that reside within the municipal boundaries of the City of Summerside, COS is not a public utility, as defined by the *Act*, and is not subject to regulation by the Commission. Further, in the 1994 decision, it was stated that the purpose of the *Act* was to provide for regulation only to the extent that a utility's decisions affect the customers of that utility, and not on the customers of other public utilities.

[57] If bound by these previous decisions, the Commission would be left considering the interests of approximately eighty customers who reside outside the City of Summerside municipal boundaries in order to determine whether or not the Application should be granted. The Commission cannot help but note that this would be a somewhat absurd result, and is of the opinion that this is

not what the legislature had in mind when sections 2.1 and 2.2 were added to the *Act* in 2003. Further, if COS had no customers residing outside its municipal boundaries there would be no interests that the Commission could consider.

[58] As such, the Commission is also of the opinion that it can consider the interests of the customers who reside inside the municipal boundaries of the City of Summerside, as well as the interests of the customers of MECL, when applying the public convenience and necessity test. In accordance with the preamble to the *Act*, the Commission is of the opinion that one of its functions, when interpreting the *Act*, is to ensure that electricity is provided to Island residents in a manner that is efficient with publicly-justifiable rates and tolls. As such, duplication of services, or any other events that may unduly increase the cost of services are, in the opinion of the Commission, important factors for consideration.

[59] The Commission, in considering the interests of the customers residing inside the municipal boundaries of the City of Summerside, is not purporting to regulate these particular individuals, but is merely considering their interests in determining whether or not the Application should be granted. The Commission finds it somewhat problematic to be considering the interests of this same group, in applying the public convenience and necessity test. However, as noted above, the Commission is of the opinion that the legislative amendments to the *Act* allow for the Commission to consider the interests of this group, even though it cannot exercise any regulatory functions in relation to this same group. Further, the Commission believes that the inclusion of section 2.1 in the *Act* in 2003 would serve little purpose if the interests of those served by the person making the application could not be considered.

[60] All parties have submitted that the Commission can consider the interests of the City of Summerside customers who reside outside its municipal boundaries. The Commission has also noted that one possible conclusion would be to hold that neither the interests of the MECL customers, nor the interests of those residing within the municipal boundaries of the City of Summerside, could be considered in applying the public convenience and necessity test. The Commission does not view this as a logical result, and is of the opinion that it is rational, based upon its interpretation of sections 2.1 and 2.2 of the *Act*, to consider the interests of the inside COS customers as well as the outside customers in applying the public convenience and necessity test. With respect to the customers of MECL, the Commission is of the opinion that as COS is proposing to interconnect to MECL's facilities, it is also logical that the interests of the MECL customers can be directly considered by the Commission in applying the public convenience and necessity test.

[61] The Commission is mindful of McQuaid J.'s comments in the 1994 case, in which he stated:

“Upon reading the Electric Power and Telephone Act, supra, in its entire context, considering it does not purport to regulate electrical utilities operated by cities or towns, unless so declared by the Lieutenant Governor in Council, considering the social context in which the Act was enacted as well as its evolution over the years, it is my opinion the purpose and object of the Act is to provide for the regulation of each public utility, only to the extent that each utilities decisions have an impact on its customers and not on the customers of other public utilities of a similar nature.”

[62] The Commission recognizes that it is bound by the decisions of the Prince Edward Island Courts, and, had it not been for the substantial amendments to the *Act*, the Commission would not have the jurisdiction to consider the interests of the MECL customers when applying the public convenience and necessity test. However, the Commission has determined that sections 2.1 and 2.2 of the *Act* specifically require a permit prior to any deviation from the current geographical monopolies in which electrical energy is distributed to Island residents, and is of the opinion that the interests of those affected, including MECL’s customers, can be considered, especially in this Application, where the service being proposed by COS is currently being provided by MECL.

[63] MECL has argued that COS cannot provide “*service*” in the Province of Prince Edward Island, as defined by the *Act*, based upon the fact that it is not a public utility and only a public utility can provide service. Therefore, pursuant to section 2.1(2) of the *Act*, MECL has contended that a “*person*,” specifically COS, cannot apply for a permit to provide service based upon the fact that it is not a public utility.

[64] With respect to this particular argument, the Commission notes that the definition of “*service*” as contained in the *Act* is inclusive, rather than exhaustive. Particularly, the Commission notes that the definition of service utilizes the word “*includes*”, rather than using the word “*means*”. As such, the Commission is of the opinion that the definition of “*service*”, as contained in the *Act*, is not exhaustive, and believes that it is possible for a person to provide service in the Province of Prince Edward Island. If a person cannot provide service, then section 2.1(2) of the *Act* would have no effect whatsoever, which the Commission does not believe was the intention of the legislature when introducing section 2.1 to the *Act* in 2003.

[65] Based upon all of the foregoing, the Commission is of the opinion that it can consider the interests of the customers of COS, both those that reside inside and outside the corporate boundaries of the City of Summerside, as well as the interests of MECL customers, when applying the public convenience and necessity test in relation to the Application.

Issue 6 – Does COS Need a Permit from the Commission to Construct a Transmission Line and to Connect to MECL’s Bedeque Substation?

[66] Through the various filings and submissions that have been made to the Commission, MECL, COS and the Province have all indicated that COS requires a permit to connect to MECL's Bedeque substation. As such, the Commission has determined that such a permit is required from COS in its Application.

[67] With respect to whether or not a permit is required in order for COS to construct its proposed transmission line, MECL and the Province are of the opinion that such a permit is required. COS, on the other hand, has indicated that it does not believe that a permit is required, because it is not providing service in the proposed area, but is merely "*passing through*."

[68] COS has indicated to the Commission that it is not attempting to provide service in the area between Bedeque and its Ottawa substation. The proposed transmission line is, in COS's opinion, merely passing through an area, as opposed to providing service in that area.

[69] The Commission notes that the definition of "service", as included in the *Act*, applies to the production, transmission, distribution or furnishing of electric energy. Further, the Commission is of the opinion that the proposed transmission line will be used to transmit electrical energy from the Bedeque substation to COS's Ottawa Street substations. This transmission line is within the geographical area reserved to MECL under section 2.2(1) of the *Act*. As such, the Commission is of the opinion that if the transmission line is constructed, COS would be transmitting electrical energy and providing service.

[70] Further, the Commission also notes that the proposed transmission line would serve the exact same function as the MECL line currently running from Bedeque to the Ottawa Street substation. Therefore, the Commission is of the opinion that a permit is required by COS prior to constructing the proposed transmission line within the geographical area presently served by MECL, as the transmission of electrical energy from Bedeque to the Ottawa Street substation constitutes service, and cannot be characterized as simply "*passing through*" an area.

[71] Therefore, COS needs a permit both to connect to MECL's Bedeque substation and a permit to construct a transmission line through the territory of MECL.

7. Disposition

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

IN THE MATTER of an
application by City of Summerside for a permit to
provide transmission services from its Ottawa
Street substation to Maritime Electric's Bedeque
substation.

Order

UPON receiving an application by City of Summerside for a
permit to provide electrical transmission services from their
Ottawa Street substation to Maritime Electric's Bedeque
substation;

AND UPON considering the evidence provided by
City of Summerside and interveners to the application;

AND UPON a determination by the Commission that
it is desirable to establish Commission jurisdiction as it relates to
the legislative test contained in section 2.1 of the *Electric Power
Act*,

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

IT IS ORDERED THAT

1. The procedure adopted by the Commission in this matter is appropriate and within the Commission's legislative discretion.
2. The Application brought by COS in this matter is made pursuant to section 2.1(2) of the *Act*, which was added in 2003. While the courts have considered various matters that relate to the present Application, as this section has only been introduced in 2003, the Commission has determined that application of the public convenience and necessity test is not *res judicata*, and has not previously been determined by the Supreme Court of Prince Edward Island.

3. In applying the public convenience and necessity test, the Commission can consider the interests of the customers of COS, as well as the customers of MECL, in proceeding with the remainder of this Application.
4. COS requires a permit to construct the proposed transmission line, as set out in more detail in its application, and requires a permit to connect to MECL's Bedeque substation.

DATED at Charlottetown, Prince Edward Island, this 7th day of May, 2010.

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), 13(2), 13(3), and 13(4) of the *Act* provide as follows:

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

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

(3) The Commission shall be deemed to be a party to the appeal.

(4) No costs shall be payable by any party to an appeal under this section unless the Court of Appeal, in its discretion, for special reasons, so orders.

IRAC140A(04/07)

NOTE: In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 5 years.