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(original)*

CT-89/1

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research under Sections 92 and 105 of the Competition Act, R.S.C. c.C-34, as amended:

AND IN THE MATTER OF the proposed acquisition by Asea Brown Boveri Inc. of certain assets and property comprising the electrical transmission and distribution business of Westinghouse Canada Inc., including those of its wholly-owned subsidiary Transelectrix Technology Inc.

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
DEC 1 1989	
REGISTRAR - REGISTRAIRE	# 119(a)
OTTAWA, ONT.	

B E T W E E N:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

ASEA BROWN BOVERI INC., WESTINGHOUSE CANADA INC., TRANSELECTRIX TECHNOLOGY INC.

Respondents
AMENDED AT HEARING THIS 18th
DAY OF December 19 89

PUBLIC STATEMENT OF GROUNDS FOR APPLICATION PURSUANT TO THE DIRECTION OF THE PRESIDING MEMBER FOR ORDER TO VARY CONSENT ORDER DATED JUNE ~~21~~ 15, 1989

Suzanne Lago
REGISTRY OFFICER

The following sets forth the principal grounds on which Asea Brown Boveri Inc. ("ABB"), is applying for an order to vary the Consent Order of the Competition Tribunal ("Tribunal") dated June 21, 1989 (the "Original Order"). This Statement is filed pursuant to the "Order Regarding Prehearing Procedure and Schedule for Hearing of Application to Vary Filed on November 8, 1989" dated November 9, 1989.

**Need for Extension of Time to Satisfy FTA
Accelerated Tariff Reduction Condition**

1. The immediate necessity for modifying the Original Order arises from the fact that, as indicated in the Affidavit of Peter A. Magnus ("Magnus Affidavit") filed in connection with this matter and other material filed, it will not now be possible, for reasons which are no fault of ABB, for the condition concerning accelerated tariff reduction under the Free Trade Agreement ("FTA Accelerated Tariff Reduction") on medium power transformers to be effected by January 1, 1990, being the date stipulated in paragraph 10(b) of the Original Order for satisfaction of this condition.

Duty Remission Order Condition Can be Satisfied

2. It would be possible, and ABB has taken the necessary steps to ensure that this will happen, for the condition in paragraph 10(a) of the Original Order respecting the issuance of a duty remission order in respect of large power transformers ("Duty Remission Order") to be satisfied more or less coincidentally with the issuance of the varying order sought herein (the "Varying Order"). The actions taken by ABB in regard to this Remission Order are described in Magnus' Affidavit.

Likely Timing of FTA Accelerated Tariff Reduction

3. As indicated in Magnus' Affidavit, the FTA Accelerated Tariff Reduction in respect of medium-sized power transformers is expected to be implemented but not before January 1, 1990 and more likely by April 1, 1990. This is for the reason that, although the Canadian and United States governments are understood to be agreed to proceed with the tariff reductions on these items, it is not expected that the Canadian FTA Accelerated Tariff Reduction would go into effect prior to the reciprocal United States reductions becoming effective. Such reductions are not expected to occur until at least 60 days after the United States Congress commences its next session which is not expected to occur before the third week in January, 1990.

4. There is, nevertheless, a very high probability that these reductions will become effective as evidenced by the joint announcement by the Canadian and United States government authorities on or about November 30, 1989 respecting the planned implementation of this tariff reduction.

Purpose and Effect of Hold Separate Provisions

5. The hold separate provisions (paragraphs 3-9, both inclusive) of the Original Order (the "Hold Separate Provisions") were designed to preserve the Hamilton business and the Guelph

business (both as defined in the Original Order) of Transelectrix Technology Inc. ("TTI") for divestiture to a third party should that be required in the event that either the Duty Remission Order, on large power transformers, or the FTA Accelerated Tariff Reduction, on medium power transformers, should not be implemented, as required by the terms of the Original Order.

6. As mentioned, while the Duty Remission Order on large power transformers will become effective (assuming the Amended Order is issued) prior to January 1, 1990, the FTA Accelerated Tariff Reduction on medium power transformers is not expected to become effective before April, 1990. This means that if the terms of the Original Order are simply extended to provide sufficient time for the FTA Accelerated Tariff Reduction condition to be satisfied, the Hold Separate Provisions (without divestiture) will be in effect for a period of time far in excess of what was reasonably anticipated at the time the Original Order was issued.

Production Difficulties at TTI

7. In the meantime, there have been adverse developments in the business of TTI which were not anticipated at the time the Original Order was issued and which, if allowed to continue without remedial action being taken, could have serious adverse implications for the ultimate saleability of such business should its divestiture be required. Production delays have very

seriously adversely impacted the business of TTI with the consequence that the potential for TTI to be a significant independent competitor were it required to be divested have been seriously diminished. These developments are detailed in the Affidavits of Peter Janson and Donald McFetridge filed in connection with the Application.

Increased Competitiveness in Power Transformer Marketplace

8. These production difficulties, and related problems, being experienced by TTI are occurring at a time when, coincidentally, the level of activity in the large and medium power transformer marketplace in Canada has increased very considerably. These developments are detailed in the Affidavits of Donald McFetridge and Peter Janson, filed in connection with this Application. During the past six months, as mentioned in such affidavits, a very substantial portion of the Canadian power transformer sales most particularly in the large categories has gone to foreign suppliers. Moreover, because of the difficulty TTI is experiencing in completing its existing contractual commitments, it would appear that at least some of its customers are concerned that TTI can not be a serious bidder on new orders because any additional workload may jeopardize the completion of existing orders which TTI has not yet filled for them.

Hold Separate Provisions Prevent Effective Remedial Action

9. The Hold Separate Provisions are effectively preventing ABB from taking necessary remedial action to correct this situation and restore the confidence of the customers on whom TTI relies for the bulk of its business. As detailed in the Affidavit of Peter Janson, there are a variety of possible actions which could be taken by ABB to rectify this situation without, at the same time, impairing the ultimate independent competitive capability of TTI should a divestiture of that operation to a third party ultimately become necessary. Indeed, the contemplated remedial action should, if anything, provide greater assurance that there would be an independently viable competitive business to be sold if, in the unlikely event, such sale should ever be required.

10. In light of this situation, and with a view to preventing any further deterioration of the TTI business, a principal purpose of the proposed modifications of the Original Order is the release of these restrictions to permit appropriate corrective action to be taken while preserving a positive obligation on the part of ABB to ensure that, in the now unlikely event that a divestiture should be required, there would be a free-standing competitive business operation to be disposed of. In this regard, the proposed Varying Order provides for the Guelph business to be retained as a free-standing operation available on a ready-for-sale basis and contemplates the

preservation of all its essential capabilities, including management, engineering staff and all equipment and facilities. These new provisions which, in effect, would replace the existing Hold Separate Provisions are set forth in paragraphs 3 to 9 (both inclusive) of the proposed Amended Order.

Immediate Duty Remission on Large Power Transformers

11. Moreover, the Varying Order provides for the immediate coming into effect of the Duty Remission Order on large power transformers which, under the Original Order, was to be deferred until such time as the FTA Accelerated Tariff Reduction became effective. This means that, effective virtually immediately, there will be across-the-board duty reductions for all large power transformers in respect of which the merger brought about the highest levels of domestic market concentration and gave rise to more significant concerns regarding possible lessening of competition in the Canadian marketplace.

Benefits of Releasing Hold Separate

12. As mentioned above, the future implementation of the FTA Accelerated Tariff Reduction is now virtually assured, although its timing is delayed significantly with the adverse implication of such delay likely causing further deterioration in the business position of TTI. The proposed Varying Order will address this deficiency while preserving for sale a

strengthened Guelph business operation in the now unlikely eventuality this should be required. At the same time, lifting of the restrictions will assist ABB, as the purchaser of TTI, to help shore-up an investment, the value of which has been rapidly diminishing since the date of its purchase.

TTI Guelph Business

13. INTENTIONALLY OMITTED

Effective Shortening of Time for Divestiture

14. If the Original Order is merely amended to extend the time for satisfaction of the FTA Accelerated Tariff Reduction condition and that condition is not satisfied within the new extended time period, the time required to complete such divestiture will most probably extend well beyond the divestiture timeframe which is contemplated by the Varying Order. This is because of the "two step" divestiture procedure provided for in the Original Order.

Guelph to be Maintained as a Freestanding Operation

15. During the pendency of the FTA Accelerated Tariff Reduction condition, ABB would, under the terms of the Varying Order, be obligated to maintain Guelph as a free-standing operating division having an independent competitive capability.

It would be both self-contained and self-sufficient so that a purchaser buying the operation in a divestiture would not have to replicate any support operations being provided by ABB from outside Guelph. A purchaser of the Guelph operation would acquire all of the same license technology which is possessed by the TTI division in respect of its Guelph operation and would have permanent right to use the same. Consistent with the principle that ABB would maintain the Guelph business as a free-standing operating division, that division would include within it all necessary employment skills to operate Guelph on an independent, competitive basis. As well, ABB will not take any action which would impair the ability of Guelph, as an independent operating unit, to continue to undertake the manufacturing activities currently carried on at Guelph. No equipment currently required in the Guelph operation would be removed, sold or dismantled. Such operating equipment and properties would be maintained in full proper working order so as to retain its productivity, contribution to profit and separate saleability of the business to a third party purchaser.

Continuity of Business

16. Because of its existing approximate two year production backlog, the Guelph operation will continue its production activities, in the ordinary course, during all relevant time periods covered by the Varying Order. To the extent that ABB is by virtue of the proposed modifications to the Original Order

permitted to assist TTI to improve its performance on deliveries, it will not take any action which will reduce the level of production at Guelph.

Rescission of Duty Remission Order if Divestiture Required

17. In the event that the FTA Accelerated Tariff Reduction on medium power transformers is not obtained within the required time and divestiture is required, ABB would take appropriate action to seek the rescission of the Remission Order in its application to large power transformers. ABB has received assurances from the Department of Finance that, should this occur, all necessary action will be taken to facilitate the rescission of this order. This would be important to a potential purchaser in the event any divestiture should be required of the Guelph facility on a divestiture (i.e., to have the tariff protection on large power transformers).

Amended Order will Enhance Divestiture Remedy

18. In summary, then, amendment of the Original Order in the manner proposed in the Varying Order will enhance the value of the Guelph facility as a backstop should divestiture become necessary. Conversely, a decision not to amend the Original Order, beyond extending the time for satisfaction of the FTA Accelerated Tariff Reduction condition, will likely lead to further depreciation in the value of the Guelph facility as such a backstop.

Position of Westinghouse

19. INTENTIONALLY OMITTED

Position of Other Interested Parties

20. The only parties which have indicated a desire to participate in these proceedings by possibly filing material in response to this Application are Ontario Hydro and Federal Pioneer Limited, neither of which have indicated their opposition to this Application.

Conclusion

21. In conclusion:

- (a) the issuance of a Remission Order with respect to large power transformers can be effected virtually immediately;
- (b) the prospects of the FTA Accelerated Tariff Reduction not being implemented are remote; however, such implementation will clearly be delayed at least four months beyond the implementation time originally expected;
- (c) a continuation of the Hold Separate Provisions will prevent necessary remedial action being taken to shore up the competitive position of TTI and preserve its salability in the unlikely event that a divestiture should be required;

(d) further delay without such remedial action being taken will only serve to worsen the competitive position and render Guelph a less viable unit for sale in a divestiture situation; and

(e) the Amended Order provides for preservation of all of the essentials in Guelph for a free-standing competitive operation should it be required to be sold.

22. For all of these reasons, it is respectfully submitted that the Application ought to be granted in the terms requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Ottawa this 1st day of December, 1989.

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