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BY EMAIL

November 1, 2017

Ontario Energy Board
P.O. Box 2319
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2300 Yonge Street
Toronto ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Sagatay Transmission LP
Appeal under section 7 of the *Ontario Energy Board Act, 1998* of the Order
of the Registrar in EB-2016-0017
OEB Staff Submission
OEB File No. EB-2017-0258**

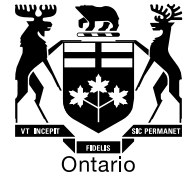
Pursuant to Procedural Order No. 3, please find attached OEB staff's submission.

Yours truly,

Original Signed By

Michael Lesychyn
Project Advisor, Supply and Infrastructure

cc: Parties to EB-2017-0258



EB-2017-0258

Sagatay Transmission LP

Appeal under section 7 of the *Ontario Energy Board Act, 1998* of the Order of the Registrar in EB-2016-0017

OEB Staff Submission
November 1, 2017

Introduction

Sagatay Transmission LP (Sagatay) filed a Notice of Appeal on June 9, 2017 under s. 7 of the *Ontario Energy Board Act, 1998* (the Act) asking the Ontario Energy Board (OEB) to cancel the May 25, 2017 order of the Registrar that dismissed Sagatay's application for leave to construct an electricity transmission line to Pickle Lake.

OEB staff does not support Sagatay's appeal. Although in OEB staff's view, the Registrar's reasons for the order speak for themselves, in this submission OEB staff has attempted to provide some context for the assistance of the panel, and to address briefly the main arguments raised by Sagatay.

The legislative context

In the summer of 2016, the Government of Ontario took a number of steps to facilitate the construction of an electricity transmission line to Pickle Lake, and to select Wataynikaneyap Power LP (abbreviated as "Watay" in the entity's filings in this appeal) as the preferred developer of the line.

First, on July 1, 2016, the Government brought two new provisions of the Act into force: sections 28.6.1 and 97.1. Section 28.6.1 enabled the Minister of Energy to issue directives to the OEB in respect of transmission systems, which directives may require the OEB to amend the licence conditions of a licensed transmitter:

Directives, transmission systems

28.6.1 (1) The Minister may issue, and the Board shall implement directives, approved by the Lieutenant Governor in Council, requiring the Board to take such steps as are specified in the directive relating to the construction, expansion or re-enforcement of transmission systems.

Same

(2) Subsections 28.6 (2) and (3) apply with necessary modifications in respect of directives issued under subsection (1).

Section 97.1 specified that the OEB is prohibited from granting leave to construct a transmission line if someone else is required to develop the line as a condition of their licence:

No leave if covered by licence

97.1 (1) In an application under section 92, leave shall not be granted to a person if a licence issued under Part V that is held by another person includes an obligation to develop, construct, expand or reinforce the line, or make the interconnection, that is the subject of the application.

Transition

(2) For greater certainty, an application made, but not determined, before the day section 16 of Schedule 2 to the *Energy Statute Law Amendment Act, 2016* comes into force, is subject to subsection (1).

Then, on July 20, 2016, the Lieutenant Governor signed two Orders in Council. One designated the following transmission lines as “priority projects” under s. 96.1 of the Act:

1. The construction of an electricity transmission line originating at a point between Ignace and Dryden and terminating in Pickle Lake; and
2. The construction of electricity transmission lines extending north from Pickle Lake and Red Lake required to connect the Remote Communities.¹

The second Order in Council approved a ministerial directive to the OEB under s. 28.6.1 of the Act.² The directive required the OEB to amend, without a hearing, the transmission licence of Watay to require it to:

- (i) Develop and seek approvals for a transmission line, which shall be composed of a new 230 kV line originating at a point between Ignace and Dryden and terminating in Pickle Lake (the “Line to Pickle Lake”). The development of the Line to Pickle Lake shall accord with the scope recommended by the Independent Electricity System Operator.
- (ii) Develop and seek approvals for the transmission lines extending north from Red Lake and Pickle Lake required to connect the Remote Communities to the provincial electricity grid. The development of these transmission lines shall accord with the scope supported by the Independent Electricity System Operator.

The Order in Council approving the ministerial directive explained that “the Government has determined that the Remotes Connection Project and the Line to Pickle Lake should be undertaken by a transmitter that is best positioned to connect remote First Nation communities in the most timely and cost-efficient manner that protects ratepayer interests,” and that “the Government has determined that the preferred manner of proceeding is to require 2472883 Ontario Limited on behalf of Wataynikaneyap Power LP to undertake the development of the Line to Pickle Lake and the Remotes

¹ O.C. 1157/2016, July 20, 2016. The “Remote Communities” refer to 16 First Nation communities listed in the Order in Council. Section 96.1 of the Act, which came into force on March 4, 2016, allows the Lieutenant Governor in Council to designate a transmission line as a priority project; when assessing an application for leave to construct a designated project, the OEB must accept the need for the project.

² O.C. 1158/2016, July 20, 2016. The directive was sent by the Minister to the OEB on July 29, 2016.

Connection Project, including any and all steps which are deemed to be necessary and desirable in order to seek required approvals.”

Taken together, these measures indicate that the Government’s policy in respect of the Line to Pickle Lake includes the following key elements:

- The Line to Pickle Lake is to be developed on a priority basis
- There is to be only one Line to Pickle Lake
- The developer of the Line to Pickle Lake will be Watay

In response to the directive, the OEB made the required amendments to Watay’s transmission licence on September 1, 2016.³

Although Watay is now required to develop the Line to Pickle Lake (and the lines connecting the 16 Remote Communities), it has not yet submitted a leave to construct application to the OEB.

The events leading to the Registrar’s decision

On January 20, 2016, the OEB received an application from Sagatay for leave to construct a 230 kV transmission line from near Ignace to Pickle Lake and related transmission facilities. On February 18, 2016, the OEB notified Sagatay that the application was incomplete: because Sagatay had not filed a System Impact Assessment Report or a Customer Impact Assessment Report, the OEB would hold Sagatay’s application in abeyance until the final reports were filed.

While the application was on hold, the legislative changes described above came into force, and Watay’s licence was amended to require it to develop the line to Pickle Lake. (Section 97.1 of the Act expressly states that it applies to applications for leave to construct that were submitted but not yet determined before the provision came into force.)

On November 2, 2016, the Registrar sent a letter to Sagatay advising that, although the missing reports had still not been filed, the OEB intended to dismiss the application in light of the July ministerial directive and the subsequent amendment to Watay’s licence. The Registrar explained that s. 97.1 of the Act “precludes the OEB from granting your application for leave to construct, as the transmission line proposed in your application is functionally equivalent to the new line to Pickle Lake that Wataynikaneyap Power is required by its licence to develop.” The Registrar referred to the IESO’s report dated October 13, 2016 setting out the IESO’s recommended scope for the line to Pickle Lake,⁴ which was contemplated by both the directive and Watay’s amended licence.

³ EB-2016-0258, Decision and Order, September 1, 2016.

⁴ IESO, “Recommended Scope for the New Line to Pickle Lake and Supported Scope for the Remotes Connection Project,” October 13, 2016 (on OEB website at https://www.oeb.ca/oeb/Documents/Documents/IESO_Report_Pickle_Lake_and_Remotes_Scope_2016_1013.pdf).

The Registrar was acting under authority delegated by the OEB's management committee pursuant to s. 6 of the Act. Accordingly, no hearing was required.⁵ Nevertheless, the Registrar invited Sagatay to make a written submission on the proposed dismissal of its application by November 14, 2016. This deadline was later extended by one week, on Sagatay's request.

Sagatay filed a submission on November 18, 2016, urging the OEB not to dismiss its application, arguing, among other things, that its proposed line was not "functionally equivalent" to Watay's proposal.

On May 16, 2017, the Registrar wrote to Sagatay dismissing the application. On May 25, 2017, in response to a request from Sagatay for the dismissal to be enshrined in an order, the Registrar formally ordered the dismissal of the application, for the reasons set out in the Registrar's May 16, 2017 and November 2, 2016 letters.

Sagatay then filed this appeal. Because the Registrar's dismissal of the application was made under delegated authority, Sagatay has a right to appeal under s. 7 of the Act.

The Registrar's s. 97.1 analysis

Sagatay argues that its proposed line to Pickle Lake is not the same as Watay's proposal. It says the proposals follow different routes and will therefore have different impacts on local First Nations and the environment. But this argument, in OEB staff's view, obscures the real issue. The question is not whether the two proposals are exactly the same in all respects, but whether Sagatay proposes to develop something that the Government has selected Watay to develop.

Section 97.1 provides that leave to construct "shall not be granted to a person if a licence issued under Part V that is held by another person includes an obligation to develop, construct, expand or reinforce the line, or make the interconnection, that is the subject of the application." In this case, the line that is the subject of Sagatay's application is a 230 kV transmission line from near Ignace to Pickle Lake. The question for the Registrar was whether anyone else was required by the terms of their licence to develop such a line. The Registrar found, correctly, that the answer was yes. In considering that question, the Registrar was not required by s. 97.1 to look at the details of that other licence-holder's (i.e. Watay's) proposal. The provision says nothing about Watay's proposal; it is concerned with what Watay is required by the terms of its licence to develop. Even if Watay did not propose anything at all – and it is worth repeating that Watay has not yet submitted an application for leave to construct – no one else would be permitted to develop what Watay is required to develop.

As OEB staff argued in its September 20, 2017 submission on Sagatay's request to file fresh evidence, all the Registrar needed to know was that Watay's licence requires it to develop and seek approvals for "a new 230 kV transmission line originating at a point

⁵ Subsection 6(4) says, "An employee of the Board may exercise powers and duties that are delegated under this section without holding a hearing."

between Ignace and Dryden and terminating in Pickle Lake (the ‘Line to Pickle Lake’),” in accordance with “the scope recommended by the IESO,” and that Sagatay’s project also met that description. A detailed comparison of the particulars of the respective proposals, including the anticipated impacts on First Nations or the environment, was not necessary for the purposes of this analysis.

The Registrar’s conclusions in this regard are summarized in the May 16, 2017 letter to Sagatay:

The OEB remains of the view that Sagatay’s proposed transmission line is functionally equivalent to the line that Wataynikaneyap has been directed by the Minister and licensed by the OEB to develop. The proposals of each of Wataynikaneyap and Sagatay would achieve the primary function of enabling long-term load-meeting capability in the Pickle Lake Subsystem of approximately 160MW, and of providing a basis for the future grid connection of remote communities north of Pickle Lake. The primary function – load-meeting capability in the North of Dryden region – is described in the IESO’s 2015 North of Dryden Integrated Regional Resource Plan, and the line to be constructed is described in the IESO’s recommended scope, filed with the OEB on October 13, 2016. Each of the proposed lines is approximately, 300 km in length, interconnects with the provincial transmission grid at a point between Dryden and Ignace and terminates at a point in Pickle Lake.

In its submissions in this appeal, Sagatay does not appear to dispute the Registrar’s key factual findings that:

- Sagatay’s proposed line to Pickle Lake would enable load-meeting capability in the North of Dryden region, as would Watay’s proposal
- Sagatay’s proposed line runs from a point on the transmission grid between Dryden and Ignace and terminates in Pickle Lake, as would Watay’s line to Pickle Lake
- Sagatay’s proposal is within the scope recommended by the IESO, which is referenced in the ministerial directive and Watay’s licence

Rather, Sagatay takes issue with the term “functionally equivalent”. Sagatay is correct that the term does not appear in the Act. However, as OEB staff reads the Registrar’s decision, all the Registrar meant by invoking the term was that Sagatay’s proposal does the same thing that Watay is required to do by the terms of its licence. For the reasons above, that is precisely the analysis that is called for by s. 97.1. Put another way, the Registrar properly considered whether Watay is already required to develop something that Sagatay also wishes to build. The Registrar did not, as suggested by Sagatay, apply the wrong legal test.

Sagatay further argues that, even if functional equivalence was the right test, the Registrar misapplied it. In particular, Sagatay says that its line and Watay’s line are “not of equal value” – to the First Nations whose lands would be adversely impacted by the Watay line, to the existing customers of Hydro One, to the woodland caribou, nor to “the region and the province in terms of their constructability.”⁶ This argument misconstrues

⁶ Sagatay Notice of Appeal, beginning at para. 29.

what the Registrar meant by functional equivalence. As the passage above from the May 16, 2017 letter makes clear, the Registrar was concerned with the purpose (that is, the function) of Sagatay's proposal, and whether Watay was already designated by the Government to fulfill that purpose. The impacts of Watay's proposal were irrelevant to the s. 97.1 analysis (and to the extent Sagatay's affidavit evidence and submissions filed on October 18, 2017 touch on the impacts of Watay's proposal, they are of no assistance to the OEB in this appeal, in OEB staff's view). Moreover, as the OEB concluded in Procedural Order No. 3:

This appeal is about whether the Registrar properly determined that the OEB Act precludes the OEB from proceeding with Sagatay's application for leave to construct. It is not a hearing on Watay's proposal; nor is it a hearing to determine which of Sagatay's or Watay's proposal is preferable.

In OEB staff's view, the same could be said of the matter before the Registrar. It was not about selecting Sagatay or Watay as the developer of the line to Pickle Lake – the Government had already done that.

Finally, Sagatay points out, correctly, that Watay's proposal is broader than Sagatay's – it includes not only the line to Pickle Lake but also the connection of the remote communities north of Pickle Lake and Red Lake, which are named in the directive. However, that does not change the fact that Watay is required under its licence to develop the line to Pickle Lake. Under s. 97.1, no one else may develop that line. In other words, even if the entire undertaking Watay is required to develop were seen, as Sagatay suggests, as a single project, that would not mean that anyone other than Watay could develop either of the components of the project.

Procedural fairness

Sagatay asserts in its Notice of Appeal that the Registrar breached the principles of procedural fairness. In OEB staff's view, there was no unfairness. Even though no hearing is required for decisions under s. 6, the Registrar provided Sagatay with an opportunity to provide written submissions before the Registrar dismissed its application. The Registrar's November 2, 2016 letter inviting submissions indicated that the Registrar intended to dismiss the application, but there was nothing unfair about that. The invitation for submissions belies Sagatay's suggestion that the Registrar's mind was already made up. Moreover, the letter explained the reasons why the Registrar intended to dismiss the application (including that Sagatay's proposed line to Pickle Lake was "functionally equivalent" to the line Watay is required to develop), and therefore put Sagatay on notice of the case it would have to meet.

The delegation of authority

Sagatay also asserts that it was inappropriate for the authority to dismiss the application to have been delegated to the Registrar: "section 6(1) of the Act was never intended to permit the Board to delegate such an important decision to its employee." This argument is not supported by the words of the Act. Subsection 6(1) says that "any

power or duty of the Board” may be delegated to an employee. The only exceptions are those enumerated in s. 6(2) (for example, the power to make rules or codes), none of which apply in the circumstances.

All of which is respectfully submitted