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February 10, 2012

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Application by Port Colborne Hydro Inc. for Leave to Sell its Distribution System to Canadian Niagara Power Inc.
Board File No.: EB-2011-0367**

Please find enclosed Board Staff's submission respecting the above application.

Please forward the submission along with this cover letter to the applicant in this proceeding.

Yours truly,

Original signed by

George Dimitropoulos
Project Advisor, Licence Applications

Attachment



ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION

Leave to Sell Distribution System

Port Colborne Hydro Inc.

EB-2011-0367

February 10, 2012

BACKGROUND

Port Colborne Hydro Inc. (“Port Colborne” or the “applicant”) is a licensed electricity distributor (ED-2003-0042) that owns the electricity distribution system in the City of Port Colborne. On October 19, 2011, Port Colborne applied to the Ontario Energy Board (the “Board”), under section 86(1)(a) of the *Ontario Energy Board Act, 1998* (the “Act”), for: (i) leave of the Board to sell its existing distribution system in its entirety to Canadian Niagara Power Inc. (the “Proposed Transaction”); and, in the event that leave is granted, (ii) Board approval permitting Port Colborne to maintain its electricity distribution licence.

Port Colborne and Canadian Niagara Power Inc. (“CNPI”) are parties to a lease agreement, implemented on April 15, 2002 and expiring on April 15, 2012, pursuant to which CNPI operates Port Colborne’s distribution system. The lease agreement provides that, at its termination, CNPI has the right to purchase Port Colborne’s distribution assets and assume complete ownership and operation of the existing distribution system in the City of Port Colborne. Port Colborne has advised that CNPI wishes to exercise this right, and submits that the Proposed Transaction will be rate neutral and will meet the Board’s no harm test.

Board staff filed interrogatories on the application on January 19, 2012 and Port Colborne responded to those interrogatories on January 30, 2012.

STAFF SUBMISSION

Board staff has no issues with the Proposed Transaction, but is concerned with Port Colborne’s secondary request to maintain its licence should the Board grant leave to proceed with the Proposed Transaction.

Under section 3 of the Act, a distributor is defined as a person who owns or operates a distribution system. Under section 57 of the Act, a licence is required for any person that owns or operates a distribution system. If Port Colborne is granted leave to proceed with the Proposed Transaction, Port Colborne will no longer be a distributor as defined under the Act. Moreover, Port Colborne would no longer require a licence from the Board, as it would be neither necessary nor appropriate for it to continue to be regulated by the Board.

Board staff also submits that the burden of proof as to why Port Colborne should maintain its licence is on the applicant. Board staff disagrees with Port Colborne's position that its possible future plans are enough to justify maintaining an electricity distribution licence if it does not own or operate a distribution system. Board staff is unclear how the Board should accept to maintain a distribution licence for an entity that does not own or operate a distribution system, and that does not have an application filed with the Board requesting approval of such possible future plans.

In response to Board staff interrogatories, Port Colborne states it is currently studying distribution-related activities such as conservation, generation, and other activities carried out by licensed distributors. Board staff submits that a distribution licence should not be maintained for possible future opportunities for which there is no filed application for the Board to review. Port Colborne states that it seeks to maintain its distribution licence in order to preserve these future opportunities and to avoid the need for duplicative regulatory applications. Board staff submits that these future opportunities will continue to exist for Port Colborne despite it not retaining its distribution licence upon the close of the Proposed Transaction. Moreover, a future licence application would not be duplicative in nature because, depending on the activities Port Colborne plans to apply for, it could be an entity with different assets and be required to apply for a type of licence other than that of a distributor licence. Board staff submits that if, following the close of the Proposed Transaction, Port Colborne seeks to acquire distribution assets (or the right to conduct any other activity regulated by the Board under section 57 of the Act), only then should it apply to the Board for the appropriate type of licence.

The Board reviews a licence application based on three main factors; namely, an applicant's past conduct, its technical capability and its financial viability. Board staff submits that should the Proposed Transaction gain approval, Port Colborne's distribution assets will have been sold, and if Port Colborne proceeds with prospective distribution-related activities it may be a different company than when it was licensed as the owner of the service area of the City of Port Colborne. Should the Proposed Transaction proceed, Port Colborne will go through a transformation and, as such, Board staff submits that it would be prudent for the Board to preserve its opportunity to review the transformed Port Colborne through a new licence application process, should such an application be filed.

In response to interrogatories, Port Colborne cites Toronto Hydro Electric System Limited's ("THESL") combined proceeding to reunite the street lighting system in the

City of Toronto with the distribution system as a single licensed distribution company. In the Board's Decision and Order (the "THESL Decision") of August 3, 2011 the Board approved the transfer of the street lighting assets that it deemed distribution system and transferred those assets to a new amalgamated licensed distribution company. Board staff submits that the THESL street lighting proceeding is not analogous to this proceeding as Port Colborne has yet to file an application to deem street lighting assets as distribution system and Port Colborne has yet to purchase the street lighting assets from the City of Port Colborne. Board staff notes that the THESL Decision was unique and fact-specific to that utility. Board staff submits that it is not prudent for an entity without distribution assets to maintain a distribution licence, and nor is it appropriate or efficient for the Board to regulate such an entity.

Board staff also has concerns with the presumptive nature of maintaining a distribution licence without owning or operating a distribution system for the express purpose of preparing for the outcome of a future Board proceeding. Board staff submits it could also be seen, although incorrectly, as pre-approval of a future application to deem street lighting assets as distribution assets or for other prospective distribution-related activities if Port Colborne is allowed to maintain its electricity distribution licence for a period of time before it applies to the Board.

Board staff notes that in the THESL street lighting proceeding, THESL filed multiple applications that were combined into one proceeding one of which was an application for an electricity distribution licence for the newly amalgamated distribution company. The THESL street lighting applications were filed on June 15, 2009 and the THESL Decision was issued by the Board on August 3, 2011, spanning a period of more than two years. The Board has an internal 90 day metric for completion of a standard licence application process. If Port Colborne decides to apply to the Board for future distribution-related activities, Board staff submits that an application for a new licence is not overly burdensome in comparison to a longer more complex proceeding such as deeming street lighting assets as distribution system.

In its response to Board staff's interrogatories, Port Colborne attempts to draw a comparison between its application and the Board-initiated proceeding to designate a transmitter to undertake development work for a new electricity transmission line between northeast and northwest Ontario (EB-2011-0140). Board staff does not agree that there is a nexus between Port Colborne's application and the designation process.

The Board's policy that underlies the designation process (Framework for New Transmission Project Development Plans: EB-2010-0059), requires each new entrant transmitter to obtain a transmission licence from the Board prior to participating in the designation process. For the purposes of the designation process, the licence requirement (entailing a review of the applicant's past conduct, technical capability, and financial viability) primarily serves as a pre-qualification step. There is no Board policy that relates to Port Colborne's application requiring Port Colborne to maintain its electricity distribution licence without any distribution assets as part of a designation process for future projects.

Port Colborne proposes that if it is entitled to maintain its distribution licence, following the close of the Proposed Transaction, it will also require specific exemptions in its licence (for example, during the interim period until Port Colborne engages in distribution activities, Port Colborne should not be required to be in compliance with the various sections of the Board's regulatory instruments that it cannot comply with). In the event that the Board grants leave to Port Colborne to proceed with the Proposed Transaction, Board staff submits that it sees no basis for Port Colborne to be exempt in this interim period as a result of its own request to maintain its licence. Port Colborne has not filed evidence as to why it should be exempt from any provisions of its licence.

Board staff has no concerns with the applicant's request for approval of the Proposed Transaction. However, for the reasons cited above, should the Board grant leave for the applicant to proceed with the Proposed Transaction, Board staff is of the view that the applicant should not be permitted to maintain its existing distribution licence.

All of which is respectfully submitted.