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OEB Adds Licence Conditions to Ensure Generator Does Not Abuse Market Power

By David Stevens

On April 9, 2020, the Ontario Energy Board (OEB) issued a Decision and Order Amending the Licences of Portlands Energy Centre L.P. (PEC) and Ontario Power Generation (OPG). The OEB's Decision relates to the pending acquisition of three gas-fired generation facilities by PEC from TransCanada Energy and TransCanada PipeLines. Specifically, the OEB's Decision responds to the requested amendment of the electricity generation licence for PEC to reflect that it becomes the owner and operator of two other gas-fired generation facilities (in Napanee and Halton Hills).

Upon the completion of the transaction, PEC will become a wholly-owned subsidiary of OPG, which is the largest electricity generator in Ontario. As noted by the OEB, this means OPG and its related entities will control approximately half of all generation capacity in Ontario 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."

In its Decision, the OEB found that the pending acquisition "raises concerns about the competitiveness of Ontario's wholesale electricity market and the potential implications for electricity consumers." Specifically, the OEB found that "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)." The OEB therefore decided that it must "include safeguards to protect the integrity of the market."

In coming to this conclusion, the OEB acknowledged OPG's assurance that the transaction will not lead to an abuse of market power and the reasons supporting that assurance. However, the OEB determined that "to ensure confidence in the market and to protect consumers ... 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."

The OEB determined that it would take a "two-pronged approach" that would: (1) impose conditions on OPG and PEC "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"; and (2) "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 requirements are set out in licence conditions that are to be added to the electricity generation licences for both OPG and PEC, upon the closing of the transaction. The first of these conditions ("Ring-fencing of Market Functions") requires that PEC and OPG not share employees or competitively-sensitive information related to the supply of electricity or ancillary services into the IESO-administered markets. The second of the conditions ("Requirement to Offer into IESO Administered Markets") indicates that, subject to any applicable regulatory or safety requirements, PEC and OPG must "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 OEB's Decision concludes by indicating that the Market Surveillance Panel (MSP) will monitor and report on the impact of the transaction on the IESO-administered markets. If concerns about market power are expressed, then further licence conditions may be added, or compliance action might be taken by the MSP, IESO or Minister of Energy.

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