



EB-2010-0351

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

AND IN THE MATTER OF an application under
section 60 of the Ontario Energy Board Act, 1998,
S.O. 1998, c. 15, Schedule B for an electricity
transmission licence.

BEFORE: Paula Conboy
Member

DECISION AND ORDER

BACKGROUND

Chatham-Kent Transmission Inc. ("CKT") filed an application with the Ontario Energy Board (the "Board"), received on November 16, 2010, under section 60 of the *Ontario Energy Board Act, 1998* (the "Act") for an electricity transmission licence.

The Board issued a Notice of Application and Hearing on December 14, 2010. Hydro One Networks Inc. ("Hydro One") and EnWin Utilities Ltd. ("EnWin"), and the Power Workers' Union ("PWU") requested intervenor status. Veridian Connections Inc. requested observer status. The Board granted all the intervention and observer requests.

On January 14, 2011, the Board issued Procedural Order No. 1, providing for interrogatories and submissions. Board staff and intervenors filed interrogatories on February 4, 2011 and CKT filed its interrogatory responses on February 18, 2011. Board staff and intervenors filed submissions on March 4, 2011. Hydro One filed

interrogatories and later indicated that it had no submissions on the CKT's application. The Independent Electricity System Operator ("IESO") filed a letter on March 4, 2011 setting out its views on the application and requesting late intervenor status. On March 9, 2011, the Board issued Procedural Order No. 2, granting the IESO intervenor status, accepting the IESO's letter as a submission, and providing CKT additional time to file a reply submission. CKT filed its reply submission on March 25, 2011.

As part of its application, CKT filed a claim for confidentiality, pursuant to the Board's *Practice Direction on Confidential Filings* (the "Practice Direction"), with respect to two parts of its application:

- (1) Exhibit E – Financial Support from a Major Canadian Financial Institution which expresses a financing opinion on the transmission project described in the application; and,
- (2) Exhibit I – CKT's Prospective Financial Statements. CKT provided the following reasons in support of its claim for confidentiality, namely that Exhibit I contains the CKT's prospective financial statements for the years 2011–2015 based on confidential assumptions related to CKT's ongoing negotiations with Pattern Energy Group ("Pattern").

No intervenors objected to CKT's claim for confidentiality.

The Board finds that the material for which confidentiality has been claimed should be afforded that status as it is, on its face, commercially sensitive information, the disclosure of which could reasonably be expected to result in prejudice to both CKT's and other third parties' competitive positions. While the Board is interested in having as much information as possible on the public record, the Board recognizes that some information, such as that subject to CKT's claim are of a confidential nature and should be protected.

The record of the proceeding is available at the Board's offices and on the Board's website.

THE APPLICATION

CKT filed an application in order to qualify to participate in the transmission sector, both in the near term through a specific transmission project and in the longer term through the Board's designation process. The specific project is a transmission line and associated facilities that would be constructed, subject to approval under section 92 of the Act, to connect a 270 MW wind generation facility within the Municipality of Chatham-Kent to the existing Chatham Switching Station. CKT stated that the transmission facilities will be designed and constructed by Pattern under the conditions of its generation licence, subject to Pattern's application and the Board approval, and pursuant to the transmission licence exemption provided for in Ontario Regulation 161/99, section 4.0.2 (1)(d)¹. Pattern is a development partner of the Korean Consortium and is jointly developing a renewable wind generation project known as the South Kent Wind Project ("SKWP"). According to the application, when construction is completed Pattern will apply to the Board for leave pursuant to section 86 of the Act to sell the transmission assets to CKT at cost. Subject to the Board approval, CKT would thereafter own and operate the transmission facility. Any costs to be recovered from ratepayers would require CKT to file with the Board an application for rates under section 78 of the Act.

CKT also indicated its intention to participate in future transmitter designation processes as contemplated in the Board's policy entitled "*Framework for Transmission Project Development Plans*" (EB-2010-0059, the "Transmission Development Policy").

In the interrogatory process CKT was asked about its ability to comply with the *Affiliate Relationships Code for Electricity Distributors and Transmitters* (the "ARC"). In response to an interrogatory from EnWin, CKT took the position that the ARC will apply to CKT once it *owns or operates* a transmission system [emphasis added]. Further, CKT stated that "if employee sharing between CKT and CKUS is desirable, then CKT will apply to the Board for exemption from section 2.2.3 of the ARC in respect of such shared employees". In its submission, Board staff expressed its concern that CKT "may not be compliant with all sections of the ARC at the time it receives its licence from the Board. In its reply submission, CKT confirmed that it will be able to comply with the ARC requirements for a transmitter upon being licensed by the Board, with one exception.

¹ 4.0.2 (1) (d) states that Clause 57 (b) of the Act do not apply to a transmitter that transmits electricity for a price, if any, that is no greater than that required to recover all reasonable costs if the transmitter is a generator and transmits electricity only for the purpose of conveying it into the IESO-controlled grid.

This relates to CKT's affiliated company Chatham Kent Utility Services (CKUS), an energy service provider which provides unit sub-metering services and owns a small solar electricity generation facility. CKT requested a temporary exemption from section 2.2.3 of the ARC until no later than December 31, 2011 as CKUS will exit its unit sub-metering business and will transfer its solar project to Chatham-Kent Hydro Inc. prior to the end of 2011.

Section 2.2.3 requires that:

2.2.3 A utility shall not share with an affiliate that is an energy service provider employees that are directly involved in collecting, or have access to, confidential information.

SUBMISSIONS AND BOARD FINDINGS

The Board has considered the submissions of the parties and has determined that it is in the public interest to grant CKT a transmission licence. In reaching its decision the Board has considered the following issues:

1. The threshold test for granting a Transmission Licence - Financial Viability and Technical Capability; and,
2. CKT's request for a temporary exemption from section 2.2.3 of the *Affiliate Relationships Code*

1. Threshold Test for Granting a Transmission Licence - Financial Viability and Technical Capability

As outlined in page 1 of the Transmission Development Policy, the Board believes the policy will:

- i. "Allow transmitters to move ahead on development work in a timely manner;
- ii. Encourage new entrants to transmission in Ontario bringing additional resources for project development; and
- iii. Support competition in transmission in Ontario to drive economic efficiency for the benefit of ratepayers."

In the exercise of its licensing function in cases such as this one, the Board's practice is to review in some degree the applicant's apparent financial status, its potential for access to further financial resources, and its technical experience and demonstrated capability. The Board typically examines the applicant's financial information to get some appreciation of its ability to operate as a transmitter. The Board also examines the applicant's technical capability to assess at a preliminary stage its ability to execute a predictable range of transmission system development projects.

With respect to technical ability and the expertise of CKT, EnWin made extensive reference to the Board's decision in EB-2009-0164 denying a licence application request made by Lexi Transmission Corporation ("Lexi").

The Board found Lexi to be a company with insufficient transmission experience or expertise to qualify for a Transmission license.

That decision pre-dates the Board's Transmission Development Policy that contemplates licensing prospective new entrant transmitters without reference to specific transmission projects. Under the new regime, applicants for such licences are simply qualified to participate in the designation process.

The Board finds that the circumstances of this proceeding are sufficiently different from those in Lexi, and as such the Lexi decision provides no particular guidance for the current application.

The Board finds that CKT has provided sufficient evidence of its financial position and technical capabilities to qualify for a Transmission licence. The Board notes that as the Pattern project evolves, a more thorough examination of the Applicant's suitability may be required. These elements will be examined in the necessary further regulatory steps contemplated for that project.

Similarly it is expected that as part of the designation process, very much more specific financial and technical/operational information will be required to meet the focused demands of specific projects. This review will be undertaken in connection with that process, not at this stage.

In response to concerns raised by EnWin about the initial Pattern project, the Board also notes that there is an important distinction between whether CKT *as a company*

has demonstrated that it has commensurate financial resources, or access to them, and the apparent technical capability to own and operate a transmission system in the public interest on the one hand, and whether a *specific transmission system* is in the public interest on the other.

The latter issue is properly addressed in an application under section 92 of the Act. The Board is not opining in this proceeding on the whether the SKWP as a project is in the public interest.

The Board has also considered the submissions made by parties with respect to the scope of the transmission licence requested by CKT. Both the PWU and EnWin submitted that the licence authorization should be limited to the transmission facilities relating to the Pattern wind project as detailed on the licence application form.

The PWU argued that the evidence does not demonstrate CKT's suitability to participate in future transmission designation processes and that CKT must demonstrate financial resources sufficient to own and operate major infrastructure projects. The PWU suggests that for the purpose of the transmitter designation process a new entrant would likely face a more detailed review of its technical and financial viability before being granted a license. The PWU submits that "the qualifications to participate in future transmitter designation processes involves different consideration than apply to the very narrowly tailored application filed presently with the Board". Further the PWU suggest that there "has not been any probing analysis of the issue of CKT's suitability to be a qualified entity for the purposes of the transmitter designation process" and asserted that if the licence is granted on the basis sought, CKT would be able to "bypass the scrutiny that it would otherwise face in seeking to become a qualified entity for the purposes of the transmitter designation process".²

CKT replied that its licence should not be limited to the specific near term project described in the application. CKT submitted that the Transmission Development Policy requires an entrant transmitter to meet minimum requirements in relation to financial and technical capability to demonstrate that it is both qualified for and committed to doing business in Ontario. CKT maintained that it had met these requirements and that the licence should be granted.

² Power Workers Union final submission filed March 4, 2011.

The Board agrees with CKT that the policy contemplates transmission licensing as a threshold qualification step, intended to be neither unduly onerous nor excessively time consuming. The Board's aim in its Transmission Development Policy is to encourage new transmission entrants to Ontario, thereby bringing additional resources for project development and supporting competition in transmission sector to drive economic efficiency for the benefit of ratepayers. The Board considered it reasonable to require that new entrants be licensed in order to participate in the designation process. Once the financial resources and technical capabilities of a new entrant are considered and found to be satisfactory, the transmitter would be issued a licence and would be able to participate in the designation process under the terms of their existing licence.

The Board has found that CKT has met this threshold test. It has provided the Board with evidence that it has the ability to access capital, and that it has the technical capability through its access to qualified personnel. The Board has also taken into consideration that CKE and its affiliates are a group of companies operating in and therefore familiar with the regulatory framework in Ontario. Whether the extent of CKT's financial viability and technical capacity is sufficient for a particular designation project or indeed the initial project set out in CKT's application has yet to be tested. As noted in the Transmission Development Policy:

“Organization; technical capability; financial capacity; schedule; costs; landowner and other consultations; and other factors will be weighted by the Board, based on the evidence in the proceeding, taking into account the individual circumstances of the project.”³

Also set out in the Transmission Development Policy the Board recognizes that “the designation process is intended to be a preliminary stage in an increasingly disciplined process. The Board expects that as part of a specific designation process, ever more focused, demanding and detailed financial and operational information may be required. The ECT is expected to provide a preliminary analysis of need sufficient for approving funding of preliminary development budgets. As budgetary and technical information becomes available, the Board will test need and prudence of with increasing vigor”⁴.

³ Ibid, page 14

⁴ Board Policy: Framework for Transmission Project Development Plans (EB-2010-0059), August 26, 2010, page 8

As such the Board will not limit the scope of CKT's transmission licence at this stage, and CKT will be able to participate in the designation process under the licence granted in this order. Whether CKT is the appropriate transmitter to own and operate major infrastructure projects outlined in a particular designation process will form part of that competitive selection process.

In addition, the Board will not specify any of the initial project transmission facilities in Schedule 1 of CKT's transmission licence as this could be perceived as prejudging a decision on Pattern's application under section 86 of the Act to sell the transmission assets to CKT. Should an application under section 86 be granted, the Board will then be in a position, should CKT file an application, to decide CKT's application to amend Schedule 1 of its licence under section 74 of the Act.

2. Request for a Temporary Exemption from Section 2.2.3 of the ARC

Board staff, the PWU and the IESO raised concerns in both the interrogatory process and their respective written submissions regarding CKT's compliance with the Transmission System Code ("TSC") and the ARC.

The PWU referenced several sections of the TSC, primarily with respect to CKT's obligation to obtain Board approved transmission rates, stating that if CKT acknowledges that it is bound by and can satisfactorily demonstrate its intention and ability to comply with its full range of obligations as a licensed transmitter, the PWU would not oppose the application on that basis. CKT responded by acknowledging its intention and ability to comply with its obligations as a licensed transmitter.

Board staff noted CKT's response to EnWin Interrogatory 2(c), in which CKT stated that it may not be compliant with all sections of the ARC at the time it receives a licence from the Board. Board staff also noted that, absent an exemption, the obligation to comply with the ARC begins at the time CKT is licensed as an electricity transmitter as compliance with legislation, regulations and market rules and the Board's codes is a condition of licence. In reply, CKT confirmed that it would be able to comply with the ARC upon being licensed by the Board, with the exception of section 2.2.3 for which it requested a temporary exemption until December 31, 2011.

CKT presently shares certain senior management personnel with its affiliate, Chatham-Kent Utility Services Inc. ("CKUS"), an energy service provider engaged in unit sub-

metering. CKT stated that CKUS plans to exit the unit sub-metering business by December 2011. In relation to 10 kW solar generation facility that CKUS owned and operated, following the approval by the Board of a Notice of Proposal under section 80 of the Act filed by Chatham-Kent Hydro Inc., CKUS has transferred the facility to Chatham-Kent Hydro Inc. CKT maintained that following these changes, CKUS will no longer be an energy service provider affiliate of CKT. CKT argued that the acquisition of separate personnel for either CKT or CKUS at this point in time would be uneconomic. CKT requested that the Board grant a temporary exemption given these particular circumstances.

The IESO submitted that it may be required, from time to time, to provide confidential information (pertaining to load flow, customer forecast and planning) to CKT and stated that CKT might have access to this information prior to CKT acquiring or commencing to operate a transmission system. The IESO stated that this information should be properly subject to the applicable provisions of the ARC and the IESO Market Rules pertaining to accessibility and secure management of confidential information.

CKT responded that the IESO Market Rules provide a comprehensive regime for the sharing of confidential information between the IESO and transmitters and that this regime stands independent of the ARC. CKT submitted that the limited ARC exemption request would not undermine any IESO data confidentiality requirements.

Generally speaking, a licensed transmitter would have access to a significant amount of confidential customer and market participant information including financial, planning and operational information and data. Section 2.2.3 of the ARC reads:

A utility shall not share with an affiliate that is an energy service provider employees that are directly involved in collecting, or have access to, confidential information.

Section 2.2.3 of the ARC is important to the objective of preventing cross-subsidization and customer confusion.

The Board, in its *Notice of Revised Proposal to Amend a Code: Proposed Amendments to the Affiliate Relationships Code for Electricity Transmitters and Distributors* stated the following with respect to section 2.2.3 of the ARC: “The Board reiterates that if a utility can demonstrate that the use of confidentiality agreements in particular circumstances

will result in no harm to ratepayers, no customer confusion and no cross-subsidization, then those specific circumstances could be assessed through an application for an exemption from section 2.2.3.”⁵

The Board is generally very reluctant to grant exemptions to its Code provisions. The Codes have been developed according to specific statutory provisions and safeguards, and are generally the product of a highly transparent consultation process involving a wide range of interests. Exemptions, while appropriate in special circumstances, have the tendency to undermine the Codes and the process under which they were created. In particular, the Board is increasingly indisposed to permitting applicants to “contract out” of Code compliance, except in the clearest case where the risk of harm is slight. Simple cost savings are also not generally a sufficient rationale for exemptions to Code provisions. Code provisions address a range of interests, and not merely lowest cost operations.

In the particular circumstances of this case the Board is satisfied that CKT has provided sufficient evidence to demonstrate that there is little risk of the harm contemplated by the respective Codes should this very limited exemption be granted.

The Board considers that CKT is in a unique circumstance where the transition to conformity with the ARC is more complicated than the usual case. In these special circumstances the Board is prepared to grant a transitional exemption but only until December 31, 2011.

TERM OF LICENCE

A transmission licence authoring a utility to own and operate a transmission system is typically granted for a term of 20 years recognising the long term nature of transmission assets. However, in this proceeding the Board is granting a licence to CKT to participate in the designation process. As such, the Board will set an initial term of 5 years.

This Licence shall take effect on May 24, 2011 and expire on May 23, 2016. The term of this Licence may be extended by the Board.

⁵ Notice of Revised Proposal to Amend a Code, EB 2007-0662, dated February 11, 2008 at p. 5

THE BOARD ORDERS THAT:

The application by CKT for an electricity transmitter licence is granted on such conditions as are contained in the attached licence.

DATED at Toronto May 24, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary