

The Avista and East-West Tie Cases, and Their Implications for the Governance of the Electricity Sector in Ontario

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I Introduction

Two recent cases have highlighted a serious weakness in the governance of the electricity sector in Ontario. The cases illustrate not just the immediate adverse effects of Government interference in specific matters but the deeper damage the Government's role does to governance of the sector as a whole.

The first case involves the denial by state regulatory authorities in the United States of the attempt by Hydro One Limited ("Hydro One") to acquire the shares of Avista Corporation ("Avista"), (referred to hereinafter as the "Avista Case"). The second case is the Province's intervention in the applications to the Ontario Energy Board ("OEB") for approval of leave-to-construct ("LTC") a transmission line in northwestern Ontario (referred to hereinafter as the "East-West Tie" or "EWT" case).

The two cases differ superficially but are similar in one critical respect. In the Avista case, the Province did not intervene directly to affect the outcome of the state's regulatory process; rather, it imposed the governance arrangements on Hydro One, arrangements which led the State of Washington's Washington Utilities and Transportation Commission ("WUTC") to deny approval of the proposed acquisition. In the EWT case, the Province intervened directly to dictate the result of the OEB's regulatory process.

What the two cases have in common is the provincial Government's interference in the governance of the electricity sector, in one case as a shareholder of Hydro One and in the other case as a Government exercising directive power. In both cases, the Government interference had adverse financial impacts. In the Avista case, Hydro One must pay a break-up fee of \$103 million as a result of the denial of approval of the acquisition. In the EWT case, the result may be an increase in the range of at least \$100 to \$125 million to the cost of the transmission line.

But the adverse financial implications of the Government's actions, while important, may be less significant in the long run than the implications of those actions for the governance of the electricity sector in Ontario and for the protection of ratepayer interests. By its actions in the Avista case, the Government has affected shareholder rights and interests in ways which bring the reputation of the Province as a secure place in which to invest into disrepute and so may have long-term implications for investment in the electricity sector.

By interfering in the EWT case, the Government has, among other things, undermined the independence of the Ontario Energy Board ("OEB") and the integrity of the regulatory system. That, in turn, may have adverse implications for investment in the sector.

This paper is divided into the following sections:

1. In the first, I describe the Avista and EWT cases;
2. In the second, I set out the principles which I suggest should apply to governance in the electricity sector and why adherence to those principles is important;
3. In the third, I discuss the governance of the electricity sector and what the Avista and EWT cases say about the present state of governance in the sector; and
4. In the final section I discuss the changes in the governance of the electricity sector required to protect the interests of ratepayers and the reputation of both the Province and the electricity sector as places in which to invest.

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The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

Robert Warren was counsel to Hydro One Networks Inc. in the East-West Tie case discussed in this paper. The views expressed in this paper are entirely his own.

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