



EB-2018-0082

**Erie Thames Powerlines Corporation
West Coast Huron Energy Inc.**

**Application for approval to amalgamate and continue
operations as a single electricity distribution company**

DECISION ON MOTION AND PROCEDURAL ORDER NO. 5

September 19, 2018

Erie Thames Powerlines Corporation (Erie Thames Powerlines) and West Coast Huron Energy Inc. (West Coast Huron Energy) (collectively, the Applicants) filed an application on March 14, 2018 under sections 18 and 86 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), referred to as the OEB Act, for approval to amalgamate and continue operations as a single electricity distribution company. The Applicants are asking the Ontario Energy Board (OEB) to approve:

- The amalgamation of Erie Thames Powerlines and West Coast Huron Energy
- The transfer of West Coast Huron Energy's distribution systems to Erie Thames Powerlines
- The transfer of West Coast Huron Energy's distribution licences and rate orders to Erie Thames Powerlines
- The amendment of Erie Thames Powerlines' electricity distribution licence to include the service territory of West Coast Huron Energy
- The acquisition by EARTH Corporation (EARTH) of all shares of West Coast Huron Energy

In Procedural Order No. 1, issued on May 22, 2018, the OEB approved Vulnerable Energy Consumers Coalition (VECC), Mr. James McCartney, and Mr. Gord Garland as intervenors. Procedural Order No. 1 also made provision for interrogatories and interrogatory responses. Interrogatories, if any, from OEB staff, VECC, Mr. McCartney

and Mr. Garland were to be filed with the OEB and served on all parties by June 4, 2018. In Procedural Order No. 2, the OEB granted Mr. Garland's request for an extension of the deadline for the filing of his interrogatories to June 8, 2018. The Applicants' responses, including responses to Mr. Garland's June 8, 2018 interrogatories, were due by June 18, 2018, and were received by the OEB on that date.

On July 13, 2018 the OEB issued a Decision on Disclosure of Corporate Valuation Reports and Procedural Order No. 3 (Decision and PO No. 3) that determined that in this particular application, the OEB would not require the Applicants to disclose the completed corporate valuation reports. Decision and PO No. 3 also established that the application would be heard by way of written hearing and set the schedule for OEB staff, intervenor and the Applicants' submissions.

Through Procedural Order No. 4, the deadline for all submissions as set out in Procedural Order No. 3 was suspended as Mr. Garland advised of his intent to file a motion related to the interrogatory responses filed by the Applicants. The deadline for submission of Mr. Garland's motion was established to be on or before July 31, 2018, and was received by the OEB on that date. A correction to the motion filed by Mr. Garland was received by the OEB on August 3, 2018.

The Garland Motions

Mr. Garland filed what he characterized as five separate motions under Rule 27.03 of the OEB's *Rules of Practice and Procedure*. Each of the motions requests an order requiring one or more of West Coast Huron Energy (WCHEI), Erie Thames Powerlines (ETPL), EARTH and the Town of Goderich to provide full and complete responses to certain interrogatories. Mr. Garland also submitted that if the Applicants are unable or unwilling to provide the information ordered by the OEB, the application should be put in abeyance, dismissed or withdrawn.

Decision on the Garland Motions

In making this decision on the motions brought by Mr. Garland, the OEB has relied on the reasons provided by the Applicants in their responses to the interrogatories for their refusal to provide the requested information. The OEB will not require further submissions. For the reasons discussed below, the Garland motions are denied.

The OEB has summarized the Garland motions and provided its findings below. Because there is a certain amount of repetition in the motions, in providing its findings the OEB has summarized the arguments made by Mr. Garland; identified the parts of the Garland motions to which those arguments relate; and provided its findings in respect of each of those areas of argument.

Summary of the Garland Motions

Garland Motion 1(a)

Motion 1(a) requested that the OEB direct the Applicants to provide:

- Copies of ERTH's audited financial statements (with the auditor identified) for 2015 and 2016 along with detailed notes.
- Financial statements (including balance sheet, income statement, and cash flow statement) of the parties to the proposed transaction for the past two most recent years.

Garland Motion 1(b)

Motion 1(b) requested that the OEB direct the Applicants to provide ERTH's consolidated 2015 financial statements and the ERTH Shareholder Agreement cited in the Letter of Intent.

Garland Motion 1(c)

Motion 1(c) requested that the OEB direct the Applicants to provide full and complete responses to Garland IR #8(a), (b), (c), (d), and (e) as summarized below.

Garland IR#8

- a) Confirm that the referenced Ingersoll information is an accurate summary of ERTH according to the Town of Ingersoll.
- b) Confirm that in 2016 ERTH had a Long-term Debt of \$33.9 Million while ETPL had a Long-term Debt of \$19.9 Million.
- c) Confirm that in 2016 ERTH had a Total Income of \$1.16 Million of which ETPL contributed \$1.08 Million.
- d) Confirm that shares in ERTH Corporation have no known intrinsic value, other than the assigned \$1 per share assigned by ERTH Corporation itself, and that ERTH raises share capital by printing more shares and exchanging those for tangible assets.

- e) Confirm that the intrinsic value of ERTH shares is untested in the market, and that as a result those shares are high risk and speculative with unknown value.

Mr. Garland also requested that further, and consistent with the OEB's *Handbook to Electricity Distribution and Transmitter Consolidations* (the Handbook), the OEB direct the Applicants to provide a valuation of any assets or shares that will be transferred in the proposed transaction, and to describe how this value was determined.

Garland Motion 2

Motion 2 requested that the OEB direct the Applicants to provide a full and complete response to Garland IR #7(a) by providing a new valuation report not used in negotiations.

Garland Motion 3

Motion 3 requested that the OEB direct the Applicants to provide full and complete responses to Garland IR #3(a), (b), (c), (d) and IR #4(a) and (b) as summarized below.

Garland IR#3¹

- a) Did Compass Minerals' new 'continuous drilling' equipment result in the need for utility 'upgrades' to meet their power requirements and when?
- b) What was the dollar value of the required 'upgrades', if any?
- c) Were the resulting higher capital costs, if any, recoverable through higher utility rates (and/or higher utility delivery charges) from Compass Minerals?
- d) Were these higher capital costs, if any, passed on to Goderich Hydro's other customers through higher hydro rates or absorbed as debt?

Garland IR#4²

- a) When and how was this debt created and what caused the debt?
- b) Did \$2 Million of this debt come out of a Town reserve fund in 2012?

Garland Motion 4

Motion 4 requested that the OEB direct the Applicants to provide full and complete responses to Garland IR #4(e) and (f) as summarized below. Alternatively, Mr. Garland

¹ Questions relate to the information provided in the June 26, 2017 "Goderich Hydro Report" to Town Council on the proposed merger.

² Questions relate to the June 26, 2018 "Goderich Hydro Report" that demonstrate WCHEI has a debt of \$3 million owed to the Town of Goderich.

suggested that the OEB could employ its “robust audit and compliance program to test the accuracy of reporting by distributors” in order to achieve the same objective.

Garland IR#4

- e) Does Goderich Hydro provide hydro service by 1st, 2nd or 3rd party agreement to the Rio-Can Plaza consisting of Zehrs, Wal-Mart etc. and/or to the Canadian Tire store, all located south east of the Town’s official boundaries off Highway 8? If not, then who does? Similarly, does Goderich Hydro provide hydro service by 1st, 2nd or 3rd party agreement to the ‘Jockey’ factory off Highway 21 and Mitchell St. south of the Town’s official boundaries, and if not, then who does?
- f) Does Goderich Hydro’s present service area extend beyond the Town’s official boundaries and, if so, please provide a Map showing both?

Garland Motion 5

Motion 5 requested that the OEB direct the Applicants to provide full and complete responses to Garland IR #5(a) and IR#9(c) and (d) as summarized below.

Garland IR#5

- a) If ERTH Corporation pays dividends to their shareholders, what were the annual total amounts, and by shareholder, for the corresponding years shown for Goderich Hydro on page 41 of the Goderich Hydro report (2000 – 2016).

Garland IR#9

- c) If the proposed ‘merger’ goes through, will Council be able to openly discuss ERTH Corporation business in public at its regular Council Meetings?
- d) If the proposed ‘merger’ goes through, what ongoing information will be available to both Council and citizens regarding Goderich’s investment in ERTH?

Mr. Garland relied on a number of arguments in support of his various motions. Each of those arguments was used as a ground for multiple requests. The OEB has set out below Mr. Garland’s primary arguments and the corresponding motion or part thereof to which each argument relates, followed by the OEB’s findings in respect of each of the arguments.

The Areas of Argument in the Garland Motions, and the OEB's Findings

Garland Argument 1

On page 1 of his motion, Mr. Garland states:

“The Board places a high value on transparency in its public review and approvals process in order to demonstrate that it is protecting the public interest and not hiding behind a veil of secrecy in its review and decision making.”

- and -

On pages 4, 6 and 10 of his motion, Mr. Garland states:

“It is also respectfully submitted that ERTH is the exception given the near total lack of financial information currently available for ERTH Corporation and that this requirement not be waived by the Board without damaging the Board’s reputation for ‘transparency’.

Argument 1 was used by Mr. Garland to support Motions 1(a), 1(b) and 2.

Findings Related to Argument 1

With respect to Mr. Garland’s contention that the requested disclosure aligns with the OEB goal of ensuring transparency during the public review process, the OEB ensures transparency by having all documents it requires to make its determinations placed on a public record. The OEB applies a rigid restrictive protocol to deal with documents requiring confidential treatment in order to ensure that all relevant documents that can be placed on the public record are available. The OEB strives to achieve effective and efficient review processes by ensuring that only documents that are relevant to the matters within the scope of the proceeding are made available. The OEB will not compel the production of evidence unless the evidence is considered relevant to this application.

The OEB is satisfied that the necessary documents to inform the appropriate review of this application have been submitted and placed on the public record. Therefore, the OEB will not compel the Applicants to produce the additional materials requested by Mr. Garland that include:

1. ERTH audited financial statements for 2015 and 2016.
2. Balance sheet, income statement, and cash flow statement of WCHEI, ETPL, ERTH, and the Town of Goderich for the past two most recent years.
3. ERTH Shareholder Agreement.
4. New valuation report not used during negotiations.

The OEB's findings related to Argument 1 are relevant to Mr. Garland's Motions 1(a), 1(b), 1(c), 2, 3, 4, and 5.

Garland Argument 2

On pages 2, 4, and 6 of his motion, Mr. Garland states:

"The Board's 'Handbook to Electricity Distribution and Transmitter Consolidations', January 19, 2016 sets out among other considerations 'The No Harms Test' and in Schedule 2 the 'Filing Requirements for Consolidated Applications'."

- and -

On pages 2, 4, 6, and 9 of his motion, Mr. Garland states:

"It is respectfully submitted that the 'Filing Requirements' are not extraneous, irrelevant or discretionary as they form the core of the application and of the information to be considered by the Board."

Argument 2 was used by Mr. Garland to support Motions 1(a), 1(b) and 2.

Findings Related to Argument 2

Mr. Garland argues that documents listed as requirements in the Handbook are not extraneous, irrelevant or discretionary and that the Applicants should be compelled to provide them. The Handbook provides guidance to applicants and stakeholders with respect to the OEB's expectations for a range of mergers, acquisitions, amalgamations and divestitures (MAADs) transactions. Applicants are free to make applications with the supporting evidence that they consider necessary to satisfy the OEB that customers will not be harmed by the transaction, i.e., be worse off than the *status quo*. The evidence required will vary depending on the nature of the transaction. In cases of insufficient evidence, the OEB will typically compel further production of evidence it considers necessary to make its determinations or deny the application for lack of supporting evidence. The OEB will not compel the provision of evidence on the basis of

it being listed in the Handbook unless it is considered by the OEB to be necessary to make determinations in the case.

The OEB finds that the additional materials requested by Mr. Garland are not required in order for the OEB to consider and make a determination on an application of this kind.

The OEB's findings related to Argument 2 are relevant not only to Mr. Garland's Motions 1(a), 1(b) and 2, but also to Motions 1(c), 3, 4, and 5.

Garland Argument 3

On pages 3 and 8 of his motion, Mr. Garland states:

“Based on the Interrogatories, specifically Board Staff IR #3(a), Garland IR #7 Preamble & IR #7(a), and the Applicants’ responses to the same and based on the Applicants July 10, 2018 response, below, to the Board’s amending letter dated June 13th, we know that:

In their Application the Applicants only requested approval for amalgamation of the LDCs pursuant to section 86(1)(c) of the OEB Act, and not the first step involving the issuance of ERTH Corporation shares to the Town of Goderich...For greater certainty, the Applicants are also seeking the OEB’s approval of the acquisition by ERTH Corporation of all the shares of WCHEI pursuant to section 86(2)(a) of the OEB Act.

Consequently, the Application involves 2 approval steps:

- 1) The merger of WCHEI/Goderich Hydro with ERTH Corporation through the Town of Goderich being issued ERTH Corporation shares [section 86(2)(a)]; and*
- 2) The amalgamation of WCHEI/Goderich Hydro with Erie Thames Powerlines (ETPL), one of ERTH’s subsidiaries/operating companies [section 86 (1)(c)].*

The first step involves amending the Application and including Schedule 2 ‘Filing Requirements for Consolidated Applications’ for this first step which specifically references ERTH Corporation and the Town of Goderich, which are parties to the 86(2)(a) Application.”

On page 13 of his motion, Mr. Garland repeats certain arguments made on pages 3 and 8 by stating:

“The Application involves 2 approval steps:

- 1) The merger of WCHEI/Goderich Hydro with ERTH Corporation through the Town of Goderich being issued ERTH Corporation shares [section 86(2)(a)]; and*
- 2) The amalgamation of WCHEI/Goderich Hydro with Erie Thames Powerlines (ETPL), one of ERTH’s subsidiaries/operating companies [section 86 (1)(c)].*

The first step involves amending the Application and including Schedule 2 ‘Filing Requirements for Consolidated Applications’ for this first step which specifically references ERTH Corporation and the Town of Goderich, which are parties to the 86(2)(a) Application.”

Argument 3 was used by Mr. Garland to support Motions 1(a), 1(b), 1(c), 2, and 5.

Findings Related to Argument 3

Mr. Garland requests information with respect to ERTH’s financial records, submitting that the consolidation involves the merger of WCHEI with ERTH and therefore ERTH is a party to the application. The Applicants responded that the merger is solely between ETPL and WCHEI and therefore the requested ERTH financial information is not relevant. The OEB agrees that the application does not include a request to approve the merger of WCHEI and ERTH, and finds that no such merger is proposed. The proposal is that ERTH will simply acquire the shares of WCHEI and therefore the financial records of ERTH would not contain information of interest to the OEB in this application. Mr. Garland contends that this may show financial transactions that would lead to higher rates for WCHEI customers. The Handbook provides the OEB’s approach to setting rates and general financial oversight of the regulated entities as being an ongoing regulatory activity. These activities occur before and after mergers and acquisitions and the OEB relies on its ongoing oversight authority for rate setting and affiliate transactions in parallel with, but outside of, its MAADs approval process.

The OEB will not compel the production of evidence to consider potential for future inappropriate cost allocation to WCHEI customers as part of this proceeding.

The OEB’s findings related to Argument 3 are relevant to Mr. Garland’s Motions 1(a), 1(b), 1(c), 2, and 5.

Garland Argument 4

On pages 4 and 9 of his motion, Mr. Garland states:

“Among the Filing Requirements in Schedule 2 are those listed under ‘2.2.4 Objective 2 – promote economic effectiveness and to facilitate the maintenance of a financially viable electricity industry.’ The 6th bullet point under Objective 2 states:

- Provide financial statements (including balance sheet, income statement, and cash flow statement) of the parties to the proposed transaction for the past two most recent years.”*

- and -

On page 4 of his motion, Mr. Garland states:

“Interrogatory Garland IR #8(f) noted: ‘f) ERTH Corporation is clearly a major party to the transactions yet no audited ERTH financial statements are included in the MADD Attachments 7 through 10. Please provide copies of ERTH audited financial statements for 2016 and 2015 with detailed notes and identify the auditor’.”

Argument 4 was used by Mr. Garland to support Motions 1(a) and 2.

Findings Related to Argument 4

Mr. Garland requested confirmations with respect to the shares in ERTH and provision of valuation reports for both WCHEI and ERTH. The Applicants responded that the value of the ERTH shares is not relevant to the OEB’s considerations in applying its “no harm” test and that the valuation reports were only used for negotiations and have no bearing on the test the OEB needs to apply in this application. The OEB’s focus in a share transfer agreement is on the impact of the merging of the multiple cost structures into one to determine if harm to customers will occur. The valuation reports and share values are matters of interest to the parties entering into the transaction and their shareholders and have no inherent impact on the cost structures that will make up the rates charged to customers. The OEB does not consider customers of a municipally owned utility to be shareholders of the utility due to their residency in that municipality. Municipalities are legal entities with ownership rights that they exercise on behalf of their constituencies.

The OEB finds that the additional materials requested by Mr. Garland are not required in order for the OEB to consider and make a determination on an application of this kind.

The OEB's findings related to Argument 4 are relevant to Mr. Garland's Motions 1(a), 1(b), 1(c), 2, and 5.

Having denied the Garland motions, the OEB considers it necessary to make provision for the following matters related to this proceeding. The OEB may issue further procedural orders from time to time.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. OEB staff, VECC, Mr. James McCartney, and Mr. Gord Garland shall file their submissions, if any, with the OEB and deliver them to the Applicants and all other parties on or before **October 5, 2018**.
2. The Applicants shall file their reply submission, if any, with the OEB and serve it on all parties on or before **October 19, 2018**.

All filings to the OEB must quote the file number, **EB-2018-0082** and be made electronically in searchable/unrestricted PDF format 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.oeb.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 or USB 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, Andrew Bishop, at Andrew.Bishop@oeb.ca and OEB Counsel, James Sidlofsky, at James.Sidlofsky@oeb.ca.

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DATED at Toronto, **September 19, 2018**

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary