



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION ON THRESHOLD QUESTION AND PROCEDURAL ORDER NO. 5

EB-2015-0003

POWERSTREAM INC.

BEFORE: Ken Quesnelle
Presiding Member

Ellen Fry
Member

October 6, 2015

1 PROCEDURAL CONTEXT

PowerStream Inc. (PowerStream) filed a custom incentive rate application with the Ontario Energy Board (OEB) on May 22, 2015 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), (OEB Act) seeking approval for changes to the rates that PowerStream charges for electricity distribution, to be effective January 1, 2016 and for each following year through to December 31, 2020.

On September 16, 2015, as directed by Procedural Order No. 1, OEB staff filed a letter with the OEB which attached a proposed agreed issues list. OEB staff's letter noted that there was no agreement on whether consideration of the announced merger between PowerStream, Enersource Hydro Mississauga Inc., Horizon Utilities Inc. and Hydro One Brampton Networks Inc. should be included in the issues list.

On September 18, 2015, the OEB issued Procedural Order No. 3 which stated that the OEB would consider this as a threshold question. The OEB requested submissions from parties on what, if any, consideration should be given by the OEB to the announced merger as part of its review of the application. The OEB received submissions from PowerStream, OEB staff and the following intervenors: Association of Major Power Consumers in Ontario (AMPCO), the Building Owners and Managers Association, Greater Toronto (BOMA), the Consumers Council of Canada (CCC), Energy Probe Research Foundation (Energy Probe), the School Energy Coalition (SEC), the Sustainable Infrastructure Alliance of Ontario (SIA), and the Vulnerable Energy Consumers Coalition (VECC).

2 INTRODUCTION

The OEB has the mandate to set just and reasonable rates. It typically does so in a rate setting application by considering the applicant's projection of costs based on a premise of what it considers the future will hold. The OEB assesses both the reasonableness of the projected costs and the reasonableness of the applicant's submitted premise of the future environment in which those costs will be incurred. The OEB also has a mandate under the OEB Act, among other things, to promote a financially viable and cost effective distribution sector.

In fulfilling its mandate, the OEB considers both the short and long term impacts of its determinations. This is particularly important due to the long term investment cycle and capital intensive nature of the distribution system. In the context of a consolidation, one way the OEB addresses the need for a long term view is through its mergers and acquisitions (MAADs) policies¹.

The OEB has determined that cost impacts of a potential merger are not relevant to its determination in this proceeding. In making its determination the OEB has considered the submissions of the parties in the following context:

- The co-existence and purpose of its MAADs and rate setting policies
- The impact of including potential merger cost savings in the scope of this proceeding

¹ *Report of the Board, Rate-Making Policies Associated with Distributor Consolidation*, July 23, 2007; *Report of the Board on Rate-Making Associated with Distributor Consolidation*, March 25, 2015, EB-2014-0138

3 FINDINGS

3.1 Arguments

Intervenors argued that the impacts of a potential merger should be in scope for the current application.

Intervenors argued that the impacts of a potential merger should be considered like any other forecast because it is clear that a merger is likely to occur, and the likely terms of the merger are known. The Intervenors argued that the OEB has the obligation to consider the merits of including potential savings that may result, if the merger were to occur, in its calculation of PowerStream's revenue requirement going forward.

SEC submitted that determining the savings due to the merger are within scope of this proceeding need not necessarily lead to a determination that they should be used to calculate PowerStream's revenue requirement. SEC submitted that the OEB needs to take the initial step of examining the potential cost savings to be able to consider the merits of including them in establishing rates in this proceeding.

SEC submitted that it is not sufficient to rely on any application under the OEB's 2015 *Report of the Board Rate-Making Associated with Distributor Consolidation*,² (the MAADs policy) to deal with all merger-related impacts. It noted that MAADs applications, which are made under section 86 of the OEB Act, are not rates applications, which fall under section 78 of the OEB Act.

SEC also referred to the 2009 PowerStream/Barrie consolidation case³. At that time PowerStream had filed its cost of service application for the 2009 rate year based on forecasts for PowerStream as a stand-alone utility. However while that application was in process PowerStream received OEB approval to merge with Barrie Hydro. In that instance, the OEB permitted use of the information on the merger in the stand-alone PowerStream rates application.

SEC argued that the MAADs policy is not binding on the OEB and that the OEB must determine on the facts of each individual case whether the policy should be applied or not.

PowerStream submitted that the merger is out of scope as its inclusion as an issue would not be consistent with the MAADs policy.

² *Report of the Board on Rate-Making Associated with Distributor Consolidation*, EB-2014-0138

³ EB-2008-0035

PowerStream submitted that the inclusion of the merger issue would put the very occurrence of the merger at risk. PowerStream argued that the repercussions would also be broader as the adoption of this approach by the OEB would be seen by the distribution sector generally as an additional barrier to consolidation.

PowerStream submitted that the 2009 PowerStream/Barrie consolidation case is distinguishable from the present case. That is because at the point when the OEB rendered its decision to include the impacts of the consolidation in the rates proceeding, the MAADs application had already been approved.

PowerStream argued that the subsequent issuance of the OEB's *Report of the Board Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* (RRFE Report) and the MAADs policy have clarified the post-merger regulatory requirements for a distributor.

PowerStream argued that if the merger issue is included in this proceeding, PowerStream would be prejudiced by the relative timing of this proceeding relative to the merger. PowerStream submitted that if rates had been set prior to the merger as was the case for Horizon Utilities' 2015-2019 custom IR proceeding⁴, this issue could not have been pursued by intervenors. PowerStream submitted that it should not be subject to different requirements simply because of the timing of its rates application.

OEB staff submitted that including an examination of savings related to the potential merger would be counter to the OEB's stated policy objectives on rate setting within the MAADs policy. This is because the MAADs policy is intended to encourage utility consolidation by allowing the consolidating entities to keep savings due to the merger for a period of time.

OEB staff also submitted that considering the impact of the potential merger is outside the scope of this proceeding because an application to approve the merger has not yet been filed with the OEB. Accordingly the OEB does not yet know the details of the merger proposal. OEB staff argued that the forthcoming MAADs application would be the appropriate forum to consider issues concerning savings due to the merger.

⁴ EB-2014-0002

3.2 The Co-existence of the MAADs and Rate Setting Policies

The OEB must decide in this proceeding how to set just and reasonable rates, guided by the objectives in the OEB Act, in light of the expected MAADs application. The OEB's decision must strike a balance between the immediate and longer term impact in terms of these objectives.

The OEB recognizes that its MAADs policy, like all OEB policies, is not binding and must be taken into account as appropriate in light of the facts of this specific case. In making a determination on relevance in the context of this application, the OEB is not persuaded that there is any reason not to take into account its MAADs policy as written.

The OEB's MAADs policy is particularly relevant to the OEB's objectives of protecting the interests of consumers with respect to prices, promoting economic efficiency and cost effectiveness and facilitating the maintenance of a financially viable electricity industry.

The OEB's recognition of the potential for consolidation activity to provide long-term benefits in terms of the OEB Act objectives is demonstrated in its MAADs incentive policies. Distributors are provided with the opportunity over a 5-10 year period to offset initial transaction costs and subsequently benefit from the cost savings that successful consolidations can generate. The OEB's MAADs policy addresses ratepayer price interests by having those savings shared with ratepayers if deferral of rebasing goes beyond 5 years. The intent is to realize long term savings that endure beyond the 5-10 year period through shorter term financial incentives.

The pre-consolidation rate setting and MAADs policy are intended to co-exist in setting just and reasonable rates. The pre-consolidation rates approved for the consolidating entities serve as the baseline beyond which cost savings are allocated in accordance with the MAADs policy. The OEB agrees with PowerStream and OEB staff that if potential cost savings due to consolidation were taken into account in a pre-consolidation rates setting, as argued by the intervenors, this would be inconsistent with the MAADs policy. To do so would be likely to disincent future consolidations.

The OEB's approach to rate setting was recently reviewed through its RRFE policy initiative. The OEB's focus on long term benefits in its MAADs policy is consistent with its focus in the RRFE on long term planning and the expectation of continuous improvement mechanisms.

In this instance, PowerStream could be filing a MAADs application during the next 6 months. The OEB does not consider that it should treat PowerStream's pre-

consolidation rates application any differently than pre-consolidation rates applications for other utilities that occur further in advance of consolidation, such as the recent Horizon Custom IR application. The OEB wishes to incent consolidation, within appropriate parameters. It does not wish to discourage the filing of a MAADs application at certain times within the rate setting cycle or discourage the seeking of rate rebasing within a specific timeframe in relation to consolidation activity.

It is the OEB's view that the effectiveness of the OEB policies on both MAADs applications and rate-setting in general would be significantly diminished if the protocol for either framework included a consideration of the temporal relationship between MAADs and rates applications beyond that which exists in the current policies. To introduce a linkage between the two based on the temporal relationship could significantly reduce the effect of the financial incentives in the MAADs policy designed to overcome any barriers to consolidation and to incent continuous improvement through the consolidation process. This in turn would diminish the potential for meaningful consolidation and threaten the achievement of the anticipated long term benefits of consolidation.

Also, given the fact that MAADs negotiations would need to be completed in order to fully assess the likely cost impact of a MAADs transaction, and that the timing of completion of MAADs negotiations is subject to a number of contingencies, such a linkage could well cause significant delay to a rates application. This would undermine the OEB's objective of enabling utilities to have their rates approved when required as part of a regular and predictable rates cycle.

In summary, the OEB considers the outcome of its existing approach to rate making processes to be just and reasonable rates. The OEB considers the outcome of its approach to rate making within the MAADs policy framework also to be just and reasonable rates. These respective approaches were designed with both long and short term objectives in mind.

SEC cites the 2009 PowerStream case in which the OEB ruled that evidence provided in the MAADs application could be considered by the OEB in the subsequent rates application.

The OEB agrees with PowerStream that the situation in the 2009 case was significantly different from the situation in this proceeding. The 2009 application to merge PowerStream and Barrie was approved shortly before PowerStream's 2009 rates application. The 2009 rates case addressed the issue of setting rates during the period between consolidation approval and rate harmonization. That is not the situation in this proceeding.

3.3 The Impact of Inclusion as an Issue at this Time

SEC submitted that the OEB needs to first examine the potential cost savings in order to be able to consider the merits of including them in establishing rates in this proceeding. The OEB does not agree. As per the above analysis, the OEB considers that evidence on potential cost savings due to the merger regardless of substance, is outside the scope of this proceeding.

4 SEC MOTION

On September 18, 2015, SEC filed a motion for production of certain documentation concerning the likely merger in response to its technical conference requests. This documentation was described in the motion as the “Preliminary Agreement Merger Documents”, the “Financial Analysis Documents” and the “Merger Savings Information” documents. Given the fact that the OEB has determined that information concerning the potential cost savings due to the merger is outside the scope of this proceeding, the OEB denies SEC’s motion.

5 PROCEDURAL DIRECTION

On September 25, 2015, the OEB issued Procedural Order No. 4 which stated that the OEB had reviewed the submissions from parties on the threshold question and had concluded that it would not be in a position to release a decision on this matter before the commencement of the settlement conference. Accordingly, the settlement conference, which had been scheduled to commence on September 28, 2015 was postponed until further notice as were all other dates related to the settlement conference established in Procedural Order No. 1.

As the OEB has now reached its decision on the threshold question, it has determined that the settlement conference will be rescheduled to commence on Monday October 19, 2015 and run, if necessary until Wednesday October 21, 2015. The Procedural Direction below confirms these dates, while also reestablishing related dates.

The OEB has also determined that an oral hearing, if necessary, will begin on November 20, 2015 and may continue until November 27, 2015, if needed. However, parties are advised that no hearing will be held on either November 24 or November 25, 2015.

THE OEB ORDERS THAT:

1. A settlement conference among the parties and OEB staff will be convened on **October 19, 2015** starting at 9:30 a.m., at 2300 Yonge Street, 25th floor, Toronto. If necessary, the settlement conference will continue on **October 20 and 21, 2015**.
2. Any settlement proposal arising from the settlement conference shall be filed with the OEB by **November 10, 2015**. In addition to outlining the terms of any settlement, the settlement proposal should contain a list of any unsettled issues, indicating with reasons whether the parties believe those issues should be dealt with by way of oral or written hearing.
3. Any submission from OEB staff on a settlement proposal shall be filed with the OEB and served on all parties within 7 days from when a settlement proposal is filed.
4. If there is no settlement proposal arising from the settlement conference, PowerStream shall file a statement to that effect with the OEB by **October 26, 2015**. In that event, parties shall file and serve on the other parties by **October 30, 2015** any submissions on which issues shall be heard in writing, and for

which issues the OEB should hold an oral hearing. If there is a partial settlement proposal, parties shall also file and serve on the other parties by **October 30, 2015** any submissions on which unsettled issues shall be heard in writing, and for which unsettled issues the OEB should hold an oral hearing.

5. An Oral Hearing will commence on **November 20, 2015** in the OEB's hearing room at 2300 Yonge Street, 25th Floor, Toronto. The hearing may continue until **November 27, 2015**, if needed. In the event that a Settlement Proposal is filed with the OEB, the presentation of the proposal will be made at the commencement of the oral hearing on **November 20, 2015**.

All filings to the OEB must quote the file number, EB-2015-0003, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the case manager, Martin Davies at martin.davies@ontarioenergyboard.ca and OEB counsel, Maureen Helt at maureen.helt@ontarioenergyboard.ca.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: boardsec@ontarioenergyboard.ca

Tel: 1-888-632-6273 (Toll free)

Fax: 416-440-7656

DATED at Toronto October 6, 2015

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary