



EB-2007-0691

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

AND IN THE MATTER OF a review of a notice of proposal
filed by Kruger Energy Inc. under section 81 of the *Ontario
Energy Board Act, 1998*.

BEFORE: Paul Sommerville
Presiding Member

Cynthia Chaplin
Member

DECISION AND ORDER

The Application

On July 17, 2007, Kruger Energy Inc. ("KEI") filed a notice of proposal with the Ontario Energy Board (the "Board") under section 81 of *Ontario Energy Board Act, 1998* (the "Act"). KEI is an affiliate of Kruger Energy Port Alma, the owner and operator of a wind power project near Port Alma, Ontario. Under section 81 of the Act, a generator or an affiliate of a generator cannot, among other things, acquire an interest in a transmission or distribution system in Ontario or construct a transmission or distribution system in Ontario unless it has first given notice of its proposal to do so to the Board and the Board has either not issued a notice of review or has approved the proposal under section 82 of the Act. Section 82(3) of the Act states that the Board shall approve a proposal under section 81 if it determines that the impact of the proposal would not adversely affect the development and maintenance of a competitive market.

In the notice of proposal, KEI stated that:

The Project consists of the construction and operation of a 100 MVA substation which will connect potential future generation projects(s) of KEI or an affiliate of KEI to the IESO-controlled grid. In future, other

generation facilities, unrelated to KEI may wish to connect to the Project. The Project would be located in the Municipality of Chatham-Kent, near the Bloomfield Business Park, and the connection would be to the 230 (kV) lines between the Chatham TS and the Lauzon TS.

It should be noted that the precise characterization of the proposed project is an area of uncertainty. Whether it is properly characterized as a transmission system or a distribution system depends on factors which have not been resolved. Section 81 operates notwithstanding this uncertainty.

The Board assigned the notice of proposal file number EB-2007-0691.

The Proceeding

On September 5, 2007, the Board received a submission from Allus Power Inc. ("Allus Power") in which Allus Power stated that KEI's proposal would give KEI an unfair competitive advantage to proceed with its own projects. KEI filed a reply on September 11, 2007. AIM PowerGen Corporation requested a meeting with the Board on KEI's notice of proposal, and was given an opportunity to file a submission, but did not proceed with the filing of a submission. Based on the submissions provided by Allus Power and KEI, the Board issued its notice of review of KEI's notice of proposal under section 81 of the Act on September 13, 2007. In accordance with section 82 of the Act, the Board proceeded with the review of the proposal. The Board issued a Notice of Written Hearing on September 25, 2007. KEI served and published the Notice of Written Hearing during the period of September 27 to 29, 2007. Allus Power, Chatham-Kent Hydro Inc. ("Chatham-Kent Hydro"), the Independent Electricity System Operator ("IESO"), and the Ontario Power Authority ("OPA") were granted intervenor status in the proceeding. During the course of the proceeding, the following three parties were granted late intervenor status: Hydro One Networks Inc. ("Hydro One"); Invenergy Canada; and the Power Workers' Union ("PWU").

In accordance with Procedural Order #1, issued by the Board on October 26, 2007, KEI filed its evidence and interrogatories were filed by Board staff, Chatham-Kent Hydro, the OPA, and Allus Power. KEI informed parties in its evidence that it was in a negotiation process to enter into a Memorandum of Understanding with AIM PowerGen Corporation to share in the costs of development, construction and operation of the proposed substation and share in connection of generation facilities up to the proportionate share of the proposed substation's total capacity. In response to a Board Staff interrogatory,

KEI stated that it would use a queuing process that was similar to Hydro One's to allot transformation capacity at the proposed substation to generation customers. In response to an OPA interrogatory, KEI stated that as an unlicensed transmitter/distributor, it was not subject to the requirement for non-discriminatory access.

On January 7, 2008, the Board issued a letter to KEI stating that it was of the view that there was insufficient evidence to determine whether the impact of the proposed substation would adversely affect the development and maintenance of a competitive market. The Board stated that System Impact Assessment ("SIA") and Connection Impact Assessment ("CIA") applications were relevant to the proceeding and were required to be filed with the IESO and Hydro One respectively before the Board held a technical conference. KEI filed an SIA application with the IESO on February 25, 2008.

On March 27, 2008, the Board issued Procedural Order #2 wherein the Board scheduled a technical conference for April 14, 2008 and provided all parties with the opportunity to file the questions that they would be asking at the technical conference. The Board reminded all parties that the sole issue in this proceeding is whether the impact of the proposal adversely affects the development and maintenance of a competitive market. The Board stated that parties were expected to address the following issues:

- (a) the capacity of the 230 kV lines between the Chatham Transformer Station and the Lauzon Transformer Station, in particular, whether the proposed substation could:
 - (i) limit future access to the 230 kV lines by other persons; and
 - (ii) impose limits on the IESO operation of the lines which could restrict other persons; and
- (b) the future operation of the proposed substation, in particular:
 - (i) what the process would be for selecting generation projects for connection to the proposed substation; and
 - (ii) whether the IESO and Hydro One connection processes could be adversely affected.

On April 2, 2008, KEI filed a letter with the Board requesting that the technical conference be adjourned to early June. It was KEI's belief that it would not be in a position to address Board staff's questions, filed on April 2, 2008, as fully as would be

beneficial to the Board in its consideration of the section 81 notice of proposal. No party objected to the adjournment request and the Board granted the adjournment.

The technical conference was subsequently rescheduled for June 12, 2008. On June 9, 2008, KEI filed a letter with the Board requesting that the technical conference be adjourned for a second time. KEI noted that the planned release date for new Renewable Energy Standard Offer Program ("RESOP") rules was the end of August. Accordingly, KEI proposed that the technical conference take place sometime after August. Again, the Board granted the adjournment.

A transcribed technical conference was held at the Board's offices on October 10, 2008. KEI, Chatham-Kent Hydro, IESO, OPA and Hydro One attended the conference. The IESO informed parties that the KEI proposed substation, in itself, is electrically neutral and has no impact on capacity on the system; however, the IESO would not allocate capacity to the substation. The IESO requires a power purchase agreement or a connection and cost recovery agreement for a proposal to be considered for the IESO queue. During the technical conference, KEI stated that it proposes to build the 100 MVA substation and connect four as yet undocumented KEI 10 MW wind projects to the substation. Ultimately the projects of other parties would be connected to the remaining capacity and it is KEI's proposal that the substation be transferred to Chatham-Kent Hydro's ownership. KEI's projects would have priority access to the substation. It is KEI's position that if the substation is transferred to Chatham-Kent Hydro, KEI's four 10 MW projects would comply with the OPA's current RESOP rules.

KEI's argument-in-chief was filed on November 10, 2008. Board staff, IESO, Hydro One, PWU, and the OPA filed submissions and KEI filed a reply submission.

The full record of the proceeding is available for review at the Board's offices and on the Board's website. While the Board has considered the full record, the Board has summarized and referred only to those portions of the record that it considers helpful to provide context to its findings.

Board Findings

The Notice of Proposal

At the outset, it is important to note that this notice of proposal under section 81 is novel. While a number of generation developers have built and financed the

transmission assets necessary to connect their projects to the grid, it appears as though in all cases these operators had received power purchase contracts and the transmission assets were designed with a capacity equivalent to the generation expected from the respective generation facilities. In fact, a KEI affiliate, Kruger Energy Port Alma, has built such a transmission asset to bring the generation produced by its Port Alma Wind Farm onto the grid. The Board approved the section 81 notice of proposal for the Port Alma Wind Farm transmission assets in proceeding EB-2008-0028.

What sets the current proposal apart is that the proposed transmission assets are designed to accommodate significantly more generation than what will be used by the proponent. If completed, the proposed transmission assets would have a capacity more than twice as large as that associated with any combination of projects to be undertaken by KEI.

Further, KEI currently has no approved projects of any size that would connect to the proposed transmission assets. It hopes to succeed in procuring contracts from the OPA for up to 40 MW of the 100 MVA capacity of the proposed substation, but at this stage this prospect is speculation.

It is important to place this notice of proposal within a broader context.

First, in Ontario, transmission of electricity is not restricted to a single provider. While the province-owned transmitter, Hydro One, has an overwhelming market position, accounting for over 95% of the transmission in the province, other parties can become engaged in the business of transmission. Generation is a competitive business according to the regulatory and legal structures in the province.

Second, it appears that there is a shortage of distributor owned assets within the area proposed for the substation, to which generation developers can connect. As part of its evidence, KEI provided correspondence from Hydro One confirming that KEI projects could not be accommodated at Hydro One's Kent TS. Subsequent to the technical conference, Chatham-Kent Hydro filed a letter dated August 21, 2007, in which it described its interest in constructing assets to connect RESOP projects. As things stand now, many generation developers in the area are not in a position to be accommodated by the distributors and consequently are unable to apply for RESOP.

Third, in considering this proposal, the Board is specifically limited to a consideration of the extent to which the proposal could be expected to have an adverse effect on the competitive market. In this context, therefore, the Board's sole focus is on the effect that the construction and operation of the proposed substation could be expected to have on the competitive market for generation.

Current government policy supports the development of renewable energy in the province. To that effect, the OPA has implemented RESOP, which, under its current rules, makes available long term contracts at attractive rates for renewable energy projects which are no larger than 10 MW and which are connected to the distribution system of a licensed distributor. As noted above, the host distributor in this case, Chatham-Kent Hydro, appears to not be able to accommodate generation projects in this vicinity. Accordingly, KEI decided to innovate by proposing to build a substation, which it hopes to turn over to a distributor at a later date. Further, KEI proposed to size that substation with capacity of 100 MVA so that it could accommodate several generation projects, reserving for itself 40 MW, and putting on offer the remaining capacity.

Impact of Proposal on Development and Maintenance of a Competitive Market

KEI has a responsibility to demonstrate to the Board that there is no adverse impact from its proposed substation on the development and maintenance of a competitive market. Both the IESO and Hydro One, through their processes, will ultimately review the proposed 100 MVA substation and connected generators. While KEI is aware of these requirements, and its affiliate, Kruger Energy Port Alma has experience with the necessary regulatory and technical reviews and approval processes, it appears that KEI has only had limited communication with the IESO and Hydro One regarding the proposed substation. The Board notes that KEI was unable to respond to the technical conference question relating to what agreements KEI proposes to enter into with the IESO and Hydro One.

On the surface, the construction of the proposed 100 MVA substation is not inherently objectionable. At the technical conference, the IESO characterized the proposed 100 MVA substation as electrically neutral. The IESO also confirmed that it is not the substation itself that would be the trigger for the allocation of transmission capacity. The IESO requires a power purchase agreement or a connection and cost recovery agreement for a proposal to be considered for the IESO queue. The submissions of Board staff, the IESO, Hydro One and the PWU caution that, if constructed, the 100

MVA substation would not be an idle asset. KEI, and possibly others, plan to connect generation to the substation and the impact on system reliability and congestion will need to be determined by the IESO and Hydro One through a completed SIA and CIA. However, in proposing a substation that is larger than its own needs, KEI cannot provide the information that would enable the IESO and Hydro One to conduct system analyses to determine impacts on system reliability and congestion. Without knowing what impact on congestion this substation and its associated generation will have, it is not possible to adequately gauge all the effects KEI's proposal may have on the competitive market.

KEI's position on the allocation of substation capacity has evolved during the course of the proceeding. The original notice clearly stated that KEI's project included the operation of the substation. Early in the proceeding, KEI informed the Board of negotiations with AIM PowerGen and referred to a queuing process, but did not provide specific detail. More recently KEI has stated that it would connect its 40 MW of generation first, but that it would be amenable to a third party making the determination on queuing for the remaining capacity.

The transmission of electricity is a regulated activity and transmitters and distributors are required to be licensed unless they meet certain exemptions from licensing under Ontario Regulation 161/99—*Definitions and Exemptions* (made under the Act). KEI has suggested that its proposal meets licensing exemptions of section 4.0.2(1)(a) and (d) of Ontario Regulation 161/99. Board staff, the IESO, Hydro One and the PWU submitted that KEI has not provided sufficient information to determine whether KEI is exempt from licensing requirements or not.

If KEI is exempt from licensing under Ontario Regulation 161/99, then KEI would also be exempt from the requirement to provide non-discriminatory access to its system under section 2.2.1 of Ontario Regulation 160/99—*Definitions and Exemptions* (made under the *Electricity Act, 1998*). If KEI is licensed and has to comply with the requirements of non-discriminatory access, it is stronger evidence that there will be no adverse effect on the competitive market. If, however, KEI is unlicensed and does not have to provide non-discriminatory access, there is more of a concern in relation to the possible adverse effects on the competitive market. The intervenors noted that provision of non-discriminatory access by transmitters and distributors is fundamental to the development and maintenance of a competitive market.

The Board agrees with the PWU that where a party seeks the benefit of exemption from obligations, the onus is on the party to establish that it qualifies for the exemption. In this case, there is not enough information to determine whether KEI would need to be licensed or not and therefore whether it would need to comply with non-discriminatory access.

The Board has considered the notice of proposal and the record of the proceeding. Overall, the Board finds that KEI has not provided sufficient information for the Board to determine that the impact of the proposed 100 MVA substation and its operation would not adversely affect the development and maintenance of a competitive market. There is a lack of clarity and a lack of information on a number of issues in this proceeding, including but not limited to, the fact that there is no assessment of the impact of the substation and the associated generation on congestion, the queuing process is undefined, the licensing requirements and the provision of non-discriminatory access is unclear, and there is doubt about whether a distributor even wants to have the assets transferred to it once the substation is built. Given all this uncertainty, the Board cannot make a final determination on whether the proposal would adversely affect the competitive market. Because the Board cannot find that the proposal would not have an adverse affect on the development and maintenance of a competitive market based on the evidence provided, the Board cannot approve the proposal.

The Board acknowledges KEI's efforts to come forth with a unique proposal to connect its generation projects. KEI may choose to file a notice of proposal in the future for either a substation which matches the capacity of any approved KEI generation projects or for a larger substation after it has fully explored the regulatory and technical aspects associated with the construction and operation of such a substation.

It is the Board's expectation that this denial will not have a significant adverse effect on Kruger because the supporting generation projects are still in development. Kruger has made clear that it is not interested in building and operating transmission systems per se, but only as part of its own generation projects. Therefore, the Board concludes that Kruger would not proceed with constructing the station until the generation projects are confirmed. When the generation projects are more fully developed, the Board anticipates that Kruger would be able to present a complete application for whatever type of project it chooses to pursue.

THE BOARD ORDERS THAT:

1. Kruger Energy Inc.'s notice of proposal under section 81 for the construction and operation of a 100 MVA substation is denied.
2. Kruger Energy Inc. shall pay the Board's costs of and incidental to this proceeding immediately upon receipt of the Board's invoice.

ISSUED at Toronto, January 8, 2009

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary