RP-2005-0018
EB-2005-0234
EB-2005-0254
EB-2005-0257

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.;

AND IN THE MATTER OF an application by PowerStream Inc. and Aurora Hydro Connections Limited under section 86 of the *Ontario Energy Board Act, 1998* seeking leave for PowerStream Inc. to acquire all outstanding shares in and subsequently to amalgamate with Aurora Hydro Connections Limited, and for related orders;

AND IN THE MATTER OF an application by Veridian Connections Inc. and Gravenhurst Hydro Electric Inc. under section 86 of the *Ontario Energy Board Act, 1998* seeking leave for Veridian Connections Inc. to acquire all outstanding shares in and subsequently to amalgamate with Gravenhurst Hydro Electric Inc., and for related orders.

DECISION

BEFORE Gordon Kaiser
Vice Chair and Presiding Member

Pamela Nowina
Vice Chair and Member

Paul Vlahos
Member

BACKGROUND

This proceeding relates to certain issues that have arisen in three separate Applications before the Board. Those three Applications were filed under section 86 of the *Ontario Energy Board Act, 1998* (the "Act") and concern:

(a) the acquisition of shares of West Nipissing Energy Services Ltd. by Greater Sudbury Hydro Inc. (EB-2005-0234);

(b) the acquisition of shares of Aurora Hydro Connections Limited by PowerStream Inc. (EB-2005-0254); and

(c) the acquisition of shares of Gravenhurst Hydro Electric Inc. by Veridian Connections Inc. (EB-2005-0257).

The Greater Sudbury Application was filed on February 23, 2005 and seeks an Order of the Board granting Greater Sudbury Hydro Inc. leave to acquire the shares of West Nipissing Energy Services Ltd. The other two Applications were filed on March 24, 2005. There were two Applicants in each of these two cases (the acquiring company and the to-be-acquired company) because the companies are also to be amalgamated following the granting of the requested Order. The Order sought by these Applicants is approval of the acquisition of the shares and of the subsequent amalgamation.

On July 5, 2005, the Board issued a Procedural Order combining the three Applications for the purpose of addressing certain common issues. Those issues largely relate to the scope of the issues that the Board will consider in determining applications under section 86 of the Act.

In the Procedural Order of July 5, 2005, the parties were asked 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 of the scope of the Board's review. The parties were also asked to state the legal basis for their positions.

The Board also requested, without limiting the matters the parties may wish to raise, submissions on the relevance of two specific issues:

(a) the adequacy of the purchase price payable in relation to the proposed transaction; and

(b) 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. The Applicants and Intervenors, and their representatives, in this combined proceeding are listed in Schedule A.

The procedural history of each of the Applications is described in the Board's July 5, 2005 Procedural Order, and a full record of each of the Applications and of this combined proceeding is available from the offices of the Board.

FINDINGS

The submissions of the parties in this combined proceeding focused on the following questions:

- What is the scope of the Board's review on applications relating to share acquisitions or amalgamations under section 86 of the Act?
- What is the proper test the Board should use in determining whether to grant leave in a section 86 application relating to the acquisition of shares or an amalgamation?
- What is the relevance of the purchase price paid?
- What is the relevance of the process followed by the seller?

The Scope of a Section 86 Review

Section 86(1) of the Act deals with changes in ownership or control of systems. Section 86(2) of the Act deals with the acquisition of share control. Those sections provide as follows:

“Change in ownership or control of systems

86 (1) No transmitter or distributor, without first obtaining from the Board an order granting leave, shall,

(a) sell, lease or otherwise dispose of its transmission or distribution system as an entirety or substantially as an entirety;

(b) sell, lease or otherwise dispose of that part of its transmission or distribution system that is necessary in serving the public; or

(c) amalgamate with any other corporation.

(…)

Acquisition of share control

(2) No person, without first obtaining an order from the Board granting leave, shall,

(a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of the transmitter or distributor; or

(b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a transmitter or distributor if such voting securities constitute a significant asset of that corporation.”

Section 86(2) of the Act applies to all three Applications while section 86(1) is relevant to the two Applications that involve a proposed amalgamation.

Although section 86(6) of the Act states that an application for leave "shall be made to the Board, which shall grant or refuse leave", it is silent on the factors to be considered by the Board in determining whether to grant leave. Most parties conceded that the Board is a statutory creation guided by its objectives as set out in section 1 of the Act. Section 1 states in part as follows:

> "1 (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
>
> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry."

Section 1 of the Act also contains a provision that requires the Board, in exercising its powers and performing its duties, to facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*. At the present time, no such plans have been approved. Accordingly, the focus in this proceeding has been the two objectives referred to above, and references in this Decision to section 1 of the Act should be interpreted accordingly.

Most parties to the proceeding stated, and the Board agrees, that the factors to be considered in approving an application to acquire shares or amalgamate under section 86 of the Act are the factors outlined in section 1 of the Act. There are therefore two basic questions: (1) What impact will the transaction have on the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service? (2) What impact will the transaction have on economic efficiency and cost effectiveness in the generation, transmission, distribution sale and demand management of electricity and on the maintenance of a financially viable electricity industry?

The Proper Test

The most important question may be, what is the proper test the Board should use in determining whether to grant leave in a section 86 application involving the acquisition of shares or an amalgamation? The factors are clearly set out in section 1 of the Act, but what is the test?

The Applicants argue that the proper test is a "no harm" test; if the Applicant can establish that there will be no harm in terms of the factors set out in section 1 of the Act, then leave should be granted.

A different view is held by the Gravenhurst Hydro Citizens Committee. As described in their reply submissions, they argue that the appropriate test is the "best result" or the "best deal" test, where the Board would be called upon to determine whether or not consumers would have been better off with the status quo or with other options that were considered by the seller. Put differently, even if the Applicants can prove that the transaction meets the "no harm" test, leave should not be granted if there was a better deal that would improve the position of consumers in terms of the factors described in section 1 of the Act.

Those arguing for the "no harm" test point to the fact that it is used elsewhere. They also point out that if the "best deal" test were used, there would be no certainty in the negotiations between a seller and any given purchaser. The selling utility would always have to be concerned that the Board would step into the shoes of the seller and determine if a competing option was better. They further argued that this regulatory uncertainty would defeat the Government's policy objective of promoting consolidation in the distribution sector.

The Board believes that the "no harm" test is the appropriate test. It provides greater certainty and, most importantly, in the context of share acquisition and amalgamation applications it is the test that best lends itself to the objectives of the Board as set out in section 1 of the Act. The Board is of the view that its mandate in these matters is to consider whether the transaction that has been placed before it will have an adverse effect relative to the status quo in terms of the Board's statutory objectives. It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has been negotiated to completion by the parties. In

that sense, in section 86 applications of this nature the Board equates "protecting the interests of consumers" with ensuring that there is "no harm to consumers".

The Board has therefore considered the question of the scope of the issues to be addressed in these Applications by reference to the "no harm" test.

Relevance of Price and Process

The Procedural Order of July 5, 2005 asked parties to comment on whether the Board, in determining applications under section 86 of the Act, should consider the price that had been negotiated or the process by which both the price and the transaction terms were arrived at.

The Applicants take the position that both the purchase price and the process are not relevant issues. They state that the Board should not step into the shoes of the owner of the utility, which they note could be either a municipality or a private entity. The selling municipalities are authorized by statute to dispose of their shares in the utility and there are no constraints in the *Electricity Act, 1998* on their ability to do so. It is also argued that the selling municipalities are accountable to the electorate and that the remedy for dissatisfied residents is to vote them out of office. Some of the Intervenors reply that this is not much of a remedy, as it would be available well after the transaction is completed. The relevance of price and process will be addressed in turn.

Price

The Board is of the view that the selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company which adversely affects economic viability as any premium paid in excess of the book value of assets is not normally recoverable through rates. This position is in keeping with the "no harm" test.

By contrast, the fact that the selling entity may have received "too low" a purchase price for the utility would not be relevant to the outcome of the proceeding on the basis of the "no harm" test. The fact that the seller could have received a higher price for the utility, even if true, would not lead to an adverse impact in the context of the objectives set out in section 1 of the Act.

The Board notes that, where an Intervenor in these Applications has raised the issue of price, the concern is that the purchase price for the utility is too low, not too high. To that extent, the price payable is not an issue for the Board in any of the three Applications.

Process

The argument that the Board should exercise oversight with respect to the sale process is advanced most strongly by the Gravenhurst Hydro Citizens Committee. They state in their written argument:

> "We submit that consumers, in this case, the ratepayers of Gravenhurst, have a right to an open and transparent process for the sale of the shares or the assets of their electricity LDC. That right arises, we submit from the fact that what is being sold is a monopoly service which is essential to the ratepayers' existence. That transparency would require, at a minimum, that the advantages and disadvantages of selling, as opposed to retaining the assets or shares, would be explained to the ratepayers, and that the relative merits of the competing offers would be explained to the ratepayers. In circumstances where the Board does not believe that the process has been sufficiently transparent, it has the means to ensure adequate disclosure while protecting the commercial interests of the municipality and purchaser."

A number of other Intervenors have raised concerns regarding the adequacy or integrity of the process by which the sellers in these Applications decided to sell their utilities. In most of these cases, the position has been that perceived deficiencies in the process (such as inadequate public consultation or "improper" motives) *in and of themselves* are relevant to the Board's determination of the Applications. The Board disagrees.

As a general matter, the conduct of the seller generally, including the extent of its due diligence or the degree of public consultation in relation to the transaction, would not be issues for the Board on share acquisition or amalgamation applications under section 86 of the Act. Based on the "no harm" test, the question for the Board is neither the why nor the how of the proposed transaction. Rather, the Board's concern is limited to

the effect of the transaction when considered in light of the Board's objectives as identified in section 1 of the Act.

In order to argue that the process by which the seller negotiated the sale of the utility or carried out its due diligence should be relevant, it would have to be demonstrated that a flawed process leads to an impaired ability of the acquired utility to meet the obligations imposed on it by the Board. Based on the "no harm" test, it is not clear how a flawed decision-making process, even if it could be demonstrated, would in and of itself provide grounds to oppose the Applications. Certainly, it would not in and of itself be grounds for denying the Applications. The "no harm" test is substantive and addresses the effect of a proposed transaction. It is not a process test that addresses the rationale for, or the process underlying, the proposed transaction.

With respect to the claim that ratepayers have a right to "an open and transparent process" for the sale of the shares or the assets of an electricity distributor, the Board has two observations. First, section 86 of the Act applies to distributors whether they are publicly or privately owned. Although the three Applications at issue involve utilities that are municipally-owned, not all distributors are publicly owned. As a result, any findings by the Board with respect to customers' process rights (in the sense of rights associated with the process leading up to the conclusion of a transaction) would apply to privately-owned companies. Further, the legislature has determined that distributors should be governed by the Ontario *Business Corporations Act* ("OBCA"). The OBCA contains provisions governing procedures and rights associated with, among other things, amalgamations and other significant corporate activities. Viewed from this perspective, the Board does not believe it is appropriate to open up corporate process issues to review. The Board does not believe it is appropriate to add an additional layer of corporate review by vesting process rights (again, in the sense of rights associated with the process leading up to the conclusion of a transaction) within customers of distribution companies. The content of such rights and the process by which they may be exercised is beyond the Board's objectives or role within the energy sector.

Counsel for the Gravenhurst Hydro Citizens Committee also argued that the relevance of process-related information is further supported by the Board's "Preliminary Filing Requirements for Sections 85 and 86 under the *Ontario Energy Board Act, 1998*". They noted that those Filing Requirements require the applicant amongst other things to:

(a) provide details of the costs and benefits of the proposed transaction to the consumers of the parties to the proposed transaction;

(b) provide a valuation of any assets that will be transferred in the proposed transaction; and

(c) provide details of any public consultation process engaged in by the parties to the proposed transaction, and the details of any communication plans for public disclosure of the proposed transaction.

On this basis, the Gravenhurst Hydro Citizens Committee argued:

> "There are two points to be made about the information that the Board requires. The first is that the Board considers the information relevant to the exercise of its discretion under section 86 of the *OEB Act*. The second is that is the information that the Board has on those points is, at the moment, entirely one-sided. The Board's analysis of, and conclusions about, those points would likely be affected by the evidence from others."

With respect to the Filing Requirements, the fact that background and contextual information is requested with respect to share acquisition or amalgamation transactions does not mean that such information is determinative or even influential with respect to whether leave will be granted. The Board therefore does not agree that the breadth of the Filing Requirements reflects the breadth of issues to be determined in an application for leave to acquire shares or amalgamate.

York Region Supply Situation

Section 6.5 of the Share Purchase Agreement between Aurora Hydro Connections Limited and PowerStream Inc. provides that the purchaser will, subject to any regulatory approval, install three 28 kV feeder lines to increase local reliability. A focus of Newmarket Hydro Ltd.'s ("NHL") intervention has been to object to the inclusion of that section in the Share Purchase Agreement. Specifically, NHL has argued that the contractual arrangement to install these feeder lines is the not the most adequate or proper solution for addressing reliability and quality of service issues in the area.

In paragraph 11 of its written argument, NHL stated:

> "…the supply solution…would, if approved by the Board and implemented, preclude other, lower cost supply options, that are both more efficient and more reliable. These alternatives were identified and endorsed by all LDC's serving York Region, including NHL, the Applicant, Powerstream, and the subject LDC, Aurora Hydro, when the York Region Supply Study was released in July 2003."

None of the parties dispute that reliability of electricity service is a relevant consideration for the Board in determining applications for leave to acquire shares or amalgamate under section 86 of the Act. Part of NHL's argument is that they need to examine certain aspects of the negotiating process in order to obtain necessary evidence to address this issue. That is, NHL is not interested in the process as an issue per se, just certain facts in that process which they claim will inform the Board on the issues of reliability and the proposal by the Applicant to install the three feeder lines as part of the transaction.

Even if NHL is entitled to explore the evidence for that limited purpose, and accepting for the sake of the argument that it is so entitled, the larger issue is whether these proceedings are the appropriate place to address this question.

The Board has started a different process to address the York Region supply issue. That process is described in a letter from the Board to the Ontario Power Authority ("OPA") dated July 25, 2005. This letter was copied to all electricity distributors in the York Region, including NHL, Aurora Hydro Connections Limited, PowerStream Inc. and Hydro One Networks Inc. (distribution). As is noted in that letter, Board staff has been meeting with Hydro One, the electricity distributors in the York Region and the OPA to identify the optimal solution to the York Region supply issue. The Board's regulatory authority with respect to enhancing distribution and transmission reliability is described in that letter in part as follows:

> "As a result, there are currently three potential options to address the issue of security and reliability of supply in York Region: Transmission Option, the Buttonville Option and the Holland Junction Option. These options contain a combination of transmission and distribution.

> The Board has the power to order that anyone *(sic)* of these options be implemented (subject to any necessary regulatory approvals, including environmental approvals) if it determines that doing so is in the interests of consumers with respect to prices and the reliability and quality of electricity service." (footnotes omitted)

In addition to reviewing the distribution and transmission options in York Region, the Board has asked the OPA, which has the power to enter into contracts for new generation and demand management, to provide its opinion on the optimal solution to meet demand growth in that area.

In its reply submissions, NHL expressed the view that the York Region supply proceeding "is not a timely, appropriate, or effective alternative process in which NHL or any other affected party can expect to raise or address the issues of electricity supply in York Region that are already raised before the Board in [the PowerStream/Aurora Application]". In support of its position that the Board should not defer the reliability issue to the broader York Region supply process, NHL pointed to a decision of the Alberta Energy and Utilities Board in *Atco Electric Ltd. and Atco Gas* (Decision 2003-098, AEUB, December 4, 2003). In that decision, the Alberta Energy and Utilities Board noted that it preferred "to avoid the creation of service problems that may result from the transfer of one entity to another".

The Board acknowledges that there may well be cases where reliability concerns are best addressed in the context of an application under section 86 of the Act rather than being deferred to another process. The Board does not, however, agree with NHL's characterization of the York Region supply proceeding as being an untimely, inappropriate or ineffective alternative process. Rather, the Board believes that the reliability concerns raised by NHL in these proceedings are more appropriately addressed in the process it has established, and in which NHL is an active participant, to address the broader York Region supply issue.

First, it addresses the matter more thoroughly by reviewing all of the options of distribution, transmission, generation and demand management. The PowerStream/Aurora share acquisition and amalgamation Application is too limited in its scope to effectively address the issue of reliability of supply to York Region.

Second, the parties to this proceeding do not bring the perspectives required for a complete treatment of this issue. Specifically, neither the OPA nor Hydro One have participated, nor have any reason to participate, in these proceedings on the reliability issue.

Third, the only reliability issue that is being addressed in these proceedings is whether the purchaser should install three 28 kV feeder lines in Aurora.

The Board does not believe that NHL will be prejudiced by the deferral of the reliability issue to the Board's broader York Region supply review process. The Board notes that any leave it might give in relation to the share acquisition and amalgamation transaction would not constitute acceptance by the Board that the installation of the three feeder lines is a solution to the supply issue, nor would it pre-determine the outcome (in whole or in part) of the broader process. The Board also notes PowerStream Inc.'s statement in its written reply argument that the feeder line proposal does not constitute a permanent supply solution for York Region, as well as its expressed commitment to working in collaboration with NHL and Hydro One to find a solution for York Region.

For all of these reasons, while reliability of electricity service is a relevant issue in section 86 applications, the Board believes that in the context of this particular Application it is appropriate for this issue to be addressed as part of the broader York Region review that is currently underway.

Next Steps

This Board has now ruled that the "no harm" test is the relevant test for purposes of applications for leave to acquire shares or amalgamate under section 86 of the Act. The factors to be considered are those set out in section 1 of the Act. On that basis, and having regard to the nature of the concerns raised in the interventions, the purchase price paid and the adequacy of the process followed by the selling entity are not issues for the Board in any of the three Applications that are the subject of this proceeding. Similarly, for the reasons noted in the preceding section, the reliability issue discussed in that section is not an issue for the Board in relation to the PowerStream/Aurora Application. It follows that the panels reviewing the Applications should determine whether there are any issues raised in relation to those Applications that remain in scope in accordance with the terms of this Decision. In other words, it will now be up to the panels to determine in each case, based on the findings in this

Decision, whether there are any issues remaining that require a hearing and to deal with each of the Applications accordingly.

COST AWARDS

The Board will issue a separate decision on costs for this proceeding.

Dated at Toronto, August 31, 2005

ONTARIO ENERGY BOARD

Original signed by

John Zych
Board Secretary

SCHEDULE A
TO
BOARD DECISION IN THE MATTER OF
RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257
DATED AUGUST 31, 2005

APPLICANTS AND INTERVENORS

SUDBURY APPLICATION
(EB-2005-0234)

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Intervenor	**Rep. And Address for Service**
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POWERSTREAM/AURORA APPLICATION

(EB-2005-0254)

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Intervenors	**Rep. And Address for Service**

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VERIDIAN/GRAVENHURST APPLICATION

(EB-2005-0257)

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