Ontario

EB-2009-0107

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 to review and vary a part of the Ontario Energy Board's Decision on a Motion brought by the School Energy Coalition in EB-2008-0222/0223/0224 dated March 23, 2009;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Ontario Energy Board's *Rules of Practice and Procedure*;

NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1

On March 23, 2009 the Board issued its Decision with Reasons (the "Motion Decision") in respect of a Motion brought by the School Energy Coalition ("SEC"). The Motion was for, among other relief, an order compelling Canadian Niagara Power Inc. ("CNPI" or the "Applicant") and/or its affiliates to completely answer certain interrogatories of the SEC dated October 23, 2008, supplementary interrogatories of the SEC dated February 4, 2009 and questions from the Technical Conference held on February 18, 2009 in the within proceedings (EB-2008-0222/0223/0224). The Board dismissed the Motion at the conclusion of the Motion Hearing on March 12, 2009 and issued the Motion Decision on March 23, 2009.

On April 13, 2009, the SEC filed a Notice of Motion for a review and variance of part of the Board's Motion Decision (the "Motion to Review").

SEC's Notice of Motion (Tab 1 of the complete Motion Record) is attached as Appendix A to this Notice of Hearing and Procedural Order. The Motion Decision is attached as Appendix B to this Notice of Hearing and Procedural Order.

A copy of SEC's complete Motion Record for the Motion to Review has been provided to CNPI and all parties in the three CNPI rate applications currently before the Board. A copy is also available for public inspection at the Board's offices and through the Public Document Search on the Board's website at www.oeb.gov.on.ca:

Under Rule 45.01 of the *Rules of Practice and Procedure,* the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. The Board is of the view that SEC's Motion to Review passes the threshold test, and the Board should conduct a review on the merits of the motion.

The Board has assigned file number EB-2009-0107 to this Motion to Review.

The oral hearing of the three CNPI applications had already been set to commence on April 20, 2009 and the Board does not wish to delay the hearing of the applications. Accordingly, the Board will proceed to hear SEC's Motion to Review in an expedited process set out further below.

CNPI is identified as the Respondent to the Motion to Review. The Board will adopt the intervenors accepted by the Board in EB-2008-0222/0223/0224 as parties to this Motion proceeding. Any person that is not automatically adopted as an intervenor by the Board in this proceeding and that wishes to participate as an intervenor or observer must notify the Board Secretary's office immediately.

The Board finds it appropriate that SEC, CNPI and other parties have the opportunity to make submissions at an oral hearing of the Motion to Review.

The Board considers it necessary to make provision for the following procedural matters related to this proceeding. Further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. CNPI, Board staff and intervenors who may wish to make a written submission on the Motion to Review must file that submission with the Board, and deliver it to the SEC and other parties by Thursday April 16, 2009.

2. The Board will hear oral argument by SEC and other parties on Friday April 17, 2009 starting at 9:00 a.m. in the Board's Hearing Room on the 25th floor, 2300 Yonge Street, Toronto, Ontario.

All filings to the Board must quote file number EB-2009-0107, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and also consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may e-mail your documents. Those who do not have internet access are required to submit all filings on a CD or diskette 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.

DATED at Toronto, April 15, 2009

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

TO NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1

DATED APRIL 15, 2009

BOARD FILE NO.: EB-2009-0107

NOTICE OF MOTION FILED BY THE SCHOOL ENERGY COALITION

EB-2008-0222/3/4

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.O.15, Sch. B;
AND IN THE MATTER OF an Application by Canadian Niagara Power Inc. for an Order or Order setting just and reasonable rates commencing May 1, 2009.
AND IN THE MATTER OF the Board's Decision With Reasons dated March 23, 2009 on a Motion brought by the School Energy Coalition.

NOTICE OF MOTION

TAKE NOTICE that School Energy Coalition ("SEC") will make a motion to the Ontario Energy Board, 26th Floor, 2300 Yonge Street, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is proposed to be heard orally.

THE MOTION IS FOR:

a. A review and variance of the Board's Decision With Reasons on the Motion made by the School Energy Coalition (the "Motion Decision") in this matter in which SEC asked that the Applicant, Canadian Niagara Power Inc. and/or its affiliates ("CNP") be compelled to completely answer certain questions refused to be answered from the Interrogatories of the SEC dated October 23, 2009, Supplementary Interrogatories of the SEC dated February 4, 2009, and at the Technical Conference held February 18, 2009 in the within proceeding.

THE GROUNDS FOR THE MOTION ARE:

Background

1. SEC's motion was brought in the context of a cost of service rate application made by Canadian Niagara Power Inc. ("CNP" or the "Applicant") for the 2009 test year.

2. Included as part of the Applicant's cost of service are $1,528,200 million in lease payments to Port Colborne Hydro/ for the City of Port Colborne. The lease was entered into in 2002 for a term of ten years.

3. In its motion, SEC sought, inter alia, answers to a number of interrogatories it had posed to the Applicant in relation to this lease. Because there is no approved Issues List in this proceeding, the motion was the first time the question of whether the lease payments were properly an issue in this proceeding arose.

4. The lease in question involved all of the assets used to provide electricity distribution to the City of Port Colborne. These assets were leased to CNP in 2002, as a result of which CNP took over the operation of the electricity distribution franchise for the City of Port Colborne from the previous franchise-holder, Port Colborne Hydro Inc. The City of Port Colborne is the sole shareholder of Port Colborne Hydro Inc.

5. Because it involved a transfer of the operations of the electricity distribution franchise from Port Colborne Hydro Inc/City of Port Colborne, to CNP, the transaction could not be completed without leave of the Board.

6. The Board granted its approval on April 12, 2002, in RP-2001-0041 [the "Leave Decision", Tab 4].

7. The electricity distribution rates for Port Colborne did not change following the Leave Decision. In granting leave approving the lease, the Board noted that the Applicant would assume the existing Board-approved rates and that "any change to the rates will require approval of the Board." [Leave Decision, Tab 4, pg. 3]

8. CNP's distribution rates were not altered until CNP brought a cost of service rate application in 2006 [the "2006 Rate Decision", Tab 5].

9. Although the lease payments were part of CNP's cost of service in the 2006 cost of service application, that application was a historic test year application brought along with 90 other electricity distributors. None of the parties examined the provision of the lease and the Board did not make specific reference to it in the 2006 Rate Decision.

10. In the current rate application, SEC asked a number of interrogatories pertaining to the lease. CNP did not answer, or did not answer completely, many of the interrogatories posed. As a result, on February 25, 2009, SEC brought a motion seeking an order compelling CNP to answer the questions posed.

11. The motion was heard March 12, 2009. An oral decision, without reasons, was made on that date, and a written decision with reasons was issued March 23, 2009.

12. In the Decision With Reasons dated March 23 [the "Motion Decision"], the Board denied SEC's motion, on the basis that:

(a) In the Leave Decision, a previous Board panel had approved the lease and that that decision makes it clear that "the Board was aware of the cost arrangements of the lease."; and,

(b) the 2006 Rate Decision had also not raised concerns about the rate impacts arising from the lease transaction.

[Motion Decision, Tab 2]

13. In SEC's submission, the Board in Motion Decision erred in law and in fact, and improperly declined jurisdiction, in finding that it either should not or could not examine the reasonableness of the cost of the lease in this rate application. Specifically, the Board erred in finding that:

(a) the Board in the Leave Decision "was aware of the cost arrangements of the lease…[and] could have imposed conditions …on the proposed lease arrangement."

In SEC's submission, the Leave Decision proceeded on a narrow statutory question and the Board implicitly and explicitly stated that rate impacts were not being considered. In addition, the Board was not operating under a cost of service rate regime at that time and it would not have been known when, if ever, the cost of the lease would be directly passed on to ratepayers; and

(b) because of the 2006 Rates Decision, examining the cost of the lease would be unfair or prejudicial to CNP.

The Board in the 2006 Rates Decision did not specifically examine the lease payments. The Board has broad discretionary powers to reconsider cost and revenue issues underpinning rates, and does so on a regular basis when fuller evidence or discussion on those issues arises in a subsequent proceeding. Furthermore, CNP provided no evidence that it had relied to its detriment on the 2006 Rates Decision.

14. In sum, the specific issue of whether the lease payments are just and reasonable has never been examined by this Board and, in SEC's submission, the Board improperly fettered its jurisdiction by declaring in the Motion Decision that it could not, or should not, examine the issue in this rate proceeding. The effect of that finding is to dispose of that issue without consideration of the merits in this proceeding, and effectively preventing the Applicant's ratepayers from ever challenging the reasonableness of the lease payments.

15. In addition, the Board in the Motion Decision appeared to create a reverse onus on parties seeking to challenge a cost or revenue item previously included in a cost of service application.

In SEC's submission, this finding is contrary to the Board's enabling legislation, which states that applicants have the onus of proving that the rates they seek are just and reasonable. In any event, SEC provided a compelling prima facie case: ratepayers are being asked to pay lease payments in the amount of $1.5 million per year for the use of assets with an approximate net book value in 2009 of $5 million.

i.) Leave Decision did Not Consider Rate Impacts

16. In its submissions on the motion, the Applicant did not refer to the 2002 Leave Decision as a reason why SEC's request should be denied. Rather, the Applicant relied exclusively on the 2006 Rate Decision.

17. Despite the fact that the Applicant did not rely on the Leave Decision in its submission, the Board in its decision relied to a great extent on that decision as a reason for why the cost of the lease to ratepayers cannot be reviewed as part of the Applicant's current cost of service application.

18. In SEC's submission, the Board erred in its findings regarding the applicability of the Leave Decision to the scope of the current cost of service application.

19. In the Motion Decision, the Board stated that "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." [Motion Decision, Tab 2, p. 3]

20. As stated, the Applicant in the Leave Decision was not applying to have the rates changed. The Board in the Leave Decision specifically stated that the existing Board-approved rates would continue and that "any change to the rates will require the approval of the Board."

No evidence was filed in that proceeding as to the rate impacts, or the ratemaking treatment, of the lease payments.

21. In fact, at that time rates for the distribution of electricity were determined using the Performance-Based Rate Making ("PBR") formula. It was not until the 2006 rate year that the Board decided to return to a cost of service approach to ratemaking.[1] In SEC's submission, therefore, it would not even have been clear to the panel in the Leave Decision that there were rate implications emanating from the lease; such implications would only arise in the context of a cost of service review, which was not then a part of the Board's ratemaking formula.

Limited Statutory Test Used for Granting Leave

22. In addition, Board in the Leave Decision applied a limited statutory test in granting leave for the transfer of the operations of the utility.

23. Although the Board states in the preamble that the application was brought under s. 86 of the Ontario Energy Board Act, 1998, in fact a review of the decision shows that the test used was that found in s. 82(3), which is a more limited test for granting or refusing leave.

24. In its findings, the Board in the Leave Decision states that "the acquisition by Canadian Niagara Power inc. of an interest in electricity distribution system in Ontario is approved pursuant to subsection 82(3) of the Ontario Energy Board Act, 1998."

25. In its reasons, the Board stated that it had determined that, "based on the evidence, the impact of the proposal would not adversely affect the development and maintenance of a competitive electricity market." [Leave Decision, Tab 4, p. 3]

[1] See *Energy Regulation in Ontario*, chapter 13:110:10; SEC Motion Record, Tab 4.

26. That is the same language used in s. 82(3) of the Act, which states that the Board *shall* make an order approving a proposal described in section 81 if it determines that the impact of the proposal would not adversely affect the development and maintenance of a competitive market."

27. It is clear, therefore, that the test that was used was concerned only with the impact of the proposed acquisition on the development of an electricity market.

28. Even if the Board had considered the test under s.86 of the Act, that section only gives the Board the jurisdiction to grant or refuse leave [see s.86(6)]. As stated above, the Board in the Motion Decision said that the Board in the Leave Decision could have "imposed conditions or commented on the proposed lease arrangement if it was concerned about potential rate impacts." In SEC's submission, it is difficult to conceive of what conditions the Board could have imposed in granting the leave request when the application was not applying to have the existing distribution rates altered.

29. In any event, regardless of the statutory test used, however, the Board made it clear in the decision that it had not considered the impact of the proposal on electricity distribution rates.

ii.) 2006 Rate Decision Not Determinative

30. With respect to the 2006 Rate Decision, the Board in the Motion Decision stated as follows:

> 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. [Motion Decision, Tab 2, p. 4]

31. Although the lease may have been part of the Applicant's evidence in the 2006 application, the Board did not specifically examine the lease at that time. The 2006 application was a historic test year application brought along with 90 other electricity distributors. The Board made no specific reference to the lease in the 2006 Rate Decision.

32. The fact that the lease was included in a previous application would not and should not preclude a future Board panel examining the Applicant's cost of service from examining the issue. In fact, the Board in the Motion Decision acknowledged that the "Board has broad powers to reconsider cost and revenue issues underpinning rates." [Motion Decision, Tab 2, p. 4]

33. What might be relevant to a subsequent panel is if the Applicant had actually "organized its affairs" in accordance with the Board's decision, in reaction to the Board's decision. Although the Applicant made a submission to that effect when arguing against SEC's motion, there is no evidence that it had actually done so. A submission without any supporting evidence is, in SEC's submission, a nullity.

34. The evidence, rather, indicates that the Applicant simply continued with the status quo following the 2006 Rates Decision. There is no evidence that, for example, it extended the term of the lease or took some other action to its detriment *in reaction to* the 2006 Rate Decision. In any event, that is the sort of evidence that could be reviewed during the course of the hearing and should not be a bar to hearing the issue at all, as the Board has effectively determined by its finding in the Motion Decision.

35. Even if the recoverability of the lease payments were now revisited and perhaps reduced, that decision would only apply going forward; the Applicant will not have been harmed in its

reliance on the 2006 Rates Decision. Instead, it will have received the benefit of having the entire lease payments included in its revenue requirement for the 2006, 2007 and 2008 rates years.

iii.) Scope of Cost of Service Review

36. In the Motion Decision, the Board appears to have created an onus on parties seeking to challenge an aspect of an applicant's costs or revenue to establish a prima facie case for doing so:

> 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.
>
> [Motion Decision, Tab 2, p. 4]

37. In the first place, SEC submits that this is not a matter of "revisiting" the cost of the lease, since it has never been reviewed by the Board. The opposite is in fact true. This is the only time the Board will be in a position to review the cost of the lease, since by the time of the next cost of service application by the Applicant, the lease will have expired.

38. Secondly, SEC believes the Board's assertion that parties seeking to challenge a cost item that has been previously included in a cost of service application have an onus of establishing a "compelling prima facie reason" for doing so is contrary to the Board's enabling legislation. Specifically, s.78(8) of the Ontario Energy Board Act, 1998, states as follows:

Order re: transmission of electricity

> **78.** (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> **…**
>
> **Burden of proof**

> (8) Subject to subsection (9), in an application made under this section, the burden of proof is on the applicant.[2]

39. Subsection 9 states that, even when an application for just and reasonable rates is brought by the Board of its own motion or on request of the Minister, the burden of establishing that the rates are just and reasonable remains with the distributor. That is, even when the distributor is not the applicant it retains the burden of proof.

40. In SEC's submission, therefore, the Board's suggestion in the Motion Decision that the onus is on parties to provide a "compelling prima facie" reason for reviewing items that happened to have been included in a distributor's cost of service in the past is incorrect and contrary to the requirements set out in the Board's enabling legislation.

41. In any event, even if a "compelling prima facie reason" is required, SEC provided one: if the lease payments in the amount of $1.5 million are approved, ratepayers would be paying a rental rate on the utility assets equivalent to approximately 30% of their net book value in 2009 (approximately $5 million), and well over 40% by the end of the IRM period. This single cost item represents 26% of the Applicant's 2009 forecasted revenue requirement for Port Colborne ($5.97 million). In SEC's submission, that is overwhelming prima facie evidence indicating that the issue should at least be explored in the context of a cost of service rate application.

42. SEC also relies upon:

i. Rule 42-44 of the Board's *Rules of Practice and Procedure*; and

[2] Subsection 9 simply states that even when an application for just and reasonable rates is brought by the Board of its own motion, the burden of proof remains

ii. such further grounds as counsel may advise and this honourable tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) Board's Decision With Reasons dated March 23, 2009 on the Motion by SEC

(b) Procedural Order #1 dated October 10, 2008

(c) Excerpt from G. Zacher and P. Duffy, eds. (original ed. The Honourable Mr. Justice David M. Brown), *Energy Regulation in Ontario*

(d) SEC Notice of Motion in Original Motion

(e) Interrogatories of the School Energy Coalition dated October 23, 2008

(f) Procedural Submissions of the SEC dated January 9, 2009

(g) Submissions of the Applicant dated January 16, 2009

(h) Supplementary Interrogatories of the School Energy Coalition dated February 4, 2009

(i) Response to Interrogatory #21, the Supplementary Interrogatories Response from the Applicant dated February 13, 2009

(j) Pages 25, 35-36, and 38 from the Technical Conference Transcript dated February 18, 2009

(k) Canadian Niagara Power Inc.'s ("CNPI") Responses to the Motion Identified Interrogatories of the Intervenor, School Energy Coalition ("SEC")

(l) CNP Submissions Regarding the Lease

(m) Manager's Summary of the 2006 EDR Application

(n) 2002 Decision in RP-2001-0041 [Leave Decision]

(o) 2006 Decision in EB-2005-0345 [2006 Rates Decision]

(p) Transcript of Motion Hearing, March 12, 2009

(q) *Rasanen v. Rosemount Instruments Limited,* [1994] 17 O.R. (3d) 267 (Ont. C.A.)

(r) *Danyluk v. Ainsworth Technologies Inc,.* [2001] 2 S.C.R. 460

Date: April 9, 2009

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AND TO: All Intervenors

APPENDIX B

TO NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1

DATED APRIL 15, 2009

BOARD FILE NO.: EB-2009-0107

Decision with Reasons on the Motion
Issued March 23, 2009

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