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DECISION AND ORDER

EB-2019-0258 / EB-2020-0110

PORTLANDS ENERGY CENTRE INC. ON BEHALF OF PORTLANDS ENERGY CENTRE L.P. / ONTARIO POWER GENERATION INC.

Amendment to Electricity Generation Licences

BY DELEGATION, BEFORE: Brian Hewson
Vice President
Consumer Protection & Industry Performance

April 9, 2020

DECISION AND ORDER

Background

Portlands Energy Centre Inc. on behalf of Portlands Energy Centre L.P. (PEC LP) has applied to the Ontario Energy Board (OEB) under section 74 of the *Ontario Energy Board Act, 1998* (OEB Act) for an amendment to Schedule 1 of its electricity generator licence (EG-2004-0540) to add the Halton Hills Generating Station (HHGS) and the Napanee Generating Station (NGS). Currently, the licence authorizes PEC LP to generate electricity at the Portlands Energy Centre in Toronto.

The reason for the amendment is to reflect the change in ownership and operation of the HHGS and NGS gas generation plants. The transaction is described as follows in PEC LP's application:

By way of a purchase agreement executed by, among others, Ontario Power Generation ("OPG"), TransCanada Pipelines Limited ("TCPL") and TransCanada Energy Ltd. ("TCE"), TCE and TCPL have agreed to sell all of their interests in the Halton Hills Generating Station ("HHGS") and the Napanee Generating Station ("NGS", and collectively with HHGS "the TCE Facilities"), and the Portlands Energy Centre ("PEC Facilities") to wholly-owned subsidiaries of OPG. Currently, TCE owns 100% of each of the TCE Facilities and PEC LP (which is a limited partnership between TCE and OPG) owns and operates the Portlands Energy Centre under generator licence number EG-2004-0540. Effective on closing of the transaction, a wholly-owned subsidiary of OPG will acquire TCE's 50% interest in PEC LP. In addition, substantially concurrently with closing, PEC LP will acquire 100% of HHGS and NGS. As a result, PEC LP will become both owner and operator of the TCE Facilities upon closing of the transaction.

Currently, the HHGS and NGS are listed in the schedule of facilities attached to TCE's generation licence (EG-2009-0024). TCE is identified as both owner and operator of the two facilities. TCE requested that those facilities be removed from the schedule. No OEB approval is required for the acquisition by OPG of TCE's 50% interest in PEC LP.

The OEB will grant PEC LP's request to add the HHGS and NGS to the list of facilities in its licence, as both owner and operator. At the same time, TCE's licence EG-2009-0024 will be cancelled. In addition, for the reasons below, the OEB has decided to impose conditions in PEC LP's licence – and in its affiliate OPG's licence – to address concerns about market power.

Process

This Decision and Order is being issued under delegated authority without a hearing pursuant to section 6(4) of the OEB Act.

PEC LP submitted its application on October 21, 2019. The application was assigned the file number EB-2019-0258. At the same time, TCE submitted an application to have the HHGS and NGS removed from its generation licence. The OEB advised TCE that an amendment was not necessary as the HHGS and NGS were the only facilities listed in its licence, but that the licence would be cancelled in co-ordination with the amendment of PCE LP's licence. PEC LP and TCE asked that their requests be determined by the OEB without a hearing. PEC LP, OPG and TCE each responded to questions from the OEB. They requested that parts of their answers be treated confidentially, as they include commercially sensitive information, and the OEB grants that request.

For the reasons below, the OEB has determined that amendments to OPG's generation licence are also required. The OEB has therefore, on its own motion pursuant to section 19(4) of the OEB Act, made those amendments, under file number EB-2020-0110.

As part of its review of this matter, the OEB consulted with the federal Competition Bureau pursuant to the 2018 Memorandum of Understanding between the two agencies, and with the Independent Electricity System Operator. The OEB provided a draft of the proposed conditions to PEC LP and OPG for their comments.

Decision

Adding the HHGS and NGS to PEC LP's licence is more than just a simple administrative matter. As a result of the transaction between OPG and TCE, OPG, which is already by far the largest generator in the Province, will acquire (through a wholly owned subsidiary) control over the HHGS and NGS, and all of the Portlands Energy Centre, in which it currently holds a 50% interest. Although not directly related to PEC LP's application, the OEB notes that OPG has also completed the acquisition of the 560 MW Brighton Beach Generating Station. Upon completion of the TCE transaction, OPG and its related entities will control approximately half of all generation capacity in the Province,¹ and a significantly larger portfolio of natural gas assets that provide certain services necessary to the efficient functioning of the market in terms of their supply of mid-range and peaking energy.

The acquisition of additional generation assets by OPG raises concerns about the competitiveness of Ontario's wholesale electricity market and the potential implications for electricity consumers. The OEB therefore considers it necessary to include safeguards to protect the integrity of the market.

¹ Publicly available information on opg.com and ieso.ca.

In determining whether to amend a licence, the OEB must consider whether the amendment is “in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*”.² In the circumstances, the most salient of these factors are the need to protect the interests of consumers with respect to prices and to promote economic efficiency and cost effectiveness in the generation of electricity.³ The OEB is also charged with responsibilities to assess and address market power issues that may arise in the IESO administered markets.⁴

The OEB Act provides the OEB with broad discretion to impose licence conditions on licensed entities. It specifically enables the OEB to impose conditions governing the conduct of a generator “as that conduct relates to the abuse or possible abuse of market power.”⁵ It further elaborates on what such conditions may entail:

Abuse of market power

(5) Without limiting the generality of subsection (1), a licence to engage in an activity described in clause 57 (c), (d) or (f) may contain conditions to address the abuse or possible abuse of market power, including conditions,

- (a) establishing minimum and maximum prices or a range of prices at which electricity may be offered for sale or sold through the IESO-administered markets or directly to another person or class of persons;
- (b) restricting the duration of contracts between licensees and any other person; and
- (c) restricting significant investment in or acquisition of generation facilities located in Ontario.⁶

The OEB has identified the following elements of the IESO administered markets to be at greater risk to the potential for abuse of market power once the transaction is completed as a result of the significant concentration of hydro-electric and gas generating assets within the OPG generation portfolio. Specifically the type of resources and significant capacity that will be within OPG’s expanded portfolio presents OPG with greater opportunity to set prices or affect competition in all three of the Operating Reserve (OR) markets, the Day Ahead Commitment Process (DACP), and the real-time energy market (Energy).

² OEB Act, s. 74(4).

³ OEB Act, s. 1; *Electricity Act, 1998*, s. 1.

⁴ See for example ss. 80, 81 and 87 of the OEB Act.

⁵ OEB Act, s. 70(2)(d)(iv).

⁶ OEB Act, s. 70(5).

OPG strongly denies that the TCE transaction will lead to an abuse of market power. It points to a number of factors that it says will limit its incentive or ability to engage in anti-competitive activities, including:

- OPG's Memorandum of Agreement with its sole shareholder, the Province of Ontario, requires OPG to serve the public interest and operate in a way that moderates overall prices and supports the efficient operation of the electricity market
- the structure of the PCE LP contracts with the IESO does not create incentives for market gaming
- most of OPG's hydroelectric facilities are rate-regulated by the OEB
- the fact the electricity market is highly regulated – the Market Rules restrict abuses of market power, and the IESO, the Market Surveillance Panel (MSP) and the OEB each have a role in monitoring the market

While these factors may reduce the risk of anti-competitive behaviour, they do not eliminate it. The potential for OPG and/or PEC to abuse their market power may affect market participants' and consumers' confidence in the IESO administered markets. To be clear, the OEB has no reason to believe OPG has engaged in or is planning to engage in anti-competitive activities. Nevertheless, to ensure confidence in the market and to protect consumers the OEB believes that appropriate conditions can be put in place to address concerns about the potential abuse of market power that may arise from the completion of the transaction.

In the OEB's view, a two-pronged approach would be appropriate, comprising (1) the imposition of conditions on both OPG and PCE LP aimed at ensuring a degree of separation between the two entities, so that they continue to compete with each other in the wholesale electricity market, (2) conditions that require OPG and PEC to offer their resources into the IESO administered markets while being subject to after the fact audit to verify their behavior is in keeping with the requirement. These conditions will be in addition to the ongoing monitoring of the market and other mechanisms, described by OPG in its comments above, which together will in the OEB's view provide adequate protection of the market from any anti-competitive impacts that may arise from the transaction.

At this time, the OEB considers it to be premature to impose the more restrictive types of conditions that are contemplated under section 70 of the OEB Act, such as conditions establishing the prices at which OEB or PEC LP can sell electricity in the market or restricting any further additions to OPG's portfolio of generation facilities. Of course, if

evidence were to emerge of any abuse of market power, the OEB could, on its own initiative, amend either or both of the OEB and PEC LP licences again.

For now, the OEB will amend the two licences, effective on the closing of the OEB-TCE transaction, to mandate that each of OPG and PEC LP make decisions on bidding and supply into the Ontario electricity market independently. The precise wording of these new conditions is set out in the Order section below.

To ensure the generating assets under control of PEC and OPG fully participate in the IESO administered markets, the OEB will amend the two licences to include conditions requiring the licensees to offer all of their respective generating resources into each of the OR markets, the DACP and the Energy market, subject of course to any regulatory, safety, equipment technical constraints or IESO contractual requirements. Satisfying the spirit of this condition would require assessment of the prices (and other parameters) at which that capacity was offered. In order to operationalize this condition the OEB will require OPG and PEC LP to develop an agreement (the Agreement) with the IESO that sets out the specifics of this *must-offer condition* and an *ex post* monitoring program. The Agreement should identify the specific criteria that would be used to assess OPG and PEC LP's activity in the specified markets to identify potential abuse of market power.

To reassure the market that OPG and PEC LP are abiding by the conditions, the monitoring program shall provide for audit and reporting obligations for both OPG and PEC LP to provide both the IESO and OEB with access to information to assess compliance. The specific actions to be taken if there is a failure to comply with conditions will be determined based on the facts of the situation, however as discussed below the OEB has a number of tools with which to address any non-compliance. The agreement would be subject to approval by the OEB prior to its coming into effect and subject to review as necessary due to changes in the wholesale electricity market. The OEB expects PEC LP, OPG and IESO to expeditiously conclude the Agreement given its importance to providing confidence to all market participants and protecting the interests of consumers that the electricity market will not be negatively affected by the transaction. If an Agreement has not been filed for approval within three months of the completion of the transaction, the Licensees and IESO are expected to report to the OEB on the reasons for the delay and the OEB may at that time consider a different approach to completion of the Agreement.

It is also expected that, given the possible effects on the IESO-administered markets from the transaction, the MSP will monitor and report on the impact of the transaction on those markets.

If concerns about market power remain despite the conditions being added to OPG's and PEC LP's licences, there are a number of regulatory tools available to promptly identify and address them. These include further licence amendments under section 74 of the OEB Act, including those identified in section 70(5), advising the Minister of Energy, Northern Development and Mines under section 87 of the OEB Act, action by the IESO pursuant to the Market Rules, and action by the MSP pursuant to the *Electricity Act, 1998*.

IT IS ORDERED THAT:

1. PEC LP's electricity generation licence (EG-2004-0540), is amended by adding:
 - (a) the following immediately after section 5 of the licence:

5A Ring-fencing of Market Functions

5A.1 The Licensee shall not share employees that are directly involved in the offer to supply electricity or ancillary services into any of the IESO administered markets with Ontario Power Generation Inc. ("OPG") or any other affiliate that is licensed to generate electricity in Ontario. This shall not preclude the sharing of corporate services between the Licensee and OPG as those services are defined in the Affiliate Relationships Code for Electricity Distributors and Transmitters subject to those employees not having access to confidential information as described in section 5A.2

5A.2 The Licensee shall implement a ring-fencing plan to ensure that no competitively sensitive information ("CSI") shall be disclosed to or obtained from any employees of OPG who at the time of disclosure are engaged by OPG in roles or functions involving the offer to supply electricity or ancillary services into any of the IESO-administered markets.

5A.3 For the purpose of section 5A.2, CSI includes information about electricity bid and offer strategy, electricity offer prices and quantities, gas procurement strategies and outage plans. CSI does not include (i) historical data or information that is no longer competitively relevant, (ii) data or information that is in the public domain or (iii) documents from which competitive information has been redacted, deleted, aggregated or otherwise dealt with in a manner that renders the document in question not commercially sensitive.

5B Requirement to Offer into IESO Administered Markets

5B.1 - Subject to any applicable regulatory or safety requirements and the Agreement described in section 5B.2, the Licensee shall at all times offer all available generating capacity into the IESO administered markets for Operating Reserve, the Day Ahead Commitment Process and real-time Energy (the “Must-Offer Condition”).

5B.2 - The Licensee shall enter into an Agreement with the IESO for the purpose of assessing ongoing compliance with the Must-Offer Condition established in section 5B.1. The Agreement shall include any necessary detail or description of the Must-Offer Condition, the criteria that will be used to assess whether the Licensee has complied with the condition, and the right for the IESO to audit the Licensee where the IESO identifies based on the criteria that the Licensee may not have complied with the condition. The Licensee shall file the Agreement for approval of the OEB. Once the Agreement is approved, any material changes to the Agreement shall be filed with the OEB for approval.

(b) the following to Schedule 1 (List of Licensed Generation Facilities), immediately after item 1:

2. The ownership and operation of Halton Hills Generating Station, with an installed capacity of 683 MW located at Part of Lot 15, Concession 6, 7974 Sixth Line South, Halton Hills, Ontario.

3. The ownership and operation of Napanee natural gas-fired combined cycle generation facility with an installed capacity of 900 MW and located at 7143 Loyalist Parkway, Bath, Ontario.

2. OPG’s electricity generation licence (EG-2003-0104) is amended by adding the following immediately after Part 6 of the licence:

PART 7 RING-FENCING OF MARKET FUNCTIONS

1. The Licensee shall not share employees that are directly involved in the offer to supply electricity or ancillary services into any of the IESO administered markets with Portlands Energy Centre L.P. (PEC) or any other affiliate that is licensed to generate electricity in Ontario. This shall not preclude the sharing of corporate services between the Licensee and PEC or any other affiliate as those services are defined in the Affiliate

Relationships Code for Electricity Distributors and Transmitters *subject to those employees not having access to confidential information as described in paragraph 2.*

2. *The Licensee shall implement a ring-fencing plan to ensure that no competitively sensitive information (“CSI”) shall be disclosed to or obtained from any employees of PEC or any other affiliate that is licensed to generate electricity in Ontario who at the time of disclosure are engaged by PEC or the other affiliate in roles or functions involving the offer to supply electricity or ancillary services into any of the IESO administered markets.*

3. *For the purpose of paragraph 2, CSI includes information about electricity bid and offer strategy, electricity offer prices and quantities, gas procurement strategies and outage plans. CSI does not include (i) historical data or information that is no longer competitively relevant, (ii) data or information that is in the public domain or (iii) documents from which competitive information has been redacted, deleted, aggregated or otherwise dealt with in a manner that renders the document in question not commercially sensitive.*

PART 8: REQUIREMENT TO OFFER INTO IESO ADMINISTERED MARKETS

1. *Subject to any applicable regulatory or safety requirements and the Agreement described in paragraph 2, the Licensee shall at all times offer all available generating capacity into the IESO administered markets for Operating Reserve, the Day Ahead Commitment Process and for real-time Energy (the “Must-Offer Condition”).*

2. *The Licensee shall enter into an Agreement with the IESO for the purpose of assessing ongoing compliance with the Must-Offer Condition established in paragraph 1. The Agreement shall include any necessary detail or description of the Must-Offer Condition, the criteria that will be used to assess whether the Licensee has complied with the condition, and the right for the IESO to audit the Licensee where the IESO identifies based on the criteria that the Licensee may not have complied with the condition. The Licensee shall file the Agreement for approval of the OEB. Once the Agreement is approved, any material changes to the Agreement shall be filed with the OEB.*

3. Items 1 and 2 will take effect on the day the OPG-TCE transaction closes. OPG shall notify the OEB when the closing occurs, and the OEB will then issue the amended PEC LP and OPG licences, which will be backdated to the closing date. The OEB will concurrently cancel TCE's electricity generation licence (EG-2009-0024).
4. The confidentiality requests by PEC, OPG and TCE are granted.

DATED at Toronto April 9, 2020

ONTARIO ENERGY BOARD

Original Signed By

Brian Hewson
Vice President, Consumer Protection & Industry Performance