



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

DECISION AND ORDER

EB-2017-0364

HYDRO ONE NETWORKS INC.

**Motion by Upper Canada Transmission Inc., Operating as
NextBridge Infrastructure, on Hydro One Networks Inc.'s Lake
Superior Link Application**

BEFORE: Christine Long
Vice Chair and Presiding Member

Allison Duff
Member

Rumina Velshi
Member

July 19, 2018

Table of Contents

1. INTRODUCTION AND SUMMARY.....	1
2. BACKGROUND AND THE PROCESS.....	2
3. DECISION ON THE MOTION.....	5
3.1 SHOULD THE LSL APPLICATION BE DISMISSED?.....	6
3.2 SHOULD THE OEB PROCESS THE LSL APPLICATION OR IS IT INCOMPLETE?.....	9
4. COST AWARDS.....	12
5. ORDER.....	13

1. INTRODUCTION AND SUMMARY

In 2013, the Ontario Energy Board (OEB) designated Upper Canada Transmission Inc., operating as NextBridge Infrastructure (NextBridge), as the transmitter to complete development work for a new 230 kV transmission line between Wawa and Thunder Bay in northwestern Ontario. In 2017, NextBridge filed an application with the OEB under section 92 of the *Ontario Energy Board Act, 1998* (OEB Act)¹ seeking leave to construct that line. The OEB's hearing of that application is in progress.

In 2018, Hydro One Networks Inc. (Hydro One) filed an application for leave to construct a 230 kV line between the same two points, also under section 92 of the OEB Act.

NextBridge filed a Notice of Motion (Motion) with the OEB asking that Hydro One's application be dismissed or, in the alternative, that the application not be processed because it is incomplete or suspended because it does not comply with the OEB's filing requirements for leave to construct applications for electricity transmission lines (LTC Filing Requirements).²

By this Decision and Order, the OEB dismisses the Motion. It does so for two reasons. First, the Hydro One application satisfies the LTC Filing Requirements and is not incomplete. Second, the OEB has concluded that Hydro One's application does not meet the criteria for dismissing a proceeding without a hearing on the merits.

¹ S.O. 1998, c. 15, Sch. B

² Ontario Energy Board *Filing Requirements for Electricity Transmission Applications*, Chapter 4: Applications under Section 92 of the Ontario Energy Board Act (July 31, 2014).

2. BACKGROUND AND THE PROCESS

Background

In 2011, the OEB undertook a process for designating a company to complete development work for a new transmission line between Wawa and Thunder Bay, commonly referred to as the East-West Tie line (EWT). Six transmitters applied for designation. One of the applicants was NextBridge. Another was EWT LP, a partnership of Hydro One, Great Lakes Power Transmission EWT LP and Bamkushwada LP.

In August 2013, the OEB designated NextBridge as the transmitter to complete development work for the line (Designation Decision). In the Designation Decision, the OEB explained the implications of designation as follows:

Designation does not carry with it an exclusive right to build the line or an exclusive right to apply for leave to construct the line. A transmitter may apply for leave to construct the East-West Tie line, designated or not. In designating a transmitter, the Board is providing an economic incentive: the designated transmitter will recover its development costs up to the budgeted amount (in the absence of fault on the part of the transmitter), even if the line is eventually found to be unnecessary.³

Since being designated, NextBridge has undertaken work to move the project forward, including extensive environmental studies of the planned route and consultations with local communities and Indigenous communities.⁴

On March 2, 2016, the Lieutenant Governor in Council made Order-in-Council 326/2016 (Priority Project OIC) under section 96.1 of the OEB Act. The Priority Project OIC declared the expansion or reinforcement of the electricity transmission network in the area between Wawa and Thunder Bay to be needed as a priority project. The preamble of the Priority Project OIC makes reference to an in-service date of 2020 for the project.

On July 31, 2017, NextBridge filed its application for leave to construct the EWT line. In that application, NextBridge projected that the EWT line will be in service by November 2020 and estimated the construction cost at \$737 million, more than \$300 million above what it had estimated the construction cost to be in the earlier designation process.

³ EB-2011-0140, Phase 2 Decision and Order, August 7, 2013, p. 4.

⁴ The Ministry of Energy identified 14 First Nation and 4 Métis communities to be consulted on the EWT project.

On August 4, 2017, the Minister of Energy wrote to the Independent Electricity System Operator (IESO) requesting that the IESO prepare an updated needs assessment based on the latest cost estimates provided by NextBridge.

On December 1, 2017, the IESO provided the Minister of Energy with an updated needs assessment (the Updated Needs Assessment), which continued to recommend the construction of the transmission line over local generation options. The Updated Needs Assessment also continued to recommend an in-service date of 2020 for the line.

On February 15, 2018, Hydro One filed an application for leave to construct a transmission line running between the two same points as the NextBridge EWT application, which Hydro One refers to as the Lake Superior Link (LSL) line. In that application, Hydro One projected that the LSL line will be in service by the end of 2021, and that the estimated construction costs for the line would be more than \$100 million lower than the construction costs estimated in the NextBridge EWT application. One reason for the cost difference between the two applications is that Hydro One's LSL application contemplates the use of an existing right-of-way that Hydro One uses through Pukaskwa National Park. Parks Canada had previously denied NextBridge's request to run a new transmission line through the park.

The Process

On February 27, 2018, NextBridge filed the Motion. On March 6, 2018, Hydro One filed a written response to the Motion, arguing that the Motion is without merit and should not be heard.

On April 6, 2018, the OEB issued a Notice of Hearing of Motion setting out the process for hearing the Motion. The Notice of Hearing invited submissions on the relief requested by NextBridge as well as on certain questions identified by the OEB in relation to Hydro One's LSL application. Hydro One was also required to file additional evidence related to the LSL project.

Through the Notice and two subsequent Procedural Orders⁵:

- All parties granted intervenor status in the NextBridge EWT application were deemed as intervenors for the purpose of the Motion. This included the Métis Nation of Ontario (MNO), the IESO, the School Energy Coalition (SEC) and the Consumers Council of Canada (CCC). The following were also granted intervenor status on the Motion: Bamkushwada L.P. and Five First Nations (BLP); Batchewana First Nation of Ojibways (BFN); Biinjitiwaabik Zaaging

⁵ EB-2017-0364, Procedural Order No. 1 Hearing of Motion, April 27, 2018; EB-2017-0364, Procedural Order No. 2 Hearing of Motion, May 18, 2018.

Anishinaabek (BZA); the Ministry of the Environment and Climate Change; the Association of Major Power Consumers in Ontario (AMPCO); the Power Workers' Union (PWU); and the Vulnerable Energy Consumers Coalition (VECC). A number of the intervenors were confirmed to be eligible to apply for an award of costs.

- Provision was made for the filing of evidence by the parties, a transcribed technical conference and an oral hearing of submissions on the Motion.

The OEB received evidence from NextBridge, Hydro One and several intervenors. A transcribed technical conference on the Motion was held on May 16 and 17, 2018 and parties requested a number of undertakings. All undertaking responses were filed with the OEB and are part of the Motion's evidentiary record.

The OEB heard oral submissions on the Motion on June 4 and 5, 2018. In lieu of oral submissions, BLP, BFN and VECC filed written submissions that have also been considered by the OEB.

3. DECISION ON THE MOTION

Before turning to the relief requested by NextBridge in the Motion, the OEB will first address the argument made by Hydro One and the PWU that NextBridge did not have standing to bring the Motion. In their view, the *Statutory Powers Procedure Act* (SPPA)⁶ and the OEB *Rules of Practice and Procedure* permit only the OEB on its own motion to dismiss an application without a hearing. This issue was raised late in the oral argument on the Motion and not all parties had an opportunity to provide submissions on this issue. As a result, and given that the Motion is being dismissed, it is not necessary for the OEB to decide this issue.

The OEB also wants to address submissions made by Indigenous communities who participated in the Motion. MNO, BLP, and BFN raised the issue that they had been consulting with NextBridge for the past five years and had spent that time establishing a relationship which they felt was poised to result (or, in the case of BLP, already has resulted) in an agreement for economic participation in the project. They expressed frustration at potentially having to start the process all over again with a new proponent. They stressed that the timeframe proposed by Hydro One for consultation was not realistic, thereby jeopardizing the proposed in-service date of Hydro One's LSL project. In addition, BZA submitted that even though it was an affected party, it had yet to be consulted by Hydro One. Parties also drew to the OEB's attention a number of cases including recent Supreme Court of Canada jurisprudence that considered the Crown's duty to consult in matters before the National Energy Board.⁷

The OEB's role in an application for leave to construct a transmission line is defined in s. 96 (2) of the OEB Act. To the extent that the issues raised by these intervenors affect the OEB's mandate under s. 96 (2) of the OEB Act, including the interests of consumers with respect to prices, and the reliability and quality of electricity service, they will be considered in the OEB's review of a leave to construct application. Similarly, the issue of what impact (if any) recent jurisprudence has on the OEB's role in discharging the Crown's duty to consult can also be addressed at that time.⁸

Relief Requested in the Motion

In the Motion, NextBridge has asked for the following:

⁶ The *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, sets out rules that generally apply to administrative tribunals in the exercise of a statutory power of decision.

⁷ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.

⁸ The OEB has previously found that it does not have the jurisdiction to conduct consultation nor to assess the adequacy of the Crown's consultation efforts in a section 92 application. See, for example, EB-2012-0082, Decision and Order, November 8, 2012, p. 12.

- (a) an order dismissing Hydro One's LSL application
- (b) in the alternative, a decision or order determining that the LSL application will not be processed because it is incomplete
- (c) in the further alternative, a decision or order determining that the LSL application does not comply with the LTC Filing Requirements and suspending that application until Hydro One has complied with the LTC Filing Requirements

While framed as two distinct issues, issues (b) and (c) are interrelated and turn on whether the LTC Filing Requirements have been met. As a result, they will be considered together.

3.1 Should the LSL application be dismissed?

There are limited circumstances under which the OEB can dismiss an application without a hearing. Argument on the Motion focused on section 4.6(1) of the SPPA, which permits the OEB to dismiss an application without a hearing if:

- (a) the proceeding is frivolous, vexatious or is commenced in bad faith;
- (b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
- (c) some aspect of the statutory requirements for bringing the proceeding has not been met.⁹

The arguments on the Motion focused on the first of these three grounds. In addition to arguing that the LSL application is frivolous, vexatious or commenced in bad faith, NextBridge also argued that there is no genuine issue that must proceed to a full hearing and that the LSL application should therefore be dismissed on a summary basis. For the reasons that follow, the OEB finds that the LSL application should not be dismissed based on either of these arguments.

Is the LSL application frivolous or vexatious?

NextBridge argued that where it is obvious that an action cannot succeed or where there is clearly no merit to the action, then the action may be treated as frivolous or vexatious. NextBridge further asserted that the LSL application is frivolous or vexatious because it fails to meet the Cabinet and ministerial expectation that the transmission line be in service in 2020. It relied on the Priority Project OIC, which makes reference to an in-service date of 2020 for the project.

⁹ These criteria have been incorporated into Rule 18.01 of the OEB's *Rules of Practice and Procedure*.

In response, Hydro One argued that the LSL application does not meet any of the criteria for dismissal under section 4.6(1) of the SPPA. Hydro One's position was supported by SEC, CCC and the PWU.

The OEB has considered the case law relied upon by NextBridge in support of its position and the evidence filed on the Motion.

For analytical purposes, the OEB has distinguished between (i) frivolous and (ii) vexatious or bad faith behaviour.

The OEB has first considered whether the LSL application can be said to be frivolous. As part of this analysis, the OEB considered whether the Priority Project OIC requires an in-service date of 2020 such that the inability of the LSL line to meet that date renders Hydro One's leave to construct application futile and therefore frivolous.

NextBridge argued that the Priority Project OIC requires a 2020 in-service date. Hydro One, as well as a number of intervenors and OEB staff, disagreed that the Priority Project OIC requires a 2020 in-service date.

The OEB is persuaded that, on a plain reading of the Priority Project OIC, the priority project declaration is not tied to a 2020 in-service date. The OEB notes in particular that the 2020 in-service date is not captured within the definition of the "East-West Tie Line Project" that was declared a priority. This is consistent with the IESO's Updated Needs Assessment that recommends (but does not require) that the project be in service by 2020.¹⁰

The OEB has also considered whether timing considerations and uncertainty related to outstanding components on the critical path are so great as to make the LSL application unable to proceed. These include the provincial Environmental Assessment process and the related First Nation and Métis consultation that must take place, the permission that is required from Parks Canada and the associated Federal Environmental Assessment process to reinforce the existing transmission right-of-way through Pukaskwa National Park, and the technical specifications of the planned tower design including the use of a "quad circuit" through Pukaskwa National Park.

There is no doubt that there are outstanding uncertainties related to the LSL application which will need to be thoroughly considered by the OEB. However, the issue is not whether the evidence needs to be tested, but when. The appropriate forum in which to test the evidence is in a hearing of Hydro One's leave to construct application, not a motion proceeding.

¹⁰ Updated Assessment of the Need for the East-West Tie Expansion, December 1, 2017, p. 1.

During the oral submissions on the Motion, NextBridge took the position that the hearing of the Motion qualifies as a hearing of Hydro One's application for the purposes of section 21(2) of the OEB Act. The "hearing" required under section 21(2) of the OEB Act in respect of an application is a hearing on the merits of the application. The hearing of the Motion does not qualify as such.

The OEB has also considered whether a delay in the in-service date to 2021 (or even later) would pose significant reliability and system issues for northwestern Ontario, such that any application for a line with an in-service date beyond 2020 is frivolous in relation to the need being met. The IESO confirmed that a delay for some period past 2020 is manageable, albeit with additional costs. The OEB has asked the IESO to carry out further assessments of system supply costs of in-service delays. Based on the evidence in this Motion, it does not appear that a delay in the in-service date is completely unmanageable from a system supply perspective. While the cost implications of a delay are not known, the OEB finds that cost uncertainty is not a reason for dismissing the LSL application; rather it is a reason to hear it.

The OEB is also not persuaded that Hydro One's LSL application is either vexatious or filed in bad faith. During the Motion, some parties took issue with the fact that Hydro One filed its application more than 6 months after NextBridge's application. The OEB has considered whether this delay could constitute either vexatious or bad faith behavior on the part of Hydro One. Hydro One submitted that it was considering filing a competing leave to construct application in March 2017. However, Hydro One submitted that when NextBridge filed its application in July 2017, that included materially higher construction costs, it decided to file a leave to construct application. The OEB sees nothing in these actions that constitutes vexatious or bad faith behavior. The LSL application, while less advanced than NextBridge's application, is still a credible application.

Should the LSL application be dismissed on a summary basis?

NextBridge invited the OEB to consider dismissal of the LSL application under a summary judgment type analysis similar to Rule 20 of the Ontario *Rules of Civil Procedure*.¹¹ It argued that the question the OEB should answer is whether there is any genuine issue as to whether the LSL application can succeed. It noted that the OEB has accepted that it has the authority to dismiss applications on a summary judgment type basis, citing a 2011 OEB decision involving a gas storage agreement dispute between landowners and Union Gas.¹²

¹¹ *Rules of Civil Procedure*, R.R.O. 1990, REGULATION 194, Rule 20.

¹² EB-2011-0087, Decision, December 8, 2011.

In response, Hydro One argued that the summary judgment process should not be applied to dismiss the LSL application. Hydro One claimed that the NextBridge argument is an attempt to get around the requirement that the OEB hold a hearing, as set out in section 21(2) of the OEB Act, and the narrow exceptions to that requirement set out in sections 4.5 and 4.6 of the SPPA. Hydro One further asserted that a summary judgment process has no place in a proceeding which is not related to the resolution of a narrow dispute between two parties, but engages the application of public interest criteria.

The OEB does not need to decide the issue raised by Hydro One of whether or how summary judgment applies to OEB proceedings, as the OEB is satisfied that summary judgment would not be appropriate in this case in any event. Hydro One has applied to build a new transmission line at a cost that is projected to be more than \$100 million less than the projected cost of NextBridge's line, and have it in service by the end of 2021. Given the public interest mandate that is engaged in leave to construct applications and the facts of this case, the LSL application should be heard on its merits. This will allow the OEB to test the evidence, assumptions, and risks of the project and to consider issues relevant to the exercise of the OEB's mandate.

Can Hydro One file a leave to construct application?

OEB staff supported NextBridge's request that the LSL application be dismissed, arguing that Hydro One, having been unsuccessful in the designation process, should not be permitted to file a competing leave to construct application.

Hydro One and a number of intervenors opposed this position on the basis that the Designation Decision did not preclude other parties from bringing a leave to construct application.

The OEB finds that the Designation Decision does not bar Hydro One from applying for leave to construct a transmission line between Thunder Bay and Wawa. As noted earlier, the Designation Decision states that "[d]esignation does not carry with it an exclusive right to build the line or an exclusive right to the apply for leave to construct the line."¹³

3.2 Should the OEB process the LSL application or is it incomplete?

As an alternative to its argument that the LSL application should be dismissed, NextBridge has sought a decision or order that the application not be processed because it is incomplete, or that it be suspended until such time as it complies with the LTC Filing Requirements.

¹³ EB-2011-0140, Phase 2 Decision and Order, August 7, 2013, p. 4.

Section 4.5(1) of the SPPA sets out the grounds upon which the OEB can refuse to process an application:

- (a) the documents are incomplete;
- (b) the documents are received after the time required for commencing the proceeding has elapsed;
- (c) the fee required for commencing the proceeding is not paid; or
- (d) there is some other technical defect in the commencement of the proceeding.¹⁴

This Motion focused on the first of these criteria, whether the LSL application is incomplete. The OEB has published the LTC Filing Requirements, which set out the information required in a leave to construct application.¹⁵

NextBridge argued that the application was incomplete and therefore should not be processed. In paragraph 11 of its Notice of Motion, NextBridge put forward three bases upon which it believed the LSL application to be incomplete:

- (a) the application does not include a final System Impact Assessment (SIA) as required by the LTC Filing Requirements
- (b) the application does not include a Customer Impact Assessment (CIA) as required by the LTC Filing Requirements
- (c) the application is incomplete because Hydro One's evidence in support of need has no connection to its proposal for a December 2021 in-service date

The OEB notes that subsequent to the filing of NextBridge's Notice of Motion, Hydro One has filed with the OEB copies of the required SIA and CIA.

In terms of the evidence in support of need, the LTC Filing Requirements call on applicants to file evidence to establish that the project fulfills needs, which are in the public interest.¹⁶ This requirement, however, does not apply where there is an Order-in-Council declaring the construction of an electricity transmission line to be needed as a priority project under section 96.1 of the OEB Act.¹⁷ There is such an Order-in-Council in this case – the Priority Project OIC.

¹⁴ SPPA, s. 4.5(1). These criteria have been incorporated into Rule 19.01 of the OEB's *Rules of Practice and Procedure*.

¹⁵ Ontario Energy Board Filing Requirements for Electricity Transmission Applications, Chapter 4: Applications under Section 92 of the Ontario Energy Board Act (July 31, 2014).

¹⁶ Ontario Energy Board Filing Requirements for Electricity Transmission Applications, Chapter 4: Applications under Section 92 of the Ontario Energy Board Act (July 31, 2014), p. 20.

¹⁷ Section 96.1(2) of the OEB Act requires the OEB to accept that a project, declared a priority under section 96.1(1), is needed.

NextBridge argues that the Priority Project OIC can only be used to establish need for a transmission line that will go into service in 2020. For other years, such as the LSL application's proposed in-service date of 2021, the applicant is required to provide evidence of need.

The OEB does not agree that Hydro One is required to establish need given the Priority Project OIC. Moreover, the OEB finds that the project's need is not contingent on an in-service date of 2020. This is clear from the IESO's Updated Needs Assessment which shows the need, continuing beyond that date.¹⁸

The OEB further notes that OEB staff, who are responsible for reviewing applications for completeness when they are filed, agreed that the LTC Filing Requirements have been met by the LSL application.

As a result, the OEB finds that the LSL application meets the LTC Filing Requirements and is not incomplete.

¹⁸ Updated Assessment of the Need for the East-West Tie Expansion, December 1, 2017, p. 15, Figure 5.

4. COST AWARDS

Hydro One argued that the costs of the Motion should be paid by NextBridge. Hydro One acknowledged that the OEB rarely awards costs against a non-applicant but argues that it is warranted given the frivolous nature of the Motion by NextBridge.

NextBridge opposes this request, arguing that the Motion is well-founded and is not the type of exceptional and unprincipled motion that could attract a cost award against a moving party.

The OEB finds that NextBridge and Hydro One will each be responsible for their own costs of the Motion. This is in keeping with common practice whereby parties (except for intervenors who are cost eligible) bear their own costs of participating in a matter before the OEB. In the OEB's view, neither Hydro One's nor NextBridge's conduct warrants a departure from this approach.

In terms of the intervenor and OEB costs for the Motion, the OEB finds that these costs should be divided equally between Hydro One and NextBridge. Evidence resulting from the hearing of the Motion will be used to support the leave to construct applications of both parties. As a result, the OEB finds that it would be appropriate to have costs divided equally between those two parties.

Previously, the OEB has found that the following parties are eligible to apply for an award of costs for their participation in the hearing of the Motion: AMPCO, CCC, MNO, SEC, BLP, BFN, BZA and VECC.

This Decision and Order sets out a process for intervenors who were previously found to be cost eligible, to file their cost claims. Hydro One and NextBridge will be able to file any objections to these cost claims and the OEB will decide upon the appropriate cost award for each intervenor. In determining the amount of the cost award, the OEB will apply the principles set out in section 5 of the OEB's *Practice Direction on Cost Awards* and the maximum hourly rates set out in the OEB's Cost Awards Tariff.

5. ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The Motion filed by NextBridge is dismissed.
2. Hydro One and NextBridge shall each pay 50% of costs awarded to intervenors.
3. Cost eligible intervenors shall file with the OEB and serve on Hydro One and NextBridge, their cost claims for the Motion within 7 days from the date of issuance of this Decision and Order.
4. Hydro One and NextBridge shall file with the OEB and serve on the party against whose claim the objection is being made its objections to the claimed costs within 17 days from the date of issuance of this Decision and Order.
5. An intervenor whose cost claim was objected to shall file with the OEB and serve on objecting party a reply submission as to why its cost claim should be allowed within 24 days of the date of issuance of this Decision and Order.
6. Hydro One and NextBridge shall pay the OEB's costs incidental to the Motion upon receipt of the OEB's invoice.

All filings to the OEB must quote file number EB-2017-0364 and be made electronically through the OEB's web portal at <http://www.pes.ontarioenergyboard.ca/eservice/> in searchable/unrestricted PDF format. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at https://www.oeb.ca/oeb/Documents/e-Filing/RESS_Document_Guidelines_final.pdf. If the web portal is not available, parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a USB flash drive in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Zora Crnojacki at Zora.Crnojacki@oeb.ca and OEB Counsel, Lawren Murray at Lawren.Murray@oeb.ca.

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DATED at Toronto July 19, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary