

CT-89/1

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
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OTTAWA, ONT.	11(c)

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-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.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH
Applicant

- and -

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

CONSENT ORDER IMPACT STATEMENT

1. This Statement is filed by the Director of Investigation and Research ("Director") pursuant to section 34 of the Competition Tribunal Rules. It describes the circumstances surrounding, and anticipated effect on competition of, the Draft Consent Order submitted by agreement of the parties to this proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

2. The Director files with this Statement a Notice of Application to the Competition Tribunal under sections 92 and 105 of the Competition Act ("Act"), stating that the Respondents propose to effect a merger (the "Merger") which is likely to prevent or lessen competition substantially in the market for power transformers rated over 40 MVA ("Subject Power Transformers"). The Notice of Application outlines a number of specific concerns regarding the impact of the Merger on competition in the Canadian power transformer market.

3. The Director and the Respondents have reached a settlement, which is designed to eliminate the anti-competitive effects of the proposed Merger and the Director requests that the Competition Tribunal approve the Draft Consent Order pursuant to section 105 of the Act to effect this settlement.

4. The settlement involves a combination of tariff remission and elimination and, in the alternative, plant divestiture, as well as certain additional undertakings by the Respondents. As explained below, these measures are

intended to restore any competition which have been eliminated as a result of the Merger.

II. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

5. Asea Brown Boveri Inc. ("ABB Canada") notified the Director in October 1988 that it intended to acquire certain assets of the power transmission and distribution business carried on by Westinghouse Canada Inc. ("WECAN") and its subsidiary Transelectrix Technology Inc. ("TTI"). The Merger is to be effected by an Asset Purchase Agreement dated February 14, 1989, as subsequently amended.

6. ABB Canada, a company incorporated pursuant to the laws of Canada, is a wholly-owned subsidiary of ABB Asea Brown Boveri Ltd. ("ABB"), a Swiss corporation. ABB is the world's largest electrical equipment manufacturing company. ABB Canada is a leading supplier of electrical transmission and distribution equipment, and the second largest manufacturer and supplier of Subject Power Transformers in Canada.

7. WECAN, a company incorporated pursuant to the laws of Canada, is a wholly-owned subsidiary of Westinghouse

Electric Corporation ("WEC"), a U.S. corporation, and one of the world's leading manufacturers of electrical and industrial equipment. WECAN is a leading supplier of electrical equipment in Canada. Through its wholly-owned subsidiary, Transelectrix Technology Inc. ("TTI"), WECAN is the leading manufacturer and supplier of Subject Power Transformers in Canada, operating plants located in Hamilton and Guelph, Ontario.

8. On February 13, 1989 the Director announced that he intended to file an application for a remedial order respecting the proposed Merger. The Respondents subsequently agreed to take actions that in the Director's view are necessary to alleviate any adverse effects of the Merger on competition. These actions are set out in the Draft Consent Order and this Statement. The Respondents have agreed not to consummate the Merger pending the consideration by the Competition Tribunal of the Draft Consent Order.

III. THE ALLEGED EFFECTS ON COMPETITION

9. Power transformers are devices used to transfer electric energy from sources of energy to end use applications in a form appropriate for transmission and end

use distribution. They convert low voltage electricity produced by a power generating source to higher voltages that are more efficiently carried over transmission lines, and reduce voltages between transmission and distribution lines to deliver electricity safely to customers. Power transformers are commonly classified by their power (in mega or million, volt amperes, "MVA") and voltage (in kilo volts, "KV").

10. The Notice of Application alleges that Subject Power Transformers constitute the relevant product market, and that the relevant geographic market for consideration of the effects of the proposed Merger on competition is Canada. The product market definition is based upon the power rating range of power transformers within which ABB Canada alone or ABB Canada and Federal Pioneer Limited are the sole domestic competitors.

11. The Notice of Application further alleges that the proposed Merger will result in ABB Canada being the sole Canadian manufacturer of power transformers rated over approximately 400 MVA and 500 KV and that the Merger will reduce to two the number of competitors in the sale of power transformers rated between approximately 40 MVA and approximately 400 MVA and give ABB Canada a dominant

position in that market segment. It is alleged that the Merger will result in ABB Canada having approximately 75% of the Canadian Subject Power Transformer market. It is alleged that the only remaining domestic manufacturer of Subject Power Transformers rated up to approximately 400 MVA and 500 KV will be Federal Pioneer Limited and that there will not be any effective competition remaining in the Canadian market for Subject Power Transformers rated above approximately 400 MVA and 500 KV.

12. The Notice of Application alleges that foreign suppliers of Subject Power Transformers have not provided effective competition to the business of the Respondents for a number of reasons, including the high Canadian tariff on imported transformers, domestic purchasing preferences on the part of many Canadian electrical utility companies, and anti-dumping protection.

13. It is further alleged that successful entry into the Subject Power Transformer market is difficult because of factors including: the substantial costs and time lags in establishing an efficient scale power transformer manufacturing facility and in assembling the necessary technical, sales and service personnel; the sunk

costs associated with an investment which comprises highly specialized assets which have very limited alternate uses; and, the need to become a qualified supplier approved by the major power utility companies.

IV. DESCRIPTION OF THE PROPOSED SETTLEMENT

14. The proposed settlement contains three main elements which are designed to alleviate any effects on competition of the Merger: tariff reduction, divestiture and certain undertakings concerning restrictive covenants and anti-dumping action. The Director has determined that the primary remedy to restore competition is to reduce tariff barriers and enhance the strength of foreign competition. Because the means to effect the reduction in tariffs depend on regulatory approvals, the Director has required, as an alternative, divestiture of prescribed assets which in his view is necessary to restore competition should the necessary regulatory approvals not be obtained. Finally, the undertakings support these alternative remedies. The elements of these remedies are:

Tariff Reduction

- (a) the customs tariff on all imports of power

transformers rated over 400 MVA shall be subject to a full duty remission scheme for a period of not less than five years effective January 1, 1990;

- (b) the customs tariff on imports of power transformers rated between 40 MVA and 400 MVA inclusive with respect to imports originating in the United States of America shall be reduced to a maximum of 6 percent effective January 1, 1990, 3 percent effective January 1, 1991, and zero percent effective January 1, 1992;

Divestiture

- (c) if the regulatory approval for the accelerated reduction of the customs tariff on power transformers originating in the United States of America has not been achieved by January 1, 1990 or earlier, ABB Canada shall proceed to divest all its interest in TTI's Hamilton business according to the procedure for divestiture set out in the settlement;

(d) if the remission of the customs tariff on all imports of power transformers rated over 400 MVA is not achieved by January 1, 1990 or the divestiture of TTI's Hamilton business is not accomplished within the specified time period, ABB Canada shall proceed to divest all its interest in the TTI Division (as defined below), or at the option of the Director, the Guelph business, according to the procedures set out in the settlement;

Undertakings Concerning Restrictive Covenants and Anti-Dumping

(e) WECAN and Canadian General Electric Company Limited ("CGE") shall amend their 1986 agreement which required CGE not to compete for the sale of power transformers of 40 MVA and above for a period of ten years. The Respondents will also amend the Asset Purchase Agreement by reducing the requirement that WECAN not compete with ABB Canada from seven to three years; and,

- (f) ABB Canada has undertaken not to directly or indirectly initiate anti-dumping proceedings in relation to Subject Power Transformers for a period of five years following issuance of the Consent Order.

15. In addition to the above, the purchaser, ABB Canada will, under the Draft Consent Order, hold separate the operations of TTI from its own operations pending the completion of the tariff reduction and divestiture remedies provided for. For the purposes of the hold separate arrangement, the TTI assets will be transferred to a separate, identifiable division of ABB Canada (the "TTI Division"). A Manager will be appointed to oversee the TTI Division on behalf of ABB Canada. This arrangement is intended to ensure that the assets are preserved, maintained in a viable state and are kept competitively independent pending any divestiture. For example, the TTI Division will continue to place competitive tenders separate from ABB Canada for the period of the hold separate.

- (a) **Tariff Remission on Imports of Power Transformers Rated Above 400 MVA**

16. Customs tariff remission on all imports of Subject Power Transformers rated over 400 MVA will remove a significant barrier affecting the ability of foreign manufacturers of such power transformers to compete effectively in the Canadian market. Remission of tariffs on power transformers rated over 400 MVA will enable foreign manufacturers to lower significantly their selling prices in Canada, and thus act as an effective competitive disciplinary force on the pricing behaviour of ABB Canada.

17. The Most-Favoured Nation Tariff rate on imports of Subject Power Transformers is currently fifteen percent, the General Preferential Tariff is ten percent, and the tariff on imports from the United States is thirteen and one-half percent. Under the Canada-U.S. Free Trade Agreement ("FTA"), the tariff on imports from the U.S. is presently scheduled to be removed in ten equal annual stages which commenced January 1, 1989.

18. Custom tariff remission on power transformers rated over 400 MVA would enable manufacturers located in Japan, the United States of America, the United Kingdom, Germany, France, and elsewhere to compete more effectively in this segment of the Canadian power transformer market. Many of the off-shore manufacturers of power transformers

with a power rating of over 400 MVA already have a presence in the Canadian market, selling other types of power transmission, distribution and generation equipment. Some of these suppliers have placed bids for power transformer tenders by Canadian power utility companies. It is expected that as a result of the Merger and tariff reductions, Canadian power utility companies will seek out and approve off-shore manufacturers of power transformers as qualified suppliers in order to maintain more than one potential supplier. This would enable those suppliers to obtain the necessary benchmark sales in Canada, demonstrate service and product quality, and establish the relationships with the power utility companies which are necessary in order to compete effectively in this market.

19. The Respondents will petition the Department of Finance for the appropriate regulatory changes necessary to effect a full five-year duty remission. Such changes can be effected by Order-in-Council. An elimination of the tariff would require an amendment to the Customs Tariff by Parliament as part of the budgetary process. This process is not available given the timing of this Application.

20. While the proposed duty remission is not permanent, the Director will monitor market conditions and

support its renewal when it expires in five years if competitive conditions require. In addition, opportunities for a more permanent statutory reduction in the tariff exist as part of the on-going GATT negotiations and the Director will monitor initiatives in this area.

**(b) Accelerated Tariff Reduction on U.S.
Imports of Power Transformers Rated
Between 40 and 400 MVA Inclusive**

21. The settlement requires that the current customs tariff of thirteen and one-half percent on imports of power transformers rated from 40 MVA to 400 MVA from the United States of America be reduced gradually to zero percent effective January 1, 1992. Under the Canada-U.S. FTA, the customs tariff on Subject Power Transformers would not have become zero until January 1, 1998.

22. In addition to enabling McGraw-Edison, a United States manufacturer of the full range of Subject Power Transformers, to become an effective competitor in the Canadian Subject Power Transformer market, this remedy will enable a number of manufacturers of Subject Power Transformers of lower MVA ratings (up to approximately 100 MVA) to compete more effectively in the Canadian power

transformer market. An important factor in this regard is that power transformer manufacturers in the United States of America are not necessarily disadvantaged vis-a-vis shipping costs in serving many parts of Canada.

23. Because orders for power transformers are generally placed approximately 18 months in advance of delivery, the proposed tariff acceleration would place U.S. imports on an equal footing with domestic production from a tariff standpoint within approximately one year of the of the issuance of the proposed Consent Order if granted.

24. The Canada-U.S. FTA provides a mechanism for such accelerated tariff reductions. The Respondents, ABB Canada, WECAN and TTI filed a submission under this mechanism dated March 31, 1989 which requests the proposed accelerated tariff reduction levels. By virtue of the presence of other competitors in the 40-400 MVA segment, it is anticipated that the Department of Finance would require their support of the proposed acceleration. Therefore, the Draft Consent Order requires ABB Canada to file with the Tribunal evidence of either such support or alternatively of the support of the Minister of Finance prior to June 16, 1989 so that the divestitures required by the Order can proceed if this tariff acceleration cannot be obtained. If such evidence is

filed, the negotiation of the range of accelerated tariff reduction proposals raised under the FTA acceleration scheme between Canada and the United States is anticipated to begin in the summer in order to achieve a January 1, 1990 effective date of such changes.

25. The Director will file with the Tribunal an expert's report which describes the anticipated effect of the proposed tariff reductions in more detail.

(c) Divestiture of the Hamilton Business

26. The Draft Consent Order requires such divestiture to introduce a new competitor into the market for Subject Power Transformers should the 40-400 MVA U.S. tariff reductions not be attained in the time specified.

27. The Hamilton business has historically manufactured Subject Power Transformers over the full range of sizes. It has not produced Subject Power Transformers since 1986. Some of the equipment necessary to manufacture the full range of Subject Power Transformers has been moved to TTI's Guelph, Ontario facility as a result of the merger between WECAN and CGE in 1986. However, the Hamilton manufacturing facility, with some investment, could

be restored to manufacture the full range of Subject Power Transformers. Reports to be filed with the Tribunal will detail the plant's ability to effectively compete in this market.

28. The Draft Consent Order requires the business to be divested to a purchaser who intends to operate it to produce Subject Power Transformers and who has the ability to do so. Current orders for such transformers must be divested with the plant to give it an immediate foothold in that market. If the divestiture is not accomplished within 120 days, the plant will be turned over to a trustee who must sell it under similar terms at the best price attainable within 60 days.

(d) Divestiture of the TTI Division

29. If the trustee sale of the Hamilton plant is unsuccessful, the TTI Division must be sold under similar terms. ABB Canada is given 120 days and failing that, a trustee is given 60 days to effect the sale.

30. The TTI Division includes the Hamilton and Guelph business. The latter is the largest supplier of Subject Power Transformers in the country. The divestiture of the

TTI Division would involve the key elements of the Merger that are of competitive concern. The availability of the TTI Division for divestiture as a going concern will ensure that problems associated with separation of assets and employees on divestiture are not encountered and will increase the prospect of a successful divestiture. The Director recognizes that the Guelph business constitutes the most important and active Subject Power Transformer facility in the TTI Division and in Canada. The Director is therefore willing to accept divestiture of the Guelph business alone should a purchaser meet all the other requirements of divestiture and the Draft Consent Order therefore provides for such divestiture at the Director's option.

**(e) Release of CGE Covenant and Reduction
of ABB Canada - WECAN Non-Compete**

31. When TTI was established, CGE agreed with WECAN not to compete in the market for Subject Power Transformers in Canada for a period of 10 years. As part of the settlement, WECAN has undertaken to file with the Tribunal, prior to the issuance of the Consent Order, written release of this covenant.

32. In the Asset Purchase Agreement drawn up to accomplish the Merger, WECAN agrees not to compete, inter alia, in the market for Subject Power Transformers, for a period of seven years. The Respondents have undertaken as part of the settlement to file with the Tribunal, prior to the issuance of the Consent Order, evidence of amendment of this provision to reduce the non-competition period to three years.

33. As the filings in relation to the CGE covenant and ABB-WECAN non-competition provision will occur before the issuance of the Consent Order, they have not been included in the Draft Order.

(f) Anti-Dumping Undertaking

34. Certain foreign sources of supply of Subject Power Transformers consider potential anti-dumping proceedings to be one of the most significant impediments to their participation in the Canadian market. An anti-dumping finding was in effect in respect of Subject Power Transformers over the period 1970-1985.

35. ABB Canada has agreed to undertake not to bring such proceedings for a period of five years and to make a

statement on the record of the Tribunal confirming this undertaking. Although such undertaking is not part of the Draft Consent Order, the Director reserves the right to seek further relief in relation to the Merger should such undertaking be breached.

V. ALTERNATIVES TO THE SETTLEMENT

36. The alternative to the settlement proposed would be to challenge the Merger in its entirety or in respect of the acquisition of TTI. The Director rejected this alternative because the primary remedy of tariff relief will effectively alleviate the competition concerns raised by the Merger without disturbing any efficiencies that the transaction might effect. The alternative remedy of divestiture will restore effective competition to the market should the tariff remedies not be attained.

VI. CONCLUSION

37. For the reasons presented herein, the Director recommends the settlement and asks the Competition Tribunal to approve the Draft Consent Order.

Respectfully Submitted:

Calvin S. Goldman, Q.C.
Director of Investigation & Research

Hull, Quebec
April 26, 1989