Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2006-0175
EB-2006-0124
EB-2006-0128

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

AND IN THE MATTER OF an application by Abitibi-Consolidated Company of Canada for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by ACH Limited Partnership for an electricity generation licence pursuant to section 60 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by ACH Limited Partnership for an electricity retailer licence pursuant to section 60 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF a request by ACH Limited Partnership to deem certain distribution assets to be part of a transmission system pursuant to section 84(b) of the *Ontario Energy Board Act, 1998*.

By delegation, before: Mark C. Garner

DECISION AND ORDER

The Ontario Energy Board (the "Board") received three licence applications as a result of a proposed commercial transaction involving eight hydroelectric generating facilities in the vicinities of Kenora, Fort Frances and Iroquois Falls. A licence amendment application was filed by Abitibi-Consolidated Company of Canada ("Abitibi") and two

new licence applications, one for an electricity generation licence and one for an electricity retailer licence, were filed by ACH Limited Partnership ("ACH").

I find that it is in the public interest to grant the requested licence amendment and to issue the electricity generation and retailer licences under Part V of the *Ontario Energy Board Act, 1998* (the "Act") subject to the following conditions:

- the ACH generation licence and the Abitibi licence amendment will not be effective until the commercial transaction closes;
- in order for the ACH generation licence and the Abitibi licence amendment to become effective, the commercial transaction must close on or before December 31, 2007;
- Abitibi and ACH (collectively, the "Applicants") must inform the Board when the commercial transaction closes; and
- until such time as the new generation licence and the licence amendment become effective, the Applicants must inform the Board of any material changes to the information submitted as part of the licence and licence amendment applications.

Within the context of the generation licence application, I have also determined that the 7 km twinned distribution line that links the Twin Falls Generating Station to the Iroquois Falls mill complex is a transmission system or part of a transmission system.

THE PROCEEDING

Abitibi filed an application with the Board on June 2, 2006 for an amendment to Schedule 1 of its electricity generation licence (EG-2003-0204). The Board assigned the application file number EB-2006-0175. The amendment is to change Abitibi's status as owner and operator of the subject facilities to operator only.

By way of a commercial transaction, Abitibi intends to transfer ownership of eight hydroelectric generating stations in the vicinities of Kenora, Fort Frances and Iroquois Falls and associated transmission and distribution lines to a new affiliate. Abitibi will continue to operate and maintain the subject facilities under agreements with the affiliate. Abitibi will also hold a majority interest in the affiliate.

The new affiliate was originally named Orion Limited Partnership ("Orion"). Orion filed applications for an electricity generation licence (as owner of the subject facilities) and an electricity retailer licence with the Board on June 2, 2006. The Board assigned these applications file numbers EB-2006-0124 and EB-2006-0128 respectively.

On June 30, 2006, the Board issued a Notice of Application and Notice of Written Hearing (the "June 30 Notice") for the applications made by Orion. No responses were received.

No notice was issued in respect to the application by Abitibi to amend its licence. The licence amendment had been filed in confidence and at that time no determination had yet been made in respect to the confidentiality request.

On October 16, 2006, and after publication of the June 30 Notice, Orion informed the Board that it had changed its name to ACH Limited Partnership and that the name of its general partner had changed from 4349440 Canada Inc. to Abitibi-Consolidated Hydro Inc. It was at this time that ACH requested that the Board determine, under section 84(b) of the Act, that a 7 km twinned distribution line connecting the Twin Falls Generating Station to the Iroquois Falls mill complex is a transmission system or part of a transmission system.

A second Notice of Application and Notice of Written Hearing was issued on November 2, 2006 (the "November 2 Notice") for the three subject applications (EB-2006-0175, EB-2006-0124 and EB-2006-0128). There were numerous reasons for requiring the additional notice including, but not limited to, the reasons set out below.

One reason was that the name of one of the Applicants had changed from Orion to ACH and the name of its parent changed from 4349440 Canada Inc. to Abitibi-Consolidated Hydro Inc. Another reason was due to confusion regarding the nature of the transaction and the relationship between the Applicants. Three parties had become aware of the Abitibi licence amendment through other communications in their communities and submitted letters to the Board regarding Abitibi's licence amendment application (EB-2006-0175). However, these parties were unaware of the related applications by Orion/ACH, or the fact that Orion was an affiliate of Abitibi. A review of these letters made it clear that the views of the parties were more properly placed in the applications of Orion/ACH. A new notice was necessary in order to ensure that all parties could understand the interrelationship between the three applications. Lastly, a new notice was necessary in order to ensure that four affected parties who receive electricity directly from Abitibi were aware of the applications.

The November 2 Notice was published by the Applicants on November 8, 2006, in Fort Frances and Kenora and on November 9, 2006, in Iroquois Falls. In addition, the Applicants served the November 2 Notice to the four parties who receive electricity

directly from Abitibi and to the three parties who had previously submitted letters of interest in relation to the Abitibi licence amendment.

In response to the November 2 Notice, the Board received four submissions objecting to written hearings. The submissions expressed concerns in respect to economic consequences to the affected communities. On December 6, 2006, Procedural Order No. 1 was issued in respect to the three applications and it was determined that an oral hearing was not necessary. The procedural order noted the limited mandate of the Board in relation to licensing matters and allowed for additional written submissions.

POSITION OF THE PARTIES

The Board received written submissions in response to Procedural Order No. 1 from the Communications, Energy and Paperworkers Union of Canada ("CEP") and Mr. Ben Lefebvre of Iroquois Falls.

CEP submitted that the Board must consider:

- the impact of the proposed new income trust structure on the generation assets and the potential for distribution of income to unit holders instead of investment in the generation assets;
- the adequacy and reliability of the generation facilities (namely, CEP noted that the subject hydroelectric dams are upwards of 100 years old and that dam safety is a critical factor to consider in adjudicating the applications);
- that the public interest includes environmental impacts on the communities should the hydro-electric facilities receive inadequate investment ; and
- whether the applications have the potential to breach the "1905 Agreement" with the Town of Fort Frances.

In his submission, Mr. Lefebvre expressed concerns about:

- the financial instability of Abitibi and the possibility that Abitibi would default on its commitments to its employees and shareholders;
- the lack of third party agreements to ensure low cost electricity to the Iroquois Falls mill; and
- the issuance of Board licences prior to the Ontario Municipal Board hearing regarding Abitibi's application to sever its property in Iroquois Falls.

None of the submissions addressed ACH's request to deem the subject distribution lines as a transmission system or part of a transmission system.

In their December 27, 2006, response, the Applicants submitted that:

- there is no statutory requirement that the Applicants obtain approval of the Board for the transfer of the generation facilities;
- as an electricity generator, an income trust is under the same obligations as any other owner of generation with respect to the operation and maintenance of its generation facilities;
- there is no evidence to suggest that Abitibi has not met its obligations to the Board or other agencies with respect to operation and maintenance of the facilities;
- there is no basis to suggest that, following the transaction, the facilities will not be operated and maintained at the required standards and in compliance with the same obligations as those currently in place;
- the submission of certain parties related to possible environmental impacts of possible improper maintenance of the facilities is highly speculative and baseless;
- the supply of electricity to the Town of Fort Frances pursuant to the "1905 Agreement" will be dealt with by transferring the obligations under the agreement to ACH upon completion of the transaction;
- the operations of Abitibi's mills and the commercial relationship between Abitibi and ACH are not matters within the Board's jurisdiction;
- ACH is capable of owning the Iroquois Falls facilities in the absence of completion of the Ontario Municipal Board proceedings; and
- the Applicants have established, from an operational and financial perspective, that they are competent to carry on the activities for which they will be licensed.

SUPPLEMENTAL INFORMATION AND SUBMISSIONS

On January 29, 2007, the Applicants advised the Board of the following two announcements:

- that Abitibi had entered into a binding letter of intent with the Caisse de dépôt de placement du Québec (the "Caisse") to create a joint venture for the subject facilities (i.e., the Caisse will acquire the interest in ACH that Abitibi had initially intended to offer through an income trust structure); and

- that there will be an all-stock merger between Abitibi-Consolidated Inc., the parent company of Abitibi and Bowater Inc. that will result in 48% of AbitibiBowater being owned by former Abitibi-Consolidated Inc. shareholders and 52% of the new entity being owned by former Bowater shareholders.

On January 30, 2007 and February 2, 2007, CEP submitted that the announcements fundamentally alter the nature of the applications before the Board. CEP stated that the structure of ownership of the subject facilities is fundamentally altered to the extent that the applications before the Board with regard to transferor and transferee are no longer current and accurate. CEP argued that the Board should examine changes in ownership and shareholder structure in determining whether the Applicants are sufficiently capable to act as a generator.

The Applicants responded to the CEP submissions on February 1, 2007 and February 6, 2007. The Applicants stated that it is currently expected that Abitibi will continue to be owned by Abitibi-Consolidated Inc. and that Abitibi will continue to be the majority owner of ACH, as was originally intended before the joint venture and merger announcements. The Applicants stated that the announcements have not changed their identities and that there are no changes at this time to the key individuals identified in the applications. The Applicants submitted that the announcements do not create material changes in the Applicants' circumstances that adversely affect or are likely to adversely affect the business, operations or assets of the Applicants.

REASONS

Pursuant to subsection 6(1) of the Act, I have been delegated the power and duties of the Board with respect to the determination of applications made under section 60 and section 74 of the Act. For the purposes of determining these applications, I have been further delegated those powers and duties that the Board would have in determining such applications. Although I have considered the full record of the proceeding, I have summarized the record only to the extent necessary to provide context for my findings.

I will address these applications in the following order: ACH's application for an electricity generation licence and its request for deeming certain distribution assets to be part of a transmission system (EB-2006-0124); ACH's application for an electricity retailer licence (EB-2006-0128); and Abitibi's application for an amendment to its electricity generation licence (EB-2006-0175).

First, however, I will address the recent Abitibi and Abitibi Consolidated Inc. announcements. I note that certain parties submitted that the subject licence applications are altered by the recent joint venture and merger announcements. The Applicants have replied that Abitibi will continue to be owned by the same parent, that Abitibi will continue to be majority owner of ACH, and that there are no changes to key individuals at this time. I accept the Applicants' arguments that the new information submitted does not fundamentally change the relevant matters in these applications.

However, since the time of the original filing the Applicants have reported numerous changes to the details of the transaction. This has led to delays in the processing of the applications. As of the time of the issuance of this Decision, the transaction has yet to be completed. As a condition of this Decision, the Applicants shall notify the Board of any material changes to the business, operations or assets of the Applicants that may occur in the future including, but not limited to, changes resulting from the recent announcements.

ACH's Application for an Electricity Generation Licence (EB-2006-0124)

ACH has applied for an electricity generation licence as owner of eight hydroelectric generating stations currently owned by Abitibi. ACH submitted all the information required in the Board's electricity generation licence application form.

Abitibi and ACH have chosen to restructure and to enter into a commercial transaction. As documented in the Board's December 6, 2006 Procedural Order, the Board's mandate in the context of licensing does not include a review of the propriety of any aspect of a commercial transaction.

The submissions of the parties relating to the commercial transaction and the relationship of Abitibi with its employees and shareholders are outside the scope of what I believe needs to be considered in a licence application. The Board's concern in relation to the licensing of new generators is in respect to the qualifications of the Applicant to act as a generator and to participate in a reasonable manner in the Ontario electricity market. I have determined that the information provided by ACH regarding its finances, as well as the technical capability and conduct of its officers, is satisfactory. The key individuals involved in ACH are also involved with Abitibi. Furthermore, no evidence was presented that would lead me to conclude that ACH is not capable of participating in the Ontario market as an owner of generation facilities.

While I understand and appreciate the concerns expressed by some parties, their submissions that ACH will not provide adequate funding to maintain the generation facilities are unsubstantiated. Any person who obtains a generation licence is under the same obligations regardless of the way in which their business is structured. The submissions by certain parties that there will be environmental consequences as a result of poor maintenance are also unsubstantiated and speculative.

In any event, such submissions are not in my view relevant to the question of whether the Applicant is eligible to hold a generation licence. Section 57(c) of the Act provides that a licence is required to generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person. The standard to be applied is whether it is reasonable to assume the Applicant can be relied upon to meet the commitments it undertakes in participating in the electricity generation market. The Board's generation licence does not obligate a person to generate electricity from the facilities for which the person is licensed.

Overall, I find that ACH has met the Board's requirements for the issuance of a new generation licence.

ACH has not applied for a transmission or distribution licence as it believes it is exempt from licensing requirements in accordance with Ontario Regulation 161/99—*Definitions and Exemptions* (made under the Act). ACH's assertion that it is exempt from distribution licensing requirements is premised on ACH obtaining the Board's determination, under section 84(b) of the Act, that the 7 km of twinned distribution line that links the Twin Falls Generating Station to the Iroquois Falls mill complex is a transmission system or part of a transmission system.

ACH will only distribute electricity to Abitibi and three other consumers. A fourth consumer will continue to be served by Abitibi. ACH has stated that it will not be in the "business" of distributing electricity but will simply be distributing electricity to a limited number of historically connected consumers for a price no greater than that required to recover all reasonable costs. Given the limited distribution activity that ACH will undertake and the fact that the subject lines essentially perform a transmission function (albeit at low voltage), I find that it is appropriate to deem the 7 km of twinned distribution line that links the Twin Falls Generating Station to the Iroquois Falls mill complex to be a transmission system or part of a transmission system.

I note that in order to make a proper determination of whether or not a person needs to be licensed as a distributor or transmitter, far more detailed information would be

required than was provided in the applications. I will say that based on the information provided, I do not expect ACH to apply for a distribution licence or a transmission licence at this time. However, this expectation is based solely on the information filed as part of the applications. Should any of that information change over time or should new information be discovered, the Applicant may be required to file an application for a distribution or transmission licence.

ACH's Application for an Electricity Retailer Licence (EB-2006-0128)

ACH has applied for an electricity retailer licence in order to retail to small and large volume consumers. ACH has stated that it has applied for retail licence qualification to enable it to sell electricity to the Abitibi mills and three consumers currently served by Abitibi. ACH submitted all the information required in the Board's electricity retailer licence application form.

The Board's concern in relation to the licensing of new retailers is in relation to the qualifications of the person applying for a retailer licence, namely their capability to act as a retailer.

The four consumers who receive electricity directly from Abitibi were served with the November 2 Notice by the Applicants. Upon completion of the commercial transaction, three of the consumers will receive electricity from ACH and the fourth will continue to receive electricity from Abitibi. I note that none of these consumers intervened in the subject proceedings or objected to the applications in any way. In their December 27, 2006 response to submissions, the Applicants stated that ACH, as a licensed retailer, will be selling electricity to the consumers on the same terms as those upon which Abitibi is currently selling them electricity.

I have determined that the information provided by ACH regarding its finances, as well as the experience and conduct of its officers, is satisfactory. Overall, I find that ACH has met the Board's requirements for the issuance of a new retailer licence.

Abitibi's Application for a Licence Amendment EG-2003-0204

Abitibi filed an application to amend its electricity generation licence so as to remove its status as owner of the eight hydroelectric generating stations. It sought to maintain its licence as an operator.

The Board may amend a licence if the Board considers the amendment to be in the public interest having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*.

Nothing precludes Abitibi from deciding to no longer own the generation facilities in question. The change in ownership does not, in and of itself, detract from the ability of Abitibi to operate the generation facilities. Abitibi will continue to be the licensed operator of the generation facilities. No submission was presented which would cause me to question the ability of Abitibi to continue to operate the facilities in a reasonable fashion.

I find that it is in the public interest to grant the licence amendment.

PROCESS TIME

With respect to the process, I provide the following comments for the benefit of all parties. I note that the Applicants have stated on numerous occasions that the time taken by the Board to decide these applications has been much longer than usual. This is true. Normally applications of this nature should take approximately 90 to 115 days to complete. These applications took in excess of 275 days to complete.

These applications were unique and complex when compared to the standard generator and retailer applications that the Board normally reviews. Although the applications were based on the standard criteria used to test the eligibility of potential generators and retailers, the unique considerations of the commercial transaction as communicated by the Applicants led to the emergence of many issues over the course of the proceeding. As a result of these issues, this proceeding was lengthier than what is normally required for most licence applications.

The process surrounding these proceedings was extended on a number of occasions due to a number of factors, including, but not limited to, the filing of confidential material beyond the normal practice in licence applications, numerous changes to the information originally filed, and the level of intervenor interest.

The Applicants were diligent in updating their applications on a regular basis. The Board received new information on several occasions following the original filings on June 2, 2006 including as recently as February 6, 2007. While I appreciate that the Applicants have kept the Board apprised of new developments over the course of these proceedings, the fact remains that all new information must be considered in order to

determine the effect of the new information on the applications. The Applicants could have compressed the process time considerably had they simply filed when they had certainty as to the final nature of the transaction. The Applicants should also have been aware as to the unique considerations of this transaction and anticipated the additional notice requirements that would result.

Finally, based on the number of individual and media inquiries received by the Board via letters, email, and telephone calls, the Applicants in my view did not make sufficient efforts to inform the communities in the areas of Kenora, Fort Frances and Iroquois Falls as to the nature of the transaction. Had the Applicants engaged the local communities better, they might have assisted themselves by providing those concerned with an understanding of the regulatory process. The confidentiality request shrouding the applications, the change of name for one of the Applicants, and the confusion among the parties as to the interrelationship between the applications all resulted in further delays as the Board had to determine how to best discharge its responsibilities in an open and transparent proceeding.

CONDITIONS

These applications were driven by the pending commercial transaction between Abitibi and ACH. As stated by the Applicants in their original filings, the commercial transaction was to be completed by the fall of 2006. On January 29, 2007, the Applicants advised that the commercial transaction is expected to close in the first half of 2007.

The approvals herein are subject to the following conditions:

- the ACH generation licence and the Abitibi licence amendment will not be effective until the commercial transaction closes;
- in order for the ACH generation licence and the Abitibi licence amendment to become effective, the commercial transaction must close on or before December 31, 2007;
- the Applicants must inform the Board when the commercial transaction closes; and
- until such time as the new generation licence and the licence amendment become effective, the Applicants must inform the Board of any material changes to the information submitted as part of the licence and licence amendment applications.

IT IS THEREFORE ORDERED THAT:

1. Abitibi-Consolidated Company of Canada's Electricity Generation Licence EG-2003-0204 is amended in accordance with the attached licence.

2. The application for an electricity generation licence by ACH Limited Partnership is granted, on such conditions as are contained in the attached licence.

3. The application for an electricity retailer licence, small and large volume, by ACH Limited Partnership is granted, on such conditions as are contained in the attached licence.

4. The 7 km of twinned distribution line that links the Twin Falls Generating Station to the Iroquois Falls mill complex is deemed to be a transmission system or part of a transmission system under section 84(b) of the *Ontario Energy Board Act, 1998*.

5. Abitibi-Consolidated Company of Canada and ACH Limited Partnership shall advise the Board of the date of the completion of the commercial transaction regarding the eight hydroelectric generating stations listed in Schedule 1 of the attached generation licence for ACH Limited Partnership.

6. Until such time as the new generation licence and the licence amendment become effective, Abitibi-Consolidated Company of Canada and ACH Limited Partnership shall advise the Board of any material changes to the information submitted as part of the licence applications and licence amendment application including, but not limited to, any changes to the key individuals and any changes to the financial information.

Under section 7(1) of the *Ontario Energy Board Act, 1998*, this decision may be appealed to the Board within 15 days.

ONTARIO ENERGY BOARD

Original signed by

Mark C. Garner
Managing Director, Market Operations

Dated at Toronto March 5, 2007