EB-2008-0222
EB-2008-0223
EB-2008-0224

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

AND IN THE MATTER OF applications by Canadian Niagara Power Inc. – Eastern Ontario Power, Canadian Niagara Power Inc. – Fort Erie and Canadian Niagara Power Inc. – Port Colborne for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2009;

AND IN THE MATTER OF a Notice of Motion by the School Energy Coalition for an order compelling the applicant to completely answer certain interrogatories of the School Energy Coalition.

DECISION WITH REASONS ON THE MOTION

Canadian Niagara Power Inc. – Eastern Ontario Power (CNPI – EOP), Canadian Niagara Power Inc. – Fort Erie (CNPI – FE) and Canadian Niagara Power Inc. – Port Colborne (CNPI – PC) (collectively CNPI or the Applicant) filed applications with the Ontario Energy Board, received on August 18, 2008, under section 78 of the *Ontario Energy Board Act*, *1998*, (the Act), seeking approval for changes to the rates that CNPI – EOP, CNPI – FE and CNPI – PC charges for electricity distribution, to be effective May 1, 2009. The Board has assigned the CNPI – EOP application File Number EB-2008-0222, the CNPI – FE application File Number EB-2008-0223 and the CNPI – PC application File Number EB-2008-0224.

On February 26, 2009, the School Energy Coalition (SEC) filed a Notice of Motion with the Board together with an Affidavit of Jay Shepherd and other supporting material. The Motion sought an order compelling the Applicant to completely answer certain SEC interrogatories dated October 23, 2008, supplementary interrogatories dated February 4, 2009 and questions posed at the Technical Conference that the Applicant has refused to answer or answer fully.

The Board heard the Motion on Thursday March 12, 2009. For purposes of hearing the Motion, the Board grouped the disputed interrogatories into the following three issues:

i) the lease arrangement among Port Colborne Hydro Inc. (the Lessor), the Corporation of the City of Port Colborne (the City), Canadian Niagara Power Inc. (the Lessee) and Canadian Niagara Power Company Limited (the Lessee Guarantor);
ii) the allocation of expenditures and affiliate income; and,
iii) executive employee compensation.

At the hearing, the Board heard submissions and argument on whether the interrogatories need to be answered. The Board did not hear evidence or cross-examination on affidavits. The Vulnerable Energy Consumers Coalition and Energy Probe appeared at the hearing to support SEC's Motion.

At the end of the hearing, the Presiding Member made the following ruling:

> "The Panel was able to reach a decision on all three groupings of the issues.
>
> The Panel has not been persuaded that CNPI needs to provide more answers or more complete answers to the interrogatories named by the Schools. The motion, therefore, compelling the applicant, Canadian Niagara Power Inc., and/or its affiliates to completely answer certain questions refused to be answered from the interrogatories of the Schools dated October 23rd, 2008, supplemental interrogatories of the Schools dated February 4th, 2009, and at the technical conference held February 8th, 2009, is dismissed.
>
> The reasons for the Board's decision will follow in due course."

REASONS
The reasons for the above ruling are set out below.

i) The Lease Arrangement

SEC made numerous requests for information in relation to the lease transaction. CNPI provided information to satisfy some of these requests but not certain others.

According to SEC, the information was requested to determine whether the Port Colborne lease is "in substance a sales agreement". SEC postulated that, in its view, the fact that the transaction was not structured as a sale for tax reasons could result in higher rates for Port Colborne than would otherwise be the case. CNPI argued that the lease satisfied the criteria established by the accounting profession (CICA Handbook) and the jurisprudence for distinguishing a true lease from a sale. With respect to the latter, CNPI filed an Advanced Tax Ruling from the Ministry of Finance (Ontario).

SEC accepted that the arrangement meets the legal tests of being a true lease but argued that this should not be determinative of the issue at hand and that it should not prohibit the Board from treating the transactions for ratemaking purposes as if the transaction was in substance a sale.

The Port Colborne lease was approved by the Board in a 2001 application (RP-2001-0041) by Port Colborne Hydro Inc. ("PCHI") under s.86(1) of the Act for leave to lease to CNPI the electricity distribution assets within the city of Port Colborne. Furthermore, the revenue and cost consequences were reflected in the Board's decision in setting 2006 rates for Port Colborne in a cost of service proceeding (RP-2005-0020 / EB-2005-0345).

In the present motion, both SEC and CNPI relied on substantially the same case law to argue whether or not issue estoppel[1] applied to the circumstances of this case. However, their conclusions were different and SEC argued that the specific rate impact of the lease transaction has never been considered by the Board and that issue estoppel therefore did not apply so as to preclude the Board from considering the rate impacts of the lease in the present rates application.

The Board agrees with SEC that the true lease characterization is not determinative of just and reasonable rates. However, in approving the lease arrangement in 2001, the Board's decision makes it clear that the Board was aware of the cost arrangements of the lease. Although the 2001 proceeding was not a rates proceeding as such, the Board could have imposed conditions or commented on the proposed lease arrangement if it was concerned about potential rate impacts. The Board did not do so.

[1] Issue Estoppel precludes the re-litigation of an issue that has already been decided in a prior proceeding.

The proceeding for setting 2006 rates also did not raise concerns about rate impacts arising from the lease transaction. While rate impacts arising from the lease arrangement were not specifically dealt with by the parties to that proceeding (which, it should be noted included SEC), CNPI's argument in this motion that the 2006 rates did reflect the cost and revenue consequences of the lease arrangement and that it had organized its affairs on the strength of that decision has merit.

The Board has broad powers to reconsider cost and revenue issues underpinning rates. But payment amounts, and, in particular fixed payment amounts, associated with the lease of the entire asset base of a utility is not an ordinary issue that should be revisited without a compelling *prima facie* reason for doing so. SEC's suggestion of benchmarking the proposed revenue requirement with that of the alternative of a sale is problematic on a number of levels. First, it is not realistic in view of the presence of a true lease. Second, it would involve the use of a multiplicity of assumptions on every component of the fictional revenue requirement calculation in a sale scenario. Third, it has the potential risk of leading to benchmarking with other scenarios, such as Port Colborne as a stand alone utility. Fourth, it would, in effect, render the 2001 Board approval of the lease arrangement meaningless. Finally, comparison of outcomes of different scenarios at different points in time and for different test period intervals would devalue the consistency and predictability principles for which the Board strives.

In making its decision on March 12, 2009, the Board took into consideration that nothing had changed in the lease agreement since its inception and approval by the Board in 2001. The Board also considered that the lease expires in early 2012 and that under the terms of the lease, the assets will be in the possession of either CNPI or PCHI - a comparative review of rates close to the expiry of the lease term was not a prospect that the Board felt was, on balance, sensible in the circumstances of this case.

For the reasons set out above the Board did not on balance find it appropriate to make an order compelling CNPI to provide the material and calculations sought by SEC in respect of the lease.

ii) The allocation of expenditures and affiliate income

CNPI provided pre-filed evidence and responded to a number of interrogatories relating to the allocation of expenditures and affiliate income. SEC argued that it did not receive answers or full answers to certain of its interrogatories relating to the strategic plan of FortisOntario (the parent of CNPI), calculations determining the rate of return on the

transmission business unit of CNPI and multi-year income statements, in a regulatory format, for Cornwall Electric (CNPI provides certain services to and receives certain services from Cornwall Electric). SEC grounded its request on the proposition that it wished to test the reasonableness of the costs allocated to the distributor applying for rates in this proceeding.

In reaching its conclusion on March 12, 2009, the Board considered the fact that CNPI's pre-filed evidence included a report by an independent consultant with respect to the methodology used to allocate the shared services which gives an opinion of the reasonableness of that methodology. CNPI's evidence includes a description and discussion of shared services costs and CNPI has provided details in response to certain interrogatories. In response to an undertaking given at the hearing, CNPI also provided a proposal from a third party service provider performing services similar to Cornwall Electric, on the basis of which CNPI determined that the fully allocated costs incurred by CNPI are less than those that would be charged by the third party provider.

With respect to SEC's request for FortisOntario's 5 year plan, CNPI has provided the information pertaining to the distribution business from that plan and the Board is not persuaded that further information from that plan is necessary in this proceeding.

Similarly, the Board finds that SEC's interrogatory with respect to the return on equity for the transmission business unit is not a necessary component in this proceeding. CNPI has provided the 2009 income before taxes for the transmission business unit as well as the forecast 2009 rate base, which is relevant to the issue of the allocation as between the distribution and transmission business units.

The testing of evidence to fix just and reasonableness rates can take various forms. The Board strives to balance the need for adequate information on the one hand and relevance, materiality, regulatory burden and confidentiality concerns on the other, and did so here in the circumstances of this specific case. The Board was not convinced that it is necessary, nor particularly helpful to the current proceeding that CNPI be required to provide the information requested by SEC, nor that it would be in the public interest to direct CNPI to do so.

iii) Executive employee compensation

CNPI provided pre-filed evidence and responses to a number of interrogatories relating to executive employee compensation. SEC argued that it did not receive answers or full

answers to its request for CNPI to report the compensation for its four executives as a separate group.

In reaching its decision not to compel CNPI to produce executive employee compensation, the Board considered the 2006 Electricity Distribution Handbook, section 6.2.5 which provides the following:

> "Where there are three, or fewer, full-time equivalents (FTEs) in any category, the applicant may aggregate this category with the category to which it is most closely related. The higher level of aggregation may be continued, if required, to ensure that no category contains three, or fewer, FTEs."

The Board also considered that the applications have the following FTEs in the executive compensation: 1.0 for Fort Erie, 0.6 for Port Colborne and 0.3 for Eastern Ontario Power. While there are four executives, there are less than three FTEs. The Board was not persuaded that there are any special circumstances in this case to warrant departing from the Handbook.

COSTS

Section 41.02 of the Board's *Rules of Practice and Procedure* provide that any person in a proceeding whom the Board has determined to be eligible for cost awards (such as the intervenors in this proceeding) may apply for costs in the proceeding in accordance with the Practice Directions.

The Board will receive costs submissions at the conclusion of the rates proceeding and expects parties to make specific submissions whether SEC as the moving party and other intervenors as supporters of the Motion should receive any costs associated with the unsuccessful motion.

DATED at Toronto, March 23, 2009

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary