



**EB-2009-0408**

**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 Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP seeking changes to the uniform provincial transmission rates for 2010;

**AND IN THE MATTER OF** a motion by Schools Energy Coalition to compel the Applicant to answer certain interrogatories and Technical Conference questions.

**BEFORE:** **Cynthia Chaplin**  
Presiding Member and Vice-Chair

**Ken Quesnelle**  
Member

### **MOTION DECISION AND ORDER**

Great Lakes Power Transmission Inc. on behalf of Great Lakes Power Transmission LP ("GLPT") filed an application with the Ontario Energy Board (the "Board") on November 30, 2009 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998 c.15, (Schedule B) seeking approval for changes to the uniform provincial transmission rates that GLPT (and other transmitters) charge for electricity transmission, to be effective January 1, 2010. The Board has assigned Board file number EB-2009-0408 to the rate application.

The parties to the proceeding filed a proposed settlement agreement on May 17, 2010. The parties reached agreement on all issues with one exception. The

remaining issue concerns whether GLPT is entitled to recover an amount of \$1,729,806 for the 2010 Test Year, which is the income tax allowance sought by GLPT after the settlement agreement is taken into account. The Board accepted the settlement agreement in its decision dated May 21, 2010.

### **SEC Motion**

On May 12, 2010, School Energy Coalition (“SEC”) filed with the Board on a confidential basis a Notice of Motion seeking an order requiring GLPT to produce the following information:

- (a) a full answer to questions on pages 58 and 66 of the Technical Conference held April 14, 2010;
- (b) the documents requested in SEC Interrogatory #1 and SEC Supplementary Interrogatory #3; and
- (c) such further and other relief as the counsel for SEC may advise and the Board may permit.

In Procedural Order 7, dated May 17, 2010, the Board determined that it would treat all materials in relation to the motion as confidential on an interim basis. Factums were filed in confidence by SEC, the Vulnerable Energy Consumers Coalition (“VECC”), Board staff, and GLPT.

The Motion was heard orally on Thursday, May 27, 2010, and the proceeding was conducted *in camera*. The parties filed proposed redactions to the various motion materials during the proceeding and filed proposed redactions to the motion day transcript on May 28, 2010. The Board accepts those proposed redactions. Redacted versions of the transcript and the motion materials will be placed on the public record.

### **Board Findings**

SEC argued that the requested information is relevant to a determination of whether or how the stand alone principle should be applied with respect to the tax provision

requested in this case. SEC proposed that the tax allowance should be eliminated or discounted significantly depending on how much tax is payable and whether it is only paid at some point in the distant future.

The requested materials all relate to the one remaining disputed issue, namely recovery of the tax provision. Specifically, SEC's request refers to three categories of information:

1. the 2010 business plan for Brookfield Infrastructure Holdings (Canada) Inc ("BIH"), the Limited Partner;
2. an explanation of which entities in the corporate structure, including an upstream company or other entity, may be expected to pay the tax provision sought in the application and when, as well as production of the related tax planning memoranda;
3. opinions and other documents relating to the corporate structure set out in the Application, including Brookfield Infrastructure Partners LP, and identification of the jurisdictions of formation and residence of the entities on the corporate structure chart.

SEC's oral submissions were focused on the second category of information. VECC supported SEC's motion and agreed that the Board should have further information to inform its decision. Board staff also submitted that the Board should require the information to be provided. Board staff referred to a case at the Alberta Energy and Utilities Board ("AEUB") as well as a policy statement by the Federal Energy Regulatory Commission in the United States in support of its position.

GLPT opposed the motion. GLPT argued that the requested information is not relevant because the line of enquiry is not relevant. In GLPT's view the issue has been considered on a number of occasions by the Board, and the same conclusion has always been reached.

The Board concludes that the requested information in categories 1 and 3 is not relevant. With respect to the category 1 information, the 2010 budget for Brookfield

Infrastructure Holdings (Canada) Inc, the Limited Partner is not relevant because there is already evidence before the Board regarding the tax position in 2007, 2008, and 2009 and the expected tax position in 2010. At the hearing, SEC focused on the category 2 information and stated that it was not enquiring into the upstream corporate structure. The Board therefore concludes that the category 3 information, which is related to the details of the corporate structure, is also not relevant to the issue.

This leaves for consideration the category 2 information and the issue of whether the Board should order production of information regarding the current expectation as to which entity, if any, may ultimately pay the tax provision associated with the transmission business?

SEC has acknowledged that the stand alone issue in this case is similar to a number of previous cases where the Board has considered the stand alone principle in the context of a utility's tax provision. These cases include the Great Lakes Power Limited distribution proceeding<sup>1</sup>, the 2006 Electricity Distribution Rate Handbook, as well as cases involving the Consumers' Gas Company<sup>2</sup>, Natural Resource Gas Limited<sup>3</sup>, Lakeland Natural Gas Limited<sup>4</sup> and Inter-City Gas Corporation.<sup>5</sup> In all of those cases, the Board has concluded that a party which bears a cost is entitled to any related tax savings or benefits. This has been applied where there have been tax losses in unregulated businesses and tax deductions for disallowed expenses, regardless of the overall structure. SEC argues, however, that the requested information should be produced because the Board might reach a different conclusion than it has in the past if the evidence establishes that the tax provision will never be paid or not until the distant future. GLPT argues that the information is irrelevant because the evidence would be hypothetical and should have no bearing on the conclusion in any event.

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<sup>1</sup> *Great Lakes Power Limited*, EB-2007-0744, Decision and Order, October 30, 2008

<sup>2</sup> *Consumers Gas*, EBRO 376 I and II, Decision with Reasons, January 30, 1981.

<sup>3</sup> *Natural Resource Gas Limited*, EBRO 496, Decision with Reasons, August 20, 1998.

<sup>4</sup> *Lakeland Natural Gas Limited*, Decision with Reasons, May 26, 1967.

<sup>5</sup> *Inter-City Gas Corporation*, EBRO 374, Reasons for Decision, January 7, 1982.

The Board concludes that the requested information is irrelevant to its consideration of the tax allowance issue and will not order production. The information may or may not indicate whether taxes will be payable by BIH or some other upstream entity either now or at some point in the future. This information may indicate BIH's expectations regarding its tax position at a particular point in time, but the information is hypothetical. Economic conditions, tax rules, and the corporate structure are all subject to change and therefore the actual future tax position remains speculative. Therefore the Board must address the issue given this uncertainty in any event.

Board staff suggested that the Board should engage in an examination into the tax details of partners and potentially other entities in the corporate structure, in other words, the Board should to some extent at least "follow the money". Board staff relied on a case at the AEUB involving AltaLink Management Ltd and TransAlta Utilities Corporation for support.<sup>6</sup> In that case, the Alberta Board undertook a further examination of the tax position of the partners and the taxes payable. The same situation does not apply here. The partners in this case are taxable Canadian companies and we already have on the record the tax position for the partners both historically and in the test year.

Some additional issues were raised during the motion proceeding. For example, SEC raised the following questions:

- whether a tax loss arising from tax deductions should be treated in the same way as a tax loss arising from an operating loss;
- whether the tax situation is akin to an affiliate transaction and therefore whether a sharing of the tax benefits arising would be appropriate; and
- whether a case involving different divisions within a single corporate entity is an appropriate analogy to the partnership arrangement in this case.

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<sup>6</sup> *AltaLink Management Ltd. and TransAlta Utilities Corporation*, AEUB Decision 2003-061, August 3, 2003.

The Board is making no determination on those matters at this time. SEC may wish to pursue these aspects of the tax provision issue, and others, in the hearing of this matter and in its submissions.

The Board will proceed by establishing the dates for written argument on the outstanding issue. If any party considers that oral cross-examination is necessary, it must provide adequate reasons for why that is the case, including a description of the specific areas on which it intends to examine, by June 1, 2010. The commencement of the oral hearing, originally scheduled for June 1, 2010 will be adjourned, or cancelled if none of the parties requests an oral hearing. If an oral hearing is held, the dates for written argument may be revised.

GLPT will file its argument in chief by June 4, 2010. Intervenors and Board staff will file their arguments by June 11, 2010. GLPT may file its reply argument by June 18, 2010.

**THE BOARD ORDERS THAT:**

1. Parties that are requesting an oral hearing and cross-examination on the outstanding issue should file their reasons in support of the request, including a description of specific areas which they intend to examine, on or before **Tuesday, June 1, 2010**.
2. In the event that the Board decides that an oral hearing should be conducted, such hearing will take place **on June 3, 2010** at 9:30 a.m. in the North Hearing Room.
3. The Applicant shall file its argument in chief, on or before **Friday, June 4, 2010**.
4. Intervenors and Board Staff shall file their arguments, if any, on or before **Friday, June 11, 2010**.
5. The Applicant shall file its reply argument, if any, on or before **Friday, June 18, 2010**.

6. If you already have a user ID, please submit all filings to the Board noted in this Procedural Order through the Board's web portal at [www.errr.oeb.gov.on.ca](http://www.errr.oeb.gov.on.ca). Additionally, two paper copies are required. If you do not have a user ID, please visit the Board's website under e-filings and fill out a user ID password request. For instructions on how to submit and naming conventions please refer to the RESS Document Guidelines found at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca), e-Filing Services. The Board also accepts interventions by e-mail, at the address below, and again, two additional paper copies are required. Those who do not have internet access are required to submit their intervention request on a CD or diskette in PDF format, along with two paper copies.

**DATED** at Toronto on May 28, 2010  
**ONTARIO ENERGY BOARD**

Original signed by

Kirsten Walli  
Board Secretary