



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION ON APPEAL

EB-2016-0050

HYDRO ONE INC.

**Application for approval to purchase Great Lakes Power
Transmission Inc.**

BEFORE: Ken Quesnelle
Presiding Member and Vice-Chair

Christine Long
Vice-Chair

Cathy Spoel
Member

June 15, 2016

TABLE OF CONTENTS

1 INTRODUCTION..... 1

2 BACKGROUND 2

2.1 REGISTRAR’S RULING 2

2.2 NOTICE OF APPEAL 3

3 DECISION..... 7

4 ORDER 10

1 INTRODUCTION

This is the Decision of the Ontario Energy Board (OEB) in response to a Notice of Appeal filed on May 27, 2016 by Algoma Coalition (Algoma or the Coalition) to a ruling made by the Registrar of the OEB in Procedural Order No. 1 issued on May 18, 2016, denying Algoma cost eligibility in this proceeding.

Algoma filed a Notice of Intervention on April 19, 2016 requesting intervenor status and seeking recovery of its costs. Algoma stated that its ability to intervene in this proceeding depends entirely upon its ability to recover its associated costs.

The OEB denies Algoma's appeal of the Registrar's ruling.

2 BACKGROUND

2.1 Registrar's Ruling

In Procedural Order No. 1, the Registrar approved Algoma as an intervenor but denied Algoma's request for cost eligibility. The Registrar noted that the burden of establishing eligibility for a cost award is on the party applying for such eligibility and that a request must include reasons as to why the party believes that it is eligible for an award of costs and address the OEB's cost eligibility criteria.

As set out in Procedural Order No.1, section 3.03 of the Practice Direction on Cost Awards (Practice Direction) states that a party is eligible to apply for a cost award where the party:

- (a) primarily represents the direct interests of consumers (i.e., ratepayers in relation to services that are regulated by the Board);
- (b) primarily represents an interest or policy perspective relevant to the Board's mandate and to the proceeding for which cost award eligibility is sought; or
- (c) is a person with an interest in land that is affected by the process.

Section 3.05 (i) of the Practice Direction states that despite section 3.03, a municipality in Ontario, individually or in a group, is not eligible for a cost award.

The Registrar's ruling noted the following:

- Algoma's Notice of Intervention does not provide a list of its members. It does state that the intervention will focus on representation of the interests of Northern Ontario Municipalities and their ratepayers and Mr. Christopher Wray, the CAO/Clerk-Treasurer of the Municipality of Wawa is listed as Algoma's member liaison. Algoma's submissions in previous OEB proceedings have indicated that its members are small Northern Ontario municipalities.
- Algoma says in its Notice of Intervention that its members are direct customers of the applicant or are beneficiaries of its services. In so doing, Algoma has addressed section 3.03 of the Practice Direction; however, it has not provided any persuasive information as to why section 3.05(i) of the Practice Direction should not apply.

The Registrar ruled that it would be both inconsistent and inappropriate to allow Algoma cost eligibility on the basis that the municipalities that it represents are customers and

not afford all Ontario municipalities the same treatment. To do this would be to circumvent the clear language of section 3.05(i) of the Practice Direction so as to render the section ineffective.

The Registrar noted that Algoma, as an association of member municipalities, has access to funding from each of its constituent member taxpayer revenue streams and should not therefore, be eligible to recover costs from the ratepayers. The Registrar referenced the OEB's finding in EB-2012-0383 which stated:

Until recently, the Board has considered applications for cost eligibility from municipalities on a case-by-case basis, and has found municipalities to generally be ineligible for costs. This is, in part, because municipalities and their associations have access to a revenue stream from their own constituent taxpayers and the Board has therefore found that they should not be funded by ratepayers.

The Registrar considered whether, under section 3.07 of the Practice Direction, special circumstances exist and concluded that no circumstances exist that are special or unique in this particular case.

The Registrar noted that Algoma cites in its Notice of Intervention a list of previous OEB proceedings in which it has intervened and for which it was found eligible for an award of costs. The Registrar did not find this to be persuasive, for the following reasons. First, the Practice Direction was amended in March of 2012 to, in part, specifically include section 3.05(i) and, with limited exceptions, the proceedings cited by Algoma Coalition for which it was found to be cost eligible pre-date that amendment. Second, in relation to proceedings subsequent to the amendment for which Algoma Coalition was found to be cost eligible, those decisions were made in the context of the applications being heard in those proceedings.

2.2 Notice of Appeal

Algoma appealed the Registrar's ruling requesting for an OEB order:

- a. cancelling that part of the Procedural Order No. 1 (at pages 1-3) in which the Registrar denies the Coalition's request for eligibility for costs as an intervenor;
- b. approving the Coalition's request for eligibility for costs in accordance with the Coalition's April 9, 2016 Notice of Intervention;

- c. staying enumerated items 2-4 of the Registrar's order at page 5 of Procedural Order No. 1;

or such further and other relief as Algoma requests and the OEB deems just.

Algoma provided the following grounds for its appeal:

- The Coalition is comprised of a number of member municipalities each of which is both serviced by and a customer of Algoma Power Inc. ("API") both North and East of Sault Ste. Marie
- On April 19, 2016, the Coalition filed its Notice of Intervention with the Ontario Energy Board (the "Board") in respect of application EB-2015-0050. Specifically, through its Notice of Intervention, the Coalition applied for both intervenor status and cost eligibility.
- The Registrar erred by considering section 3.05(i) in isolation from sections 3.04 and 3.06 of the Practice Direction.
- In making a determination whether a party is eligible or ineligible for costs, section 3.04(d) functions to allow the Board to consider "any other factor the Board considers relevant to the public interest". The Registrar erred by not giving consideration to the public interest served by the Board hearing from a wide variety of affected interests especially those interests of Northern Ontario ratepayers who are isolated, marginalized, and lack the financial resources to individually participate. This is Coalition's *raison d'être*, namely to give voice to those who would otherwise be unrepresented before the Board and, in so doing, overcoming an important access to justice barrier. The Board's concern for reducing barriers to access is fundamental to its "Giving Ontario Energy Consumers a Stronger Voice" initiative. The stated goal of this initiative is "to empower Ontario's energy consumers by providing them with more opportunities to actively engage in the OEB's decision making process".
- Further, given the Registrar's finding that the Coalition's members are direct customers of the applicant or are the beneficiaries of its services, the Registrar erred in failing to consider section 3.06. This section provides that "[n]otwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 *may be eligible for a cost award if it a customer of the applicant*" (emphasis added). It should be noted that the Coalition also

represents the interests of its members' ratepayers who are themselves directly affected by this application and, therefore, an important stakeholder group for the purposes of this proceeding.

- Similarly, the Registrar erred by failing to consider section 3.07, which provides that, in special circumstances a party that falls into one of the categories in section 3.05 is eligible for an award of costs. As noted in paragraph 11 above and in the Coalition's Notice of Intervention, its ability to intervene in Board proceeding depends entirely upon its ability to recover its associated costs. The Coalition's intervention is the only way its members' voices may be heard as its members' interests are not otherwise represented.
- The fact that the Coalition has always participated responsibly in and brought a unique and valuable perspective to Board proceedings has never been disputed.
- Denying the Coalition eligibility for costs and thereby excluding small Northern Ontario municipalities and their ratepayers from having a voice in this proceeding is contrary to both the Growth Plan for Northern Ontario (enacted under the *Places to Grow Act, 2005*) and section 2 of the Rules which provide that the Rules be "construed in the *public interest* to secure the most *just*, expeditious, and efficient determination on the merits of every proceeding before the Board" (emphasis added).
- Specifically, the purpose of the Growth Plan for Northern Ontario is, inter alia, that the Provincial Government, businesses, municipalities, and other stakeholders, collaborate to enable decisions affecting northern communities be made "in ways that sustain a robust economy, build strong communities and promote a healthy environment and a culture of conservation". One of its guiding principles is delivering a network of infrastructure, including energy infrastructure, to support strong, vibrant northern communities. The Growth Plan for Northern Ontario recognizes that Northern Ontario is unique and calls for a new era of collaborative decision making to ensure northerners' future prosperity. As noted above, the Coalition submits that its intervention is essential to ensure northerners' collective voice is heard in this application and the only way this can occur is if it is granted cost eligibility.
- In addition, the rigid application of section 3.05 evinces bias on the part of the Registrar in making her decision to deny the Coalition cost eligibility. As an employee of the Board, the Registrar is undoubtedly aware that

the Coalition has an active judicial review application on this same issue in respect of the Board's February 5, 2016 decision in EB-2015-0051. On this basis, the Coalition submits the Registrar failed to act impartially and that her decision was an unfair or malicious abuse of discretion

3 DECISION

The OEB has considered Algoma Coalition's Notice of Appeal and denies the request to cancel that part of Procedural Order No. 1 in which the Registrar denies the Coalition's request for cost eligibility.

In making this decision the OEB has considered the grounds raised in the Notice of Appeal and sets out its findings below. The findings are set out under the following three headings: the Practice Direction; Growth Plan for Northern Ontario; and impartiality and abuse of discretion.

Practice Direction on Cost Awards

When considering cost claims, the OEB has complete discretion in determining the amount of any costs to be paid¹.

The OEB agrees with the Registrar's finding that the Algoma Coalition ratepayer members are direct customers of the applicant and as such satisfy section 3.03 of the Practice Direction. However, as noted by the Registrar Section 3.05 (i) of the Practice Direction states that despite section 3.03, a municipality in Ontario, individually or in a group, is not eligible for a cost award. The Registrar found that as a municipality or group of municipalities the Algoma Coalition is ineligible for costs.

The OEB notes that Algoma describes itself in its Notice of Appeal in the following manner: "the Coalition is comprised of a number of member municipalities each of which is serviced by, and is a customer of Algoma Power Inc. ("API") both North and East of Sault Ste. Marie."

The OEB also finds that the Registrar, after determining that Algoma is ineligible, correctly considered section 3.07 of the Practice Direction. That section requires the OEB to consider whether special circumstances exist that would cause the OEB to exercise discretion in favour of granting cost award eligibility to a party that would otherwise be ineligible. The Registrar considered if there were such special circumstances and determined there were not.

¹ Section 2.01(b) of the Practice Direction

While it is true that Algoma has, in a few previous OEB proceedings been found eligible for costs, the OEB notes that all but one of these decisions pre-date the March 2012 amendment which specifically excluded municipalities from cost award eligibility. With respect to the one decision post amendment, EB-2015-0051, the OEB finds that the Panel made it clear in that proceeding that cost eligibility was warranted in that specific proceeding.

In this proceeding, the OEB finds otherwise and it is completely within the OEB's discretion to do so. The OEB does not find that the Algoma Coalition primarily represents the direct interests of consumers (ratepayers) in relation to regulated services. That is not the role of a municipality or a group of municipalities. Furthermore, the context in this proceeding is distinguishable from the case cited by Algoma Coalition where it was awarded costs. That case was a distribution rates case. In this proceeding, the OEB is considering the sale of the shares of a regulated transmitter to another regulated transmitter. Rates are not the primary focus of this proceeding. In any event, transmission customers represented by Algoma Coalition will pay a blended transmission rate the same as any residential customer in Ontario. Therefore the interest of the individuals Algoma Coalition states it represents are no different from other Ontario customers as it relates to rates. The OEB has considered the arguments put forward by the Algoma Coalition in respect of Section 3.07 but does not find them persuasive and will exercise its discretion to award cost eligibility to a party found to be ineligible for costs as set out in Section 3.05 (i) for the reasons listed above.

As noted by the OEB in previous proceedings, decisions regarding cost award eligibility are made on a case by case basis, and the fact that a stakeholder has been granted cost award eligibility previously does not necessarily mean it will be granted eligibility in a future proceeding or process.

Growth Plan for Northern Ontario

The Algoma Coalition submits that by denying cost eligibility the OEB is denying small Northern Ontario municipalities and their ratepayers from having a voice in this proceeding which is contrary to both the Growth Plan for Northern Ontario (enacted under the *Places to Grow Act, 2005*) and section 2 of the Rules which provide that the Rules be "construed in the *public interest* to secure the most *just*, expeditious, and efficient determination on the merits of every proceeding before the Board"(emphasis added).

The OEB disagrees. The Growth Plan for Northern Ontario, 2011, is a 25-year plan that was released on March 4, 2011.

The Growth Plan aims to strengthen the economy of the North by:

- Diversifying the region's traditional resource-based industries
- Stimulating new investment and entrepreneurship
- Nurturing new and emerging sectors with high growth potential.

The OEB does not disagree with Algoma Coalition's assertion that one of the guiding principles of the Plan is delivering a network of infrastructure, including energy infrastructure, to support strong, vibrant northern communities. However, the OEB does not find that the exercise of its discretion with respect to cost award eligibility is contrary to the Plan. The Algoma Coalition has been granted intervenor status and has thereby been granted the right to fully and actively participate in the proceeding. The OEB has determined, however, that as a municipality, the ratepayer should not bear the cost of Algoma Coalition's participation. The Plan itself is a strategic framework to guide decision-making about and investment planning in Northern Ontario for the next 25 years.

The Registrar's Decision was not an Abuse of Discretion

Lastly, Algoma Coalition has alleged that the Registrar has failed to act impartially and that her decision was an unfair or malicious abuse of discretion. The OEB is very concerned about the seriousness of this assertion. In considering abuse of discretion the OEB has reviewed the findings of the Registrar and has determined that the Registrar considered all of the relevant criteria with respect to cost award eligibility. The relevant factors are specified in the Practice Direction and the Registrar appropriately considered those factors.

The OEB finds the Practice Direction was properly applied by the Registrar in reaching the decision to deny Algoma Coalition cost eligibility and it follows that there was no bias, no failure to act impartially and no grounds to substantiate an unfair or malicious abuse of discretion.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The appeal of the Decision of the Registrar of the OEB in Procedural Order No. 1 issued on May 18, 2016, denying Algoma cost eligibility in this proceeding is denied.

DATED at Toronto June 15, 2016

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary