Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2010-0220

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

AND IN THE MATTER OF an application by the Ontario Power Authority for a licence.

By delegation, before: Jennifer Lea

DECISION AND ORDER

By an application received by the Ontario Energy Board on August 23, 2010, the Ontario Power Authority ("the OPA") sought a renewal of its licence. The Board assigned File number EB-2010-0220 to the application. Notice of the application was issued on September 10, 2010. Submissions on the application in response to the notice were received from: Parker Gallant, City of Toronto, Green Energy Coalition, Historic Saugeen Métis, John R. O'Toole (M.P.P. for Durham) and Ontario Energy Board staff. The OPA replied to each of the arguments raised in the submissions.

Request for Oral Hearing

Mr. Parker Gallant, in his letter dated October 1, 2010, requested that the Board decide the application by way of oral hearing. Mr. Gallant argued that an oral hearing was necessary to complete the public record with respect to the OPA's alleged breach of its existing licence. More specifically, he indicated that OPA witnesses should be required to answer questions regarding its breach of licence, its record of public statements regarding an update to the Integrated Power System Plan ("IPSP"), and evidence regarding the effect on the power system of key elements of the original IPSP renewable energy expansion forecast. In addition, Mr. Gallant proposed that an Ontario

Energy Board witness with responsibility for licensing be called to explain the steps the Board has taken to enforce the OPA's compliance with its licence.

I find that the last two items, the effects of the original IPSP renewable energy expansion forecast and the steps taken by the Board to enforce the licence are not relevant to my determination of this licence application. The compliance of the OPA with its licence relates to the conduct of the licensee, and therefore may be relevant to an application for a renewal of the licence. However, I find that the public record can be made sufficiently complete through a written hearing process. I find that the facts necessary to be determined in this application are contained in the written record, and a further oral process to elucidate those facts is unnecessary.

Undisputed Changes to the Licence

In making its application, the OPA proposed several changes to the original licence, which had been issued by the Board on September 30, 2005. The OPA did not propose a change to the term of the licence of five years, nor did any party except Board staff comment on this question. I find that five years is an appropriate term for the renewal.

The OPA proposed several other changes to the licence which were not opposed by any party.

The addition of a definition of the word "Minister" in section 1 is acceptable.

The amendments proposed to section 7.2(d) of the licence to recognize the existence of a governance and structure by-law are appropriate and I find these changes should be made.

The proposed removal of existing section 7.2(f) to recognize the fact that the position of Chief Conservation Officer no longer exists will also be made.

The complete removal of existing section 7.2(g), as apparently requested in Exhibit A-1-8, the marked licence appended to the application, is more problematic. It appears that complete removal may not have been the actual proposal, as section 5.1 of the application, in numbered paragraph 1, reads: "We have updated sections 7.2(d) and existing 7.2(g) (new 7.2(f)) to reflect that by-laws and stakeholdering processes have been established by the OPA". There is no "new 7.2(f)" in Exhibit A-1-8. I find that

portions of existing section 7.2(g) should be retained as a new 7.2(f), which is to read as follows:

> (f) provide the Board with a description of any material changes to processes established by the Licensee under section 25.12 of the Electricity Act.

The Board is one of the stakeholders that receives information and invitations to discussion sessions that take place as the OPA carries out its responsibilities under section 25.12 of the Electricity Act, so the Board needs to receive formal notice under this licence of only significant changes to those processes.

Provision of Information

The existing licence contains section 7.1, which reads:

> 7.1 The Licensee shall provide, in the manner and form determined by the Board, such information as the Board may require from time to time.

Section 7.2 goes on to list several specific types of information that the OPA must provide. Board staff proposed the addition of several subsections to section 7.2, particularizing certain information that the OPA must provide to the Board. The OPA did not object to the Board staff proposals, although it submitted that additional clarity as to the information required would be helpful.

The first obligation that Board staff proposed was that the OPA provide any Ministerial directive or letter from the Minister at the time the OPA receives such correspondence. This request was grounded on the provisions of the *Green Energy and Green Economy Act*, which provides the authority for the Minister to issue directions to the OPA. I find that a requirement to provide the Board with any Ministerial directive without waiting for a request from the Board under section 7.1 is reasonable. I do not find that a requirement to provide the Board with any letter from the Minister is sufficiently specific for inclusion in the licence as a particular example of the information that the licensee must automatically provide. However, to satisfy the need for the Board to be aware of Ministerial directions in whatever form they are given, I find the following provision will be included in the licence:

> 7.2(g) provide the Board with any directions to the Licensee from the Minister, whether contained in a Ministerial directive or other document;

Board staff also proposed the addition of a subsection that would require production on request of information regarding generation programs and contracts to assist the Board in setting regulated prices. The OPA, in its response, noted that many of its contracts contain a provision that prohibit the OPA from providing certain confidential information to the Board unless required to do so under a Board order. Board staff had acknowledged the potential sensitivity of contract information and pricing, and proposed that the information be provided only on the understanding that the Board would retain the information in confidence.

The proposal from Board staff differs from most of the other provisions in section 7.2, which require automatic production without a specific request from the Board. Board staff is not seeking a requirement that the OPA always produce information about generation contracts, programs and prices, but that it produce the information upon the request of the Board. Such a request could be made under section 7.1 of the licence, and should not necessitate a specific obligation to be listed under section 7.2. I find that the general provision under section 7.1 should be sufficient to obtain the production of information that the Board requires to set regulated prices. Issues such as the necessity for a Board order and the confidentiality of the information can be addressed through the use of that provision.

Lastly, Board staff proposed that the licence include an additional provision in the licence “requiring the OPA to provide information of the type and in the format as may be required from time to time in order to assist the Board in carrying out its regulatory responsibilities”. This request was linked to the integral role of the OPA in electricity planning, including transmission planning and demand management.

The proposed condition is very similar to existing section 7.1, and Board staff did not explain why section 7.1 was insufficient to obtain the material that is needed. I am not persuaded that this condition proposed by Board staff is necessary.

Amendment or Removal of Sections 10 and 11

The issue that generated the most controversy in the written hearing was the OPA proposal that the requirement in section 10.1 of the licence, to submit an IPSP to the Board for review every three years, be changed to require the submission of the IPSP "as frequently as required by regulation". In its reply submission, the OPA characterized this as an administrative change, as the regulation itself does require submission every three years. The reason the OPA gave for requesting this change was that if the regulation was amended to require a different time period for IPSP submissions, it would be unnecessary to amend the licence to accord with the revised regulation.

Parker Gallant, City of Toronto, Green Energy Coalition, Historic Saugeen Metis, and John R. O'Toole all objected to the proposal to change the wording of section 10.1. Most of the arguments opposing the change appeared to be asking the Board to impose a licence requirement that could be used to require the filing of an IPSP independent of the requirements in the legislation or any directives from the Minister. The City of Toronto and John O'Toole pointed out the importance of a reliable electricity system and a regular planning and review process, and submitted that the Board should ensure that this occurs regardless of possible amendments to the legislative requirements.

Mr. Gallant, in his letter of October 1, 2010 submitted:

> "The institutional structure of Ontario's electricity sector revolves around central planning. This central planning based system is operating without a plan, a deficiency that greatly increases financial risks to ratepayers and may well imperil Ontario's power system reliability impacting the creation of jobs and the ability of the Province to maintain its obligations to the ratepayers and taxpayers."

The Green Energy Coalition ("GEC"), in proposing a maximum five year submission timetable, said:

> "GEC urges the Board to include a provision requiring the submission of an integrated plan no less frequently than every five years whether required more frequently by regulation or Ministerial Direction or not…GEC is concerned that transparency, access to information and public input into the planning process will be potentially compromised if regular review is not guaranteed. Given the

possibility that the three year requirement in the regulations will be relaxed, it is vital that the Board set a maximum period…

The ability of the Board to require resubmission at an earlier time is also important to include given the potential for rapidly changing circumstances. That ability, however, is not a substitute for a mandatory maximum period as it does not provide a strong signal to OPA of the need to re-file regularly nor does it guarantee to stakeholders that there will be a regular opportunity for review. This is particularly important given the likelihood that OPA will be pursuing a change to the regulation requiring three year reviews."

The OPA did not accept the argument that the licence should impose an obligation that is in addition to any requirements in the legislation. The OPA in reply stated:

"The OPA's proposed change is designed to ensure that the requirement in the licence remains consistent with the requirement in the regulation throughout the course of the five year term of the licence renewal. It would create confusion if the regulation is changed in the future with result that there are two different time periods governing the frequency with which an integrated power system plan must be submitted to the Board. An amendment to the licence would likely be required to address this confusion.

It is clear in the legislative scheme set out in ss. 25.30(1) of the EA that the frequency with which an IPSP is to be submitted to the Board is generally to be set by regulation rather than in the OPA's licence. It is for this reason that the OPA cannot support the submission of GEC that a maximum period of five years between submissions should be set out in the licence."

Board staff submitted that the provision should be removed entirely, as section 10, as well as section 11, are duplicative of requirements in the legislation. Board staff did not address the proposal from GEC that the licence impose a requirement over and above requirements in the legislation. The OPA did not agree with the Board staff proposal to remove the sections, finding "some transparency value" in setting out the provisions.

I find that the retention of section 10 of the licence with the changes proposed by the OPA is not useful. Section 5.1 of the licence reads:

5.1 The Licensee shall comply with all applicable provisions of the Act, the Electricity Act and the Regulations.

Section 5.1 of the licence can be used to enforce the requirement contained in the legislation for the OPA to submit an IPSP, if enforcement action is required. Unless the licence is to impose a requirement that is additional to that contained in the legislation regarding the filing of an IPSP, I do not find value in retaining section 10.

The same argument is equally valid with respect to present section 11, which deals with the development and approval of procurement processes. I do not find the amended section 11 proposed by the OPA is needed, as the legislation covers the subject matter in this section. (Sections 7.1 and 9.3 of the licence, which also duplicate legislative requirements, could be removed on that basis, but those sections were not mentioned in the application or the submissions, and I will not deal with them in this decision.)

Further, I do not find that the licence should contain a requirement that is additional to that contained in the legislation regarding the filing of an IPSP. I acknowledge the genuine concern for the public interest in electricity system planning and the IPSP review process demonstrated in the submissions of GEC, Parker Gallant, City of Toronto and John R. O'Toole. However, it is not clear that the imposition of a fixed time period for the submission of an IPSP would create the certainty that these intervenors appear to be seeking.

The OPA, in its submission, pointed out that the Minister of Energy, in his speech on September 20, 2010, indicated that the government was developing a new IPSP directive for the province's Long Term Energy Plan. At the time the submission was filed, there was no information available as to when this directive would be delivered to the OPA. Since the record closed in this application, the Minister of Energy has released the Long Term Energy Plan and posted a proposed Supply Mix Directive on the province's Environmental Registry for public comment. Given the importance of the directive for the development of the IPSP, it is not practical to require a date certain for the filing of the IPSP within the licence. I find that sections 10 and 11 of the licence should be deleted.

The Historic Saugeen Métis, in its submission on the licence application, reminded the Board that the Board had declined to consider the application for intervenor status made by the Historic Saugeen Métis in the IPSP proceeding (EB-2007-0707). The Historic

Saugeen Métis objected to the change in the licence condition proposed by the OPA on the basis that it might create a disadvantage in seeking that status in any future IPSP proceeding. I cannot grant intervenor status in the EB-2007-0707 proceeding by way of this licence application hearing. Further, I agree with the OPA that a request for intervenor status in the IPSP proceeding will not be affected by the decision in this application regarding section 10 of the licence.

Compliance of the OPA with the Existing Licence

Two intervenors raised concerns with the OPA's compliance with its existing licence. Parker Gallant, in his submissions of October 1, 2010 and October 5, 2010, argued that the OPA was in breach of nine provisions of the licence, and emphasized in particular his argument that the OPA has failed to submit an IPSP in accordance with the legislation and Board orders. Mr. Gallant submitted that the OPA should be required to comply with its existing licence before its licence is renewed. He stated in his October 5th submission:

> "As they [the OPA] are currently in Non-Compliance with their existing licence, it is incumbent upon them to first restore their licence granted by the OEB September 30, 2005 and terminating December 31, 2010. It should be a requirement that Board staff ensure the OPA are in compliance with their existing licence prior to making any recommendations for renewal.
>
> To summarize, the OPA is clearly in breach of many of their licensing rules and in Non-Compliance with the Electricity Act. Failure to address these breaches would be construed by the public to be setting precedents that place the standards of care and the rule of law in jeopardy in the Province of Ontario. If the OPA is allowed to proceed with its current application, to renew its Licence, the matter should be brought to the attention of the Attorney General under the Provincial Offences Act."

In reply, the OPA submitted that an application for licence renewal is not an appropriate forum to determine whether or not there has been a breach of a requirement of the licence or a regulation. However, the OPA went on to explain its view that it is in full compliance with its licence, arguing that the three year time period in the regulation

would commence as of the date of Board approval of the IPSP, not the date that the IPSP was filed with the Board for approval.

The Board has taken into account, on previous licence renewal applications, proven breaches of an existing licence. Indeed, a proven breach of licence by the licensee is certainly relevant to the Board's consideration of a licence renewal application, and to the conditions that should be imposed in any renewed licence. However, in this case, there has not been a finding by the Board or any other enforcement agency that the OPA has breached its licence. I agree with the OPA to this extent: the licence application process is not the appropriate forum in which such a determination should be made. I find that the allegations made in this case are not a bar to renewal of the licence.

The City of Toronto sought the imposition of two conditions relating to the release of information and reception of stakeholder input on the Conservation and Demand Management programs developed by the OPA. The City implied that in not ensuring timely disclosure of the program information, the OPA was not acting in accordance with the spirit of the *Electricity Act*. The OPA in reply argued that it had shared information and consulted stakeholders on the programs, listing its efforts in this regard. In addition, the OPA indicated in its reply submission that further documentation had been released since the City filed its submission on the licence application. The OPA objected to the conditions proposed by the City on the grounds that they were unnecessary, and too vague to provide a clear obligation on the OPA or guidance for stakeholders.

I agree with the OPA that the conditions proposed by the City are vague, and also find that such conditions appear to be directed at a problem which is moving towards resolution. The situation regarding the programs is evolving, and the proposed conditions may become redundant or inappropriate during the five year term of the licence. I will not impose the conditions proposed by the City.

Summary of Findings

The findings in this decision can be summarized as follows:

It is in the public interest to grant the application of the OPA for renewal of its licence, to enable it to exercise its powers and perform its duties under the Electricity Act.

The licence of the OPA will be renewed for a period of five years.

The changes to the licence proposed by the OPA will be made, with the following exceptions:

- New section 7.2 (f) will read as follows: (f) provide the Board with a description of any material changes to processes established by the Licensee under section 25.12 of the Electricity Act; and
- Section 10 and section 11 of the licence will be deleted.

In addition, the following new condition will be imposed as part of section 7.2:

g) provide the Board with any directions to the Licensee from the Minister, whether contained in a Ministerial directive or other document.

IT IS THEREFORE ORDERED THAT:

1. The licence of the OPA will be renewed for a period of five years.

2. The changes to the licence proposed by the OPA in Exhibit A-1-8 of its application will be made, with the following exceptions:

    a. New section 7.2 (f) will read as follows: (f) provide the Board with a description of any material changes to processes established by the Licensee under section 25.12 of the Electricity Act; and

    b. Section 10 and section 11 of the licence will be deleted.

3. In addition, the following new condition will be imposed as part of section 7.2:
   g) provide the Board with any directions to the Licensee from the Minister, whether contained in a Ministerial directive or other document.

Under section 7 of the Ontario Energy Board Act, 1998, this decision, which was made by an employee by delegation under section 6 of the Act, may be appealed to the Board within fifteen days.

DATED at Toronto, December 1, 2010

ONTARIO ENERGY BOARD

Original signed by

Jennifer Lea
Counsel, Special Projects