



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

DECISION AND ORDER

EB-2017-0258

SAGATAY TRANSMISSION LP

Appeal of Registrar's Order in EB-2016-0017

BEFORE: Cathy Spoel

Presiding Member

December 14, 2017

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1 INTRODUCTION AND SUMMARY

Sagatay Transmission LP (Sagatay) appeals the May 25, 2017 order of the Registrar of the Ontario Energy Board (OEB) dismissing its application for leave to construct an electricity transmission line to Pickle Lake.

The Registrar, an employee of the OEB, was acting under authority delegated to her pursuant to section 6 of the *Ontario Energy Board Act, 1998* (the Act). Sagatay has a right to appeal the order to the OEB under section 7 of the Act.

The Registrar found that section 97.1 of the Act precluded the OEB from granting Sagatay's application for leave to construct. That section provides that "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." In this case, the Registrar determined that there was "another person" who had an obligation to develop the line to Pickle Lake, namely Wataynikaneyap Power LP (WPLP).

For the reasons that follow, the OEB agrees with the Registrar's conclusion that section 97.1 foreclosed the possibility of approving Sagatay's proposal. The OEB therefore dismisses the appeal and confirms the Registrar's order.

2 THE PROCESS

Sagatay filed its Notice of Appeal with the OEB on June 9, 2017. Under section 7 of the Act, the parties to an appeal of a delegated decision are: (1) the appellant (in this case, Sagatay); (2) the applicant, if the order is made in a proceeding commenced by an application (in this case, also Sagatay); (3) the employee who made the order (the Registrar); and (4) any other person added as a party by the OEB. As in previous section 7 appeals, the OEB added OEB staff as a party. The OEB also received and granted a request by WPLP to be added as a party. WPLP is a limited partnership involving 22 First Nation communities and FortisOntario Inc., which holds an OEB transmission licence requiring it to develop a transmission line to Pickle Lake.¹

In its Notice of Appeal, Sagatay requested a written hearing, and the OEB agreed. Sagatay also asked to file additional affidavit evidence. After considering submissions from the parties, the OEB agreed to accept additional evidence on three of the six areas identified by Sagatay. In accordance with Procedural Order No. 3, Sagatay then filed the additional evidence, together with further written submissions on the appeal, which were followed by written submissions from WPLP and OEB staff, and finally a reply submission from Sagatay. WPLP and OEB staff opposed Sagatay's appeal. The Registrar made no submissions.

¹ The licence is in the name of 2472883 Ontario Limited on behalf of WPLP.

3 ANALYSIS

Sagatay's Application for Leave to Construct and the Registrar's Decision to Dismiss It

The appellant, Sagatay, is a limited partnership in which Algonquin Power and Utilities Corp., the Mishkeegogamang First Nation, the Ojibway Nation of Saugeen and Morgan Geare Inc. have an interest. Sagatay holds a transmission licence issued by the OEB.²

On January 20, 2016, Sagatay filed an application to the OEB for leave to construct a 230 kV high voltage electricity transmission line running approximately 300 km from near Ignace to Pickle Lake in northwest Ontario, as well as related interconnection and transformer facilities (OEB file number EB-2016-0017). On February 18, 2016, the OEB sent a letter to Sagatay advising that the application was incomplete – the application would be held in abeyance until a System Impact Assessment Report and a Customer Impact Assessment Report were filed.

While Sagatay's application was on hold, the Government of Ontario identified the development of a transmission line to Pickle Lake as a priority project, and selected WPLP as the proponent of the project. This was done by way of two new provisions of the Act and two Orders in Council.

On July 1, 2016, sections 28.6.1 and 97.1 of the Act came into force. Section 28.6.1 enables 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 specifies 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:

² The licence is in the name of Liberty Utilities (Sagatay Transmission) GP Inc. on behalf of Sagatay Transmission LP.

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).

On July 20, 2016, two Orders in Council were issued. One designated the following transmission lines as “priority projects” under section 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.³

The second Order in Council approved a ministerial directive to the OEB under section 28.6.1 of the Act.⁴ The directive required the OEB to amend, without a hearing, the transmission licence of WPLP 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

³ 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.

⁴ O.C. 1158/2016, July 20, 2016.

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

The directive was sent by the Minister to the OEB on July 29, 2016. In response, the OEB made the required amendments to WPLP’s transmission licence on September 1, 2016.⁵ In particular, the following new condition, mirroring the directive’s description of the project scope, was added to the licence:

13 Expansion and Upgrading of Transmission System Further to Ministerial Directive

13.1 Effective September 1, 2016, the Licensee shall proceed to do the following related to expansion of the transmission system to connect the Remote Communities to the provincial electricity grid:

(a) 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 IESO.

(b) 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 IESO.

(c) For the purposes of this paragraph 13.1 and Schedule 1, the Remote Communities are: Sandy Lake, Poplar Hill, Deer Lake, North Spirit Lake, Kee-Way-Win, Kingfisher, Wawakapewin, Kasabonika Lake, Wunnumin, Wapekeka, Kitchenuhmaykoosib Inninuwug, Bearskin Lake, Muskrat Dam Lake, Sachigo Lake, North Caribou Lake, and Pikangikum.

On November 2, 2016, the Registrar sent a letter to Sagatay advising that the OEB intended to dismiss its application in light of the ministerial directive and the subsequent amendment to WPLP’s licence. The Registrar explained that section 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 invited Sagatay to make a written submission on the proposed dismissal.

Sagatay did so 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 WPLP’s proposal, and that its “route is superior to the route selected by Wataynikaneyap Power.”

⁵ EB-2016-0258, Decision and Order, September 1, 2016.

On May 16, 2017, the Registrar wrote to Sagatay dismissing the application. The Registrar referred to the reasons provided in the November 2, 2016 letter, and elaborated on why section 97.1 of the Act prohibits the OEB from granting leave to construct the line to Pickle Lake “to any proponent other than Wataynikaneyap”:

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.

On May 25, 2017, Sagatay asked the Registrar to enshrine the dismissal of the application in an order (out of a concern that the section 7 right to appeal applies to “orders” rather than decisions), which the Registrar did that same day. The Registrar’s order formally dismissed the application, for the reasons set out in the Registrar’s May 16, 2017 and November 2, 2016 letters.

Does the Act preclude the OEB from granting Sagatay’s application for leave to construct?

The question in this appeal is whether the Registrar erred in finding that section 97.1 of the Act precludes the OEB from granting Sagatay’s application for leave to construct a transmission line to Pickle Lake.

The Registrar concluded that WPLP’s proposed line to Pickle Lake and Sagatay’s proposed line were “functionally equivalent”, therefore Sagatay’s line could not proceed under section 97.1. As the Registrar explained in the May 16, 2017 letter to Sagatay (quoted above), both lines would achieve the same primary function of enabling load-meeting capability in the North of Dryden region; both fell within the IESO’s recommended scope; and both would run from a point between Dryden and Ignace and terminate in Pickle Lake.

The OEB agrees with the Registrar’s conclusion that WPLP has an obligation to develop “the line... that is the subject of [Sagatay’s] application,” within the meaning of section 97.1, and that Sagatay’s application could therefore not be approved.

Section 97.1 of the Act was enacted to prevent the OEB from approving a transmission line that someone else is already required to build, or as WPLP says in its submission, to ensure that a ministerial directive issued under section 28.6.1 and the resulting licence condition “are not nullified by a competing leave to construct application.” There is no doubt the Government selected WPLP as the proponent of the “line to Pickle Lake” as defined in the directive and the ensuing licence. As Sagatay’s proposed line also falls within the meaning of “the line to Pickle Lake”, it would defeat the purpose of section 97.1 (and the directive) if the OEB were to approve Sagatay’s application.

WPLP’s licence does not specify the exact route of the line to Pickle Lake, down to each bend and crossing; it merely establishes certain parameters (e.g., the line must commence between Dryden and Ignace; it must terminate at Pickle Lake; it must meet the IESO’s recommended scope). Sagatay does not dispute that its own line falls within those parameters. Instead, much of Sagatay’s submissions to the Registrar and again in this appeal focused on the differences between the details of its proposal and WPLP’s proposal. Sagatay points out that its line would follow Highway 599, while WPLP’s would not, and argues that the lines would therefore have different impacts on the environment and on First Nations in the area. In this regard it is worth repeating what the OEB said 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. When Watay files an application for leave to construct its project, which it is required to do by the terms of its transmission licence, the OEB will determine whether that project is in the public interest under s. 96 of the Act (although the OEB must, by virtue of s. 96.1(2), accept that the project is needed, and s. 96(2) limits the factors that the OEB may consider in assessing whether an electricity transmission project is in the public interest).

The line that WPLP is required to build is a high voltage transmission line from a point between Dryden and Ignace to Pickle Lake that meets the IESO’s recommended scope. That is what Sagatay applied for. There may be differences between the detailed routes preferred by each proponent, but in the OEB’s view both Sagatay and WPLP are still proposing the same line.

The OEB agrees with WPLP when it says that Sagatay’s approach to section 97.1 would in effect require the OEB to undertake a comparison of competing leave to construct applications, contrary to the very intent of the provision, which is to avoid competing applications. As OEB staff put it in their submission, the Registrar’s task in this case was not about selecting Sagatay or WPLP as the developer of the line to Pickle Lake – “the Government had already done that.”

The OEB is also not persuaded by Sagatay's argument that its line is not captured by section 97.1 because its line is narrower in scope than WPLP's line. Under WPLP's licence, WPLP must develop not only the line to Pickle Lake but also the further northward extension of the transmission system beyond Pickle Lake to enable the connection of the "Remote Communities" as defined in the directive. Sagatay's proposal does not include that second component. Even if both components of WPLP's undertaking were seen as one single project, as Sagatay suggests, that would not change the fact that WPLP is required by its licence to develop the line to Pickle Lake, and by the terms of section 97.1, no one else may do so. As OEB staff explained in its submission, no one other than WPLP may develop either of the two components.

Sagatay's argument about procedural fairness

Sagatay asserts in its Notice of Appeal that the Registrar breached the principles of procedural fairness by not providing it with an opportunity to provide a "meaningful response". The Registrar's November 2, 2016 letter to Sagatay explained why the Registrar intended to dismiss the application (that is, because Sagatay's proposed line was functionally equivalent to the line WPLP is required to develop, and therefore could not be approved pursuant to section 97.1) and invited written submissions. When Sagatay asked for more time, the Registrar granted it. The Registrar's May 16, 2017 letter confirming the dismissal shows that the Registrar considered Sagatay's submissions before making a final decision. The OEB sees nothing unfair in the way the Registrar handled this matter. It was consistent with section 4.6 of the *Statutory Powers Procedure Act* and Rule 18 of the OEB's *Rules of Practice and Procedure*, which together allow the OEB to dismiss an application without a hearing if it relates to matters outside the OEB's jurisdiction, as long as the OEB provides notice of its intention to dismiss the application to the applicant and provides the applicant with an opportunity to make written submissions. Section 97.1 deprived the OEB of jurisdiction to approve Sagatay's application; the Registrar's dismissal of the application after receiving written submissions was procedurally proper.

Sagatay's argument about the validity of the ministerial directive

In its reply submission, Sagatay suggests that the ministerial directive requiring the OEB to amend WPLP's licence was "an invalid exercise of executive power on the part of the [Lieutenant Governor in Council] with which the Board should not comply." Sagatay argues that section 28.6.1 of the Act was meant only to authorize directives of a more general nature, and that "[s]uch a dramatic intrusion into a competitive market would need to be specifically authorized in the statute."

Sagatay did not advert to this argument in its Notice of Appeal, or in its supplementary submission filed on October 18, 2017. Under Rule 17.04 of the OEB's *Rules of Practice and Procedure*, an appellant may not rely on any ground that was not stated in the Notice of Appeal. It was therefore too late for Sagatay to raise this in its reply, leaving the other parties with no opportunity to respond.

Even if the OEB considered that this ground of appeal could be raised at this late stage, the OEB would not give effect to it. The text of section 28.6.1 is, on its face, broad: it can be taken to authorize both directives that relate generally to all transmission systems and directives that relate specifically to a particular licensee. Sagatay's argument about legislative intent might be stood on its head: it might be asked why, if the legislature meant for the provision to enable only directives of a general nature, it did not say so expressly. Moreover, it is worth noting that section 28.6.1 was enacted at the same time as section 97.1. When read together, it would appear that the legislature contemplated the very type of situation raised in this appeal, where the Government would direct the OEB to require a specific licensee to develop a transmission system, thereby precluding the OEB from approving any competing proposals for the same system.

Sagatay's argument about the delegation of authority

Sagatay claims in its Notice of Appeal that it was inappropriate for the Registrar to have been delegated the authority to dismiss its application, because "section 6(1) of the Act was never intended to permit the Board to delegate such an important decision to its employee."

This OEB finds no merit in this argument. Subsection 6(1) provides that "any power or duty of the Board" may be delegated to an employee. The only exceptions are those enumerated in subsection 6(2), none of which apply in the circumstances.⁶

⁶ Subsection 6(2) reads:

Subsection (1) does not apply to the following powers and duties:

1. Any power or duty of the Board's management committee.
2. The power to make rules under section 44.
3. The power to issue codes under section 70.1.
4. The power to make rules under section 25.1 of the *Statutory Powers Procedure Act*.
5. Hearing and determining an appeal under section 7 or a review under section 8.
6. The power to make an order against a person under section 112.3, 112.4 or 112.5, if the person gives notice requiring the Board to hold a hearing under section 112.2.
7. A power or duty prescribed by the regulations.

Conclusion

The OEB sees no reason to interfere with the Registrar's determination that Sagatay's application for leave to construct was precluded by section 97.1 of the Act. The Registrar correctly concluded that WPLP is required to develop the line to Pickle Lake as described in the directive and its licence, and the OEB cannot approve a competing application by anyone else.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The order of the Registrar is confirmed.
2. No party requested costs and none are awarded. Sagatay shall pay the OEB's costs of and incidental to this appeal immediately upon receipt of the OEB's invoice.

DATED at Toronto December 14, 2017

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary