



EB-2005-0234

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 Greater Sudbury Hydro Inc. under section 86 of the *Ontario Energy Board Act, 1998* seeking leave to acquire all outstanding shares in West Nipissing Energy Services Ltd.

BEFORE

Bob Betts
Presiding Member

Paul Sommerville
Member

Cynthia Chaplin
Member

DECISION AND ORDER

The Application

On February 23, 2005, Greater Sudbury Hydro Inc. (“GSHI”) filed an application with the Ontario Energy Board (the “Board”) under section 86 of the *Ontario Energy Board Act, 1998* (the “Act”) seeking leave to acquire all outstanding shares in West Nipissing Energy Services Ltd. (“WNESL”) (the “Application”).

Both GSHI and WNESL are licensed electricity distributors.

GSHI owns, operates and manages assets associated with the distribution of electricity within the geographic territory and municipal boundaries as outlined in Schedule 1 of its electricity distribution licence ED-2002-0559. GSHI's licensed service area covers the City of Greater Sudbury and the Township of Falconbridge. GSHI is wholly owned by Greater Sudbury Utilities Inc., which in turn is wholly owned by the City of Greater Sudbury.

WNESL owns, operates and manages assets associated with the distribution of electricity within the geographic territory and municipal boundaries as outlined in Schedule 1 of its electricity distribution licence ED-2002-0562. WNESL's licensed service area covers the former Town of Cache Bay and the Town of Sturgeon Falls, now in the Municipality of West Nipissing. WNESL is wholly owned by West Nipissing Power Distribution Ltd., which in turn is wholly owned by the Municipality of West Nipissing.

Upon approval and completion of the transaction contemplated in the Application, the City of Greater Sudbury would indirectly hold 100 percent of the outstanding shares in WNESL.

The Application states that it is the intention of GSHI to amalgamate with WNESL as of December 31, 2005, but does not include a request for leave to amalgamate. Accordingly, a further application to the Board requesting leave to amalgamate would have to be filed by GSHI and WNESL in order for the amalgamation to proceed.

According to documentation filed with the Application, all internal approvals necessary to enable the parties to enter into the agreement that underlies the proposed transaction have been obtained.

GSHI intends to implement rate harmonization concurrent with the amalgamation of GSHI and WNESL that is anticipated to occur at the end of the year. GSHI has stated that, on the basis of current distribution rates, residential customers currently served by

WNESL will benefit from a rate reduction when rates are harmonized. GSHI has also stated that a rate harmonization plan will be established under the revised rate mitigation and harmonization approach established by the Board in relation to the 2006 electricity distribution rates proceeding for the 36 general service (>50 kW) customers who may be negatively affected by rate harmonization.

A Notice of Application and Written Hearing was published as directed by the Board. Mr. Brian LaFleche and Mr. Len LaFleche, representing the “Save Our Hydro Group”, have been granted intervenor status in respect of the Application.

The full record of this proceeding is available for review at the Board’s offices. While the Board has considered the full record, the Board has summarized and referred only to those portions of the record that it considers helpful to provide context to its findings.

The Intervention

The concerns raised by the Save Our Hydro Group can generally be described as falling within three categories of issues.

The first category concerns the process surrounding the negotiation of the transaction contemplated in the Application, including concerns that the process was not transparent; that there was inadequate public consultation on and public disclosure about the proposed transaction; that no tender was issued; that there was a failure to consult with the board of directors and employees of WNESL; that the Municipality did not follow the process required by its by-laws or by law; and that no opportunity was given to consider a potential competing bid by another utility.

The second category of issues raised by the Save Our Hydro Group relates to the purchase price and, more specifically, asserts that the price payable for the shares of WNESL is too low. Concerns were also expressed about the related issue of the accuracy of the valuation of WNESL’s assets.

The third category of issues raised by the Save Our Hydro Group relates to questions regarding the tenure and future remuneration of existing WNESL employees.

During the oral hearing held as part of the combined proceeding described below, the Save Our Hydro Group raised two further concerns. The first relates to reliability of electricity service. Specifically, based on the Save Our Hydro Group's understanding that two of the three existing WNESL line staff would be working in the City of Greater Sudbury for six months of the year, concerns were expressed that there may be delays in effecting repairs, particularly when weather conditions are poor. The second issue relates to rates. The Save Our Hydro Group indicated its understanding that the transaction is expected to have a positive impact on rates for residential customers. It noted, however, that it did not have any information regarding rates for commercial customers, and that there was a concern as to the potential impact of the proposed transaction on those rates.

The Save Our Hydro Group requested that the Application proceed by way of oral hearing.

In addition to the submissions of the Save Our Hydro Group, the Board received several letters of comment objecting to the transaction contemplated in the Application, many of which were form letters which were filed with the Board by the Save Our Hydro Group. Those letters object to the proposed transaction on the grounds that there was inadequate public consultation, and also refer to the lack of confidence that the Municipality has shown towards the board of directors of WNESL. Other letters of comment reflect the concerns expressed by the Save Our Hydro Group regarding the process surrounding the negotiation of the proposed transaction. One letter of comment expressed concern that Sudbury workers would have to travel for one hour to reach West Nipissing, that part of the purchase price payable by GSHI was destined for plant improvements in Sudbury and that keeping a "satellite office" in West Nipissing in order to meet the Board's service level requirements would be prohibitively expensive.

The Municipality of West Nipissing requested and was granted observer status in relation to this Application.

Procedural Order No. 1

On June 15, 2005, the Board issued its Procedural Order No. 1 in respect of the Application. The Procedural Order established revised deadlines for the filing of submissions in relation to the issue of whether the Application should proceed by way of oral hearing. Both the Save Our Hydro Group and GSHI filed submissions on that issue, the former in favour and the latter opposed.

The Combined Proceeding

On July 5, 2005, the Board issued a Procedural Order combining the subject Application with two others for the purpose of addressing common issues relating to the scope of the issues that the Board will consider in determining applications under section 86 of the Act. The Procedural Order combined the Application with an application by Veridian Connections Inc. and Gravenhurst Hydro Electric Inc. for leave for Veridian Connections Inc. to acquire shares in and to subsequently amalgamate with Gravenhurst Hydro Electric Inc. (EB-2005-0257) and an application by PowerStream Inc. and Aurora Hydro Connections Limited for leave for PowerStream Inc. to acquire shares in and to subsequently amalgamate with Aurora Hydro Connections Limited (EB-2005-0254). The Board assigned file number RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257 to the combined proceeding.

The Procedural Order asked the parties to identify matters that they considered to be relevant to the Board's determination of applications under section 86 of the Act as well as matters they considered to be outside the scope of the Board's review. The Board also requested, without limiting the matters that the parties may wish to raise, submissions on the relevance of two specific issues:

- (i) the adequacy of the purchase price payable in relation to the proposed transaction; and
- (ii) the adequacy or integrity of, or the motivation underlying, the tendering, public consultation, public disclosure or decision-making processes associated with the proposed transaction.

The Board held an oral hearing on this matter on July 19, 2005. GSHI made oral and written submissions in the combined proceeding. The Save Our Hydro Group made oral and written submissions in the combined proceeding, focussing on the issues previously raised by it. As noted earlier, the Save Our Hydro Group at this time also raised, in response to questions from the Panel, concerns regarding timeliness of electricity service and the impact of the proposed transaction on rates for commercial customers.

The Board issued its Decision in the combined proceeding on August 31, 2005 (the "Combined Decision"). In the Combined Decision, the Board made two significant determinations in relation to the manner in which the Board will review applications for leave to acquire shares or amalgamate under section 86 of the Act.

First, the Board determined that the factors to be considered in deciding such applications are those identified in the Board's objectives as set out in section 1 of the Act. Second, the Board determined that it will use a "no harm" test in deciding whether to approve a share acquisition or amalgamation transaction. In other words, the Board will approve a transaction if it is satisfied that the transaction will not have an adverse effect in terms of the factors identified in the Board's objectives.

Based on these two findings, the Board concluded that the price payable by a purchaser is only relevant if the price is too high and creates a financial burden on the acquiring company. In such a case, there could be an adverse effect on the economic viability of

the purchaser. A price that is too low would not have an adverse effect in terms of the factors identified in the Board's objectives.

Similarly, the Board concluded that the conduct or motivation of a seller leading up to the transaction (including, for example, the amount of public consultation on, or public disclosure about, the transaction) are not in and of themselves grounds for denying the approval of a transaction. The "no harm" test looks at the effect of a transaction, not the reason for or the process preceding the transaction.

Based on the Combined Decision, almost all of the issues raised by the Save Our Hydro Group with respect to the Application are no longer "in scope" for this proceeding, because they have been determined not to be factors relevant to the Board's review of applications for leave to acquire shares or amalgamate under section 86 of the Act. The exceptions are the concerns expressed by the Save Our Hydro Group during the oral hearing in the combined proceeding regarding the timeliness of electricity service and the potential impact of the proposed transaction on rates for commercial consumers.

On September 14, 2005, a conference call was held to allow the Board to hear the views of the remaining parties on the following questions:

1. Does the Save Our Hydro Group contest the Application on the basis of issues that remain in scope in this proceeding, based on the Board's August 31, 2005 Decision?
2. If so:
 - (a) what are those issues?

- (b) what materials or evidence filed by GSHI with respect to those issues does the Save Our Hydro Group wish to test, and by what means? Is an oral hearing required for this purpose?
- (c) does the Save Our Hydro Group wish to have GSHI produce further materials or evidence?
- (d) does the Save Our Hydro Group intend to produce evidence in support of its position in relation to the Application?

Representatives of GSHI and the Save Our Hydro Group participated in the conference call. The Save Our Hydro Group made submissions reiterating their earlier concerns respecting the process followed by the Municipality which culminated in the transaction which is the subject of the Application. With respect to the general concern expressed by the Save Our Hydro Group in relation to the potential impact of the transaction on rates for commercial customers, the Board reiterated that any changes in rates will need to be the subject of a separate rate proceeding. Interested parties would be given notice of that proceeding and would have an opportunity for input on the proposed rate changes at that time.

GSHI submitted that all of the concerns raised by the Save Our Hydro Group were, based on the Combined Decision, no longer in scope in this proceeding, or, in the case of the rates issue, would be subject to a distinct process, and that no new "in scope" issues had been raised. The Board agrees, and notified the parties of its determination that the issues which the Save Our Hydro Group wishes to have addressed by the Board are outside the scope of the Board's review of this application.

The Board has therefore proceeded with its determination of the Application on that basis.

Board Findings

Section 86 of the Act provides, among other things, that no person may acquire voting shares in an electricity distributor without leave of the Board if, as a result of the acquisition, the person would hold more than 20 percent of the voting securities of the distributor. In addition, under that section leave of the Board is required before an electricity distributor can amalgamate with any other corporation.

The Combined Decision has made it clear that, in deciding whether or not to grant leave in relation to the Application, the Board must determine whether the transactions contemplated in the Application will have an adverse effect on:

- (i) the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service; or
- (ii) economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity or the maintenance of a financially viable electricity industry.

GSHI has submitted that the transaction contemplated in the Application will:

- ensure more efficient system planning and capital investment;
- provide opportunities for efficiency gains in rationalization of the organizational structure, human resources and engineering functions, as well as greater resource and cost management in the form of lower overall distribution rate adjustments;
- maintain or improve operational safety and system integrity through GSHI's three-year planned capital and maintenance program, which

includes normal system enhancements and system optimization in relation to the rationalization of substations;

- have a positive impact on rates for residential customers;
- have a positive impact on WNESL's operating costs, which may be reduced by approximately 15% as a result of system integration in the form of the centralization of accounting, engineering, administration, regulatory affairs and billing and customer interaction systems;
- be financed through cash resources on hand, will have no impact on GSHI's debt obligations and will leave sufficient cash resources to support GSHI's ongoing operations and planned capital requirements. The restructured operations and capital requirements of WNESL are expected to be adequately supported by WNESL's cash flow.

The Board also notes GSHI's expressed commitment to:

- maintain the existing service centre in Sturgeon Falls so as to ensure that response times will not be below those existing today and will conform to performance standards set by the Board; and
- establish a transition committee, and subsequently a permanent management committee, to deal specifically with issues affecting WNESL customers.

Based on the above, the Board is satisfied that the transaction contemplated in the Application will not have an adverse effect in relation to the factors identified in its objectives as set out in section 1 of the Act. In other words, the Board is satisfied that the Application meets the "no harm" test.

The Board notes that the Share Purchase Agreement that underlies the proposed transaction contains provisions and schedules that refer to rates. These are provisions that associate certain future payments to the Municipality of West Nipissing with rate increases that might later be authorized by the Board, and tables of illustrative rate changes and distribution rate increases.

The Application currently before the Board is not a rate application. Rates would be an issue in the context of this Application only if the proposed transaction raised immediate concerns in relation to financial viability. However, the Board wishes to remind both GSHI and WNESL that no finding of the Board in this proceeding predetermines the outcome of any future rate applications.

Cost Awards

The Board received submissions and a claim for cost awards from the Save Our Hydro Group. The Board has previously determined that the Save Our Hydro Group is eligible for an award of costs.

The Board acknowledges that, prior to its Combined Decision, there was some uncertainty regarding the scope of the issues to be considered in determining whether to grant leave in applications to acquire shares or amalgamate under section 86 of the Act. In the circumstances, it would not be appropriate to deny costs to an intervenor for having raised issues that were, at the time, of potential relevance but that have subsequently been determined to be out of scope. This is no different from the Board's practice of allowing costs for intervenors in relation to the preparation of interventions that raise issues that are ultimately not included on an issues list in a proceeding.

The Board has therefore determined that the Save Our Hydro Group shall be awarded 100% of its reasonably incurred costs in connection with its participation in this proceeding. In the Combined Decision, it was noted that the Board would issue a separate decision on cost awards in relation to the combined hearing at a later date.

Accordingly, the Save Our Hydro Group's entitlement to costs for its participation in relation to the combined hearing will be determined by the Panel that presided over the combined hearing. To facilitate the processing of cost awards to the Save Our Hydro Group, the Save Our Hydro Group should await that Panel's determination prior to filing its detailed cost claim. The Save Our Hydro Group must then submit its detailed cost claim, in the form required by the Board's *Practice Direction on Cost Awards*, within 21 days of the date on which a decision on cost awards is issued by the combined hearing Panel.

The Board anticipates that the Board's costs of, and incidental to, this proceeding, which relate almost exclusively to the combined proceeding, will be addressed by the combined hearing Panel in its decision on cost awards.

THE BOARD THEREFORE ORDERS THAT:

1. Greater Sudbury Hydro Inc. is granted leave to acquire all outstanding shares in West Nipissing Electric Service Ltd.
2. Notice of completion of the share acquisition shall be promptly given to the Board.
3. The Board's leave to acquire shares shall expire 18 months from the date of this Decision and Order. If the share acquisition has not been completed by that date, a new application for leave will be required in order for the transaction to proceed.
4. The eligible costs of the Save Our Hydro Group in relation to this Application, other than in relation to the combined proceeding, as assessed by the Board's Cost Assessment Officer, shall be paid by the Applicants upon receipt of the Board's Cost Order.

ISSUED at Toronto, September 16, 2005

ONTARIO ENERGY BOARD

Original signed by

Peter H. O'Dell
Assistant Board Secretary