



EB-2007-0050

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement project between the Bruce Power Facility and Milton Switching Station, all in the Province of Ontario;

AND IN THE MATTER OF Notices of Motion brought by Pollution Probe Foundation, and combined submission of Motion Records from the Ross Firm Group, and Fallis, Fallis and McMillan.

BEFORE: Pamela Nowina
Presiding Member and Vice-Chair

Cynthia Chaplin
Member

Ken Quesnelle
Member

DECISION AND ORDER ON MOTION

Hydro One Networks Inc. ("Hydro One") filed an amended application (the "Amended Leave to Construct Application") with the Ontario Energy Board (the "Board") dated November 30, 2007 under section 92 of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B (the "Act"). This Amended Leave to Construct Application amends Hydro One's original application filed with the Board on March 29, 2007.

Hydro One is seeking an Order of the Board to construct approximately 180 kilometres of double-circuit 500 Kilovolt (“kV”) electricity transmission line adjacent to the existing transmission corridor (500 kV and/or 230 kV) extending from the Bruce Power Facility in Kincardine Township to Hydro One’s Milton Switching Station in the town of Milton. Hydro One also proposes to make modifications at the Milton, Bruce A and Bruce B transmission stations to accommodate the new transmission lines. This Leave to Construct Application was given Board file No. EB-2007-0050.

Hydro One has submitted that the project is required to meet the increased need for transmission capacity associated with the development of wind power in the Bruce area and the return to service of nuclear units at the Bruce Power Facility. Hydro One proposes an in-service date of Fall 2011 for the new 500 kV transmission line and related facilities. The estimated cost of the transmission project is approximately \$635 million.

Four Procedural Orders addressing scheduling, issues development and preliminary matters were issued in succession following receipt of the Application.

On February 25, 2008, the Board issued Procedural Order No.5 setting out the schedule for interrogatories and the filing of intervenor evidence.

On March 7, 2008 the Board issued Procedural Order No. 6 which addressed an issue of confidentiality related to a System Model used by the Independent Electricity System Operator (“IESO”). On April 1, 2008, the Board issued its Decision and Order on Confidentiality Matters.

On March 20, 2008 Pollution Probe filed a Notice of Motion with the Board seeking Orders from the Board requiring responses to various interrogatories. Pollution Probe categorized the interrogatories they are seeking answers into two types: “the Historical Information Interrogatories”, and the “the Confidential Information Interrogatories”. The Board notes that paragraph 3 of Procedural Order No. 5, directed Hydro One to notify the Board and intervenors if it intends to refuse to answer an interrogatory, for various reasons, by the end of the third day following the filing of an interrogatory. The Board received various

notifications from Hydro One indicating that it refused to answer a number of interrogatories from several parties.

On March 28, 2008, the Board issued Procedural Order No. 7 setting a Motion Day for April 3, 2008 to hear Pollution Probe's Motion as well as motions from any other parties relating to interrogatory responses. On April 1, 2008 the Board received a combined Motion from the Ross Firm Group and the Fallis Group, and a response from Hydro One to Pollution Probe's Motion of March 20, 2008.

Pollution Probe filed a letter with the Board on April 2, 2008 advising the Board that on April 3, 2008 it would request an adjournment of its motion seeking further and better interrogatory responses. Pollution Probe indicated that Hydro One's motion materials received on April 1, 2008, required Pollution Probe to consult with its expert witness and thus the need for an adjournment.

The Board held the Motion Day Hearing on April 3, 2008. The Board heard from Pollution Probe and the other parties on the request for an adjournment. The Board decided not to grant the adjournment and proceeded to hear the Motions. As a result of the Board's decision to deny its request for an adjournment, Pollution Probe withdrew from the Motions Proceeding.

Description of the Motions

The Pollution Probe motion grouped its request for interrogatory responses into "Historical Information" and "Confidential Information". The requests contained in the Ross-Fallis motion also requested historical information and confidential information, as well as expanded answers to some interrogatories and two requests (witness identification and the naming of "drivers") which were of a general nature. While Pollution Probe withdrew from the proceeding, the Board has considered its motion materials in determining what information the Board would find helpful to the review of Hydro One's application.

Board Findings

Historical Information

The combined Motion Record of the Ross Firm Group and the Fallis Group of

March 30, 2008 requested in part an Order of the Board that Hydro One provide full and adequate responses to the Ross Firm Group's interrogatories 1.1(i), 1.2, 2.1, 2.2 and 9.1 dealing with historical generation information. Mr. Fallis indicated during the hearing on the Motion that he would be satisfied if Hydro One could provide a complete reply to Pollution Probe's Interrogatories No.1 and No. 2 which sought historical data on Bruce "A" and "B" to cover the period from January, 1984 to 2002. These were requested in Pollution Probe's Motion Record of March 20, 2008. Mr. Ross of the Ross Firm Group indicated that a response to the group's Interrogatory 1.1(i) would not be required if Hydro One responded to Pollution Probe's Interrogatories 1 and 2.

In response to various interrogatories Hydro One provided some historical information, and declined to respond to others. In Hydro One's letter to the Board dated March 13, 2008, sent in compliance with the Board requirements set out in paragraph 3 of Procedural Order No.5, it declined to provide historical information on two grounds. The first was whether the historical information occurred in a period that pre-dates Hydro One's existence. The second related to the relevance of the historical data related to the question of the adequacy of the transmission system as it existed in distant past.

The Board notes that Pollution Probe indicated its need for historical information evidenced by questions submitted to Hydro One on October 1, 2007 in preparation for the Technical Conference held on October 15 and 16, 2007. The Board also notes the letter dated April 1, 2008 from a consultant to the Ross Firm Group, Mr. Edward R. Brill, indicated that the historical information is needed to establish a baseline for the system and to understand the system capacity going forward. Mr. Brill stated in part:

"It is SEA's understanding that the historical transmission data was requested in The Ross Firm Group interrogatories 1.1(i) and 1.2, in addition to other historical data requested by The Ross Firm Group and the Fallis Group Interrogatories. SEA requires this information in order to establish a baseline for the system and to understand the system capacity going forward.

SEA requests the historic information about generation capacities of the combined generation capabilities of Bruce "A" and "B" and "Douglas

Point”, in their best generation periods, and we request information on the megawatt levels transmitted during operation of 9 and later 8 nuclear reactor units.

SEA requests the information requested above in order to provide a complete and accurate analysis of the need and justification of the proposed project. It is SEA’s opinion that without this information, we are unable to offer an informed opinion as to the existing transmission system’s capacity and justification of the proposed Bruce to Milton 500-kV transmission line expansion.”

The Board finds that historical information would assist the Board in its understanding of the application and would assist the intervenors in preparation of their evidence. The Board notes that intervenors have indicated that this information is required in order to perform an independent expert assessment of the transmission system as it has operated in the past and how it operates currently. The Board finds that this area of enquiry is appropriate, and that therefore the requested information is relevant. The Board also notes that one of the experts expected to provide testimony has indicated that this data is necessary for the production of his evidence. Responses are therefore required as follows:

- Pollution Probe Interrogatory No. 1, covering the missing data (Capacity, Total Monthly Output, Peak Hourly Output, and Average Capacity Factor) for both Bruce A and Bruce B covering the period from Jan, 1984 to May, 2002. [Ref. C-2-1],
- Pollution Probe interrogatory No. 2, covering the missing data (Annual Output, Peak Hourly Output, and Average Annual Capacity Factor) for both Bruce A and Bruce B from 1984 to 2002. [Ref. C-2-2],
- The Board has determined that the request in Ross Firm Group’s Interrogatory 1.2 is too broad to solicit an appropriate response. However, the Board has determined that the following information is relevant and is to be provided:

(A) For each month, from January 1984 to the present, please provide the data listed below for each of the transmission circuits

evacuating power from the Bruce stations (A & B) which includes the six 230 kV lines [B27S, B28S, B4V, B5V, B22D, B23D] and the four 500 kV lines [B560M, B561M, B562L, B563L]:

- (i) Monthly Thermal Capacity in MW
- (ii) Monthly Capacity Permissible (Capability) in MW;
- (iii) Monthly Peak in MW;
- (iv) Monthly Capacity Factor

(B) For each year from January 1984 to the present, please provide the data listed below for each of the transmission circuits evacuating power from the Bruce stations (A & B) which includes the six 230 kV lines [B27S, B28S, B4V, B5V, B22D, B23D] and the four 500 kV lines [B560M, B561M, B562L, B563L]:

- (i) Annual Peak in MW;
- (ii) Annual Capacity Factor

Generation Forecast Information

Pollution Probe requested that a number of interrogatories be answered related to the forecast of generation. Hydro One itself acknowledged that the testing of the underlying generation forecast is an appropriate area of enquiry for this proceeding. The Board therefore finds that it would be assisted if parties are provided with additional information regarding that generation forecast. In particular, the Board directs Hydro One to answer the following:

- Pollution Probe Interrogatory 19(a) and 19(d)
- Pollution Probe Interrogatory No. 38
- Pollution Probe Interrogatory 42(a)
- Pollution Probe Interrogatory No. 47(c) deals with locked-in energy and seeks added levels of detail stated as “the finest level of temporal detail calculated”. The Board would be assisted if the answer to this interrogatory included an explanation of all the assumptions used for this analysis and directs that this be provided.

Hydro One may wish to consider whether any of these answers should be filed in accordance with the Board's Practice Direction on Confidential Filings.

Short Circuit Studies and Load Flow Studies

The Ross Firm Group Interrogatory 9.1 asked for the production of short circuit studies and load flow analysis. Its Interrogatory 9.2 asked for load flow computer models. Hydro One declined to respond to these interrogatories. The Ross Firm Group in its motion requested that Hydro One be ordered to provide the information. However, in his oral submissions, Mr. Ross indicated that his firm was working with the IESO to obtain the required load flow information and that he was no longer seeking an order on this issue.

The remaining issue is whether the short circuit studies should be provided. Mr. Ross said he was unprepared to argue the matter of confidentiality which was Hydro One's reason for not providing the information. Hydro One argued that the information request concerned the disclosure of customer-specific information, which Hydro One and the OPA and the IESO are not allowed to disclose due to customer impact assessment terms and conditions, as well as the provisions of the Transmission System Code. Mr. Nettleton, on behalf of Hydro One, also argued that the short circuit studies are not related to historical information and that the Ross Firm Group's expert did not request the information in his letter. Mr. Nettleton questioned why this level of detail is required since the information was used to create the customer impact assessment which has been filed in this case.

The Board can, and often does, order the production of confidential information. The Board also takes a fairly broad view of relevance for the purpose of ordering the production of evidence. However, in this instance, the Ross Firm Group has not made a case as to why the information is relevant and in light of the confidentiality concerns, the Board will not order the production of the information.

Expanded Answers

In its Motion, the Ross Firm Group asked for expanded answers to its Interrogatory 3 (to Hydro One) and Interrogatory 6 (to IESO). In response to both

those interrogatories, Hydro One referred the Ross Firm Group to other interrogatory responses and evidence. The Board is satisfied that these responses are sufficient and will not order further production of information.

Land Use Policy

The Ross Firm Group in its motion asked that Hydro One be ordered to respond to two interrogatories regarding Ontario's Provincial Policy Statement ("Land Use Policy"). The first of these interrogatories (Ross Firm Interrogatory 2.1) requested copies of all legal opinions with regard to the interpretation and implementation of the Land Use Policy. In its letter of March 13, 2008, Hydro One declined to answer the interrogatory, stating that it did not intend to rely on the requested information for purposes of its application. Hydro One pointed out that as a general proposition, legal opinions are protected by solicitor-client privilege and that the interpretation of the Land Use Policy was not a matter of evidence, but rather a matter of legal argument.

In the oral hearing, Mr. Ross, on behalf of the Ross Firm Group, argued that the information sought was relevant, and that the protection of solicitor-client privilege was limited. Mr. Ross based his argument regarding the limitation of solicitor-client privilege on *Rubinoff v. Newton*, [1967] 1 O.R. 402 (S.C.), and in particular, the following statement:

Much of what is learned by a solicitor in preparation of a case is privileged, but the moment they use that information for the purpose of founding an action or defence he must disclose the facts on which he relies

Based on the above, Mr. Ross argued that if Hydro One is relying upon a legal opinion in the interpretation of Land Use Policy to determine the acceptability of an alternative, this opinion is no longer privileged and must be produced.

In response, Mr. Nettleton, on behalf of Hydro One, reiterated that solicitor-client privilege protected legal opinions from disclosure and pointed out that in any event, Hydro One had not indicated it relied on legal opinion when interpreting Land Use Policy. Mr. Nettleton read that portion of the letter of March 13, 2008, which disclosed the basis on which the interpretation of the policy was made: "the consideration of its plain and ordinary meaning, taking into account well-

recognized, long-standing public policy objectives associated with minimizing overall impacts to the environment and the public”.

The Board will not order Hydro One to respond to Ross interrogatory 2.1. The Board believes that the Ross Firm Group can make its case regarding Hydro One's interpretation of Land Use Policy without access to Hydro One's legal opinions. Hydro One has stated that it has based its interpretation on a plain reading of the policy. The Ross Firm Group is free to challenge Hydro One's interpretation of the policy. The Board does not find it necessary to consider or determine the issue of solicitor-client privilege.

In its Interrogatory 2.2, the Ross Firm Group asked Hydro One to provide all internal memos, letters and/or reports discussing the interpretation of the Land Use Policy. Hydro One again referred the Ross Firm Group to its letter of March 13th, 2008. In this letter Hydro One explained that no such documents exist. The Board accepts Hydro One's response and will not order further response to Ross Firm Group Interrogatory 2.2.

Identification of Witnesses

In its interrogatory responses, Hydro One did not provide identification of witnesses and authors. Mr. Ross and Mr. Fallis both made submissions that Hydro One should be ordered to provide this information. In his submissions, Mr. Nettleton indicated that Hydro One would provide this information before the oral hearing and would make best efforts to produce this information one week before the hearing. This is indeed essential information, and the Board orders its production one week before the first day of the oral hearing.

Drivers

In their Motion, the Ross Firm Group and the Fallis Group, sought a declaration that the OPA, IESO and Bruce are “drivers” of the project. The Board sees no purpose in such a declaration. The Board can, and will if required, order any of these parties to provide information without giving them any special status.

Schedule

Mr. Ross and Mr. Fallis both requested that, if the Board were to accept any of their motions, the Board consider changes to the schedule to accommodate their review of new interrogatory responses. The Board has considered this request and will provide an update to the schedule in a procedural order.

Board Order

The Board directs Hydro One to respond to all its findings regarding additional information listed above.

With regard to the “historical information” interrogatories, Hydro One stated that it does not have all of the relevant data in its possession. The Board directs Hydro One to make its best efforts to obtain this information, from Ontario Power Generation, Bruce Power, or some other body. In the event that Hydro One is unsuccessful in its attempts to secure this information, the Board will exercise its powers under section 12 of the *Statutory Powers Procedure Act* and issue a summons to require a party or other organization to produce this information. The Board notes that this would result in a further delay in the proceedings.

DATED at Toronto, April 7, 2008

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary