Ontario Energy Board
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416- 481-1967
Facsimile: 416- 440-7656
Toll free: 1-888-632-6273

Commission de l'Énergie de l'Ontario
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone; 416- 481-1967
Télécopieur: 416- 440-7656
Numéro sans frais: 1-888-632-6273

Ontario

BY E-MAIL

January 16, 2012

Kirsten Walli
Board Secretary
Ontario Energy Board
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Grand Renewable Wind, LP
Application for Leave to Construct Electricity Transmission Line and Related Facilities and Approval of form of Easement Agreement
Board File Number EB-2011-0063

Please find attached the Board staff's Submission as directed in the Board's Motion to Review and Procedural Order No.5 dated December 22, 2011, with respect to the above proceeding. Please send copies to Applicant, Applicant's Counsel and all intervenors of record.

Yours truly,

Original signed by

Nabih Mikhail
Project Advisor
Electricity Facilities and Infrastructure

c. Mr. Jeong Tack Lee, Grand Renewable Wind LP
Mr. George Vegh, McCarthy Tétrault LLP
Ms. Kristyn Annis, McCarthy Tétrault LLP
Mr. James M. Cho, Samsung Renewable Energy Inc.
All intervenors of record

Attachments

BOARD STAFF SUBMISSION
MOTION TO REVIEW
GRAND RENEWABLE WIND LP
LEAVE TO CONSTRUCT TRANSMISSION FACILITIES EB-2011-0063

January 16, 2012

CONTEXT OF THE MOTION TO REVIEW

On December 22, 2011 the Board issued a Motion to Review and Procedural Order No.5 to address a letter dated December 12, 2011 by Six Nations Council (an intervenor in the proceeding) regarding the Board's Decision and Order dated December 8, 2011. Six Nations Council referred to an apparent inconsistency between the language used in that Board's Decision versus the language that appeared in the actual Order, in particular the Conditions of Approval (the "Conditions") that formed part of the Order.

The December 8 Board Decision and Order approved a leave to construct application as filed by Grand Renewable Wind LP ("GRWLP") for a 19 kilometre transmission line and associated facilities (the "Project") that will connect two generation facilities – a wind farm and a solar farm – to the Independent Electricity System Operator ("IESO") controlled-grid. The application did not seek any approvals with respect to the generation facilities themselves.

At page 12 of the Decision, the Board stated that:

> The Board accepts that the Project is needed in order to transmit the electricity generated by the two generation facilities. The Board's approval will be conditioned, however, on the two generation projects receiving the REA [Renewable Energy Approval] and any other approvals necessary for their construction.

The Six Nations Council observed that Condition 1.6 that forms part of the Board's Order, does not precisely match the condition as described in the Decision. Condition 1.6 of the Order states:

> GRWLP shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

The Board in its December 22, 2011 Motion to Review stated that:

> The primary difference is that the Decision specifies that the Project will be conditioned on the completion of the REA for <u>both</u> generation projects, i.e.

the wind farm and the solar farm. Condition 1.6 as it appears in Appendix A to the Order simply states that GRWLP must obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, and does not specify that the approval for the Project (i.e. the transmission line and facilities) is conditioned on any approvals relating to the two generation projects.

The Six Nations Council asked in its December 12, 2011 letter that the Board should vary its Decision pursuant to Rule 43 of the Board's *Rules of Practice and Procedure* (the "Rules") to specify in the Conditions that the Project cannot commence until the REAs for the two generation projects have been completed. Board staff notes that what is referred to here as **the Project**, is actually referred to in the Conditions of Approval contained in the Boards December 8, 2011 Decision and Order as the **Transmission Facilities**.

The Board stated that it would be assisted in particular by submissions regarding two issues and provided a schedule for these submissions for all parties in this proceeding. The two issues are:

- The appropriateness of tying approval of the Project i.e., the Transmission Facilities, to the REA for the solar farm (as opposed to the REA that includes the Project); and
- The extent to which the findings of the Customer Impact Assessment Report and System Impact Assessment Report (which contemplated the Project i.e., the Transmission Facilities, serving both generation facilities) are still valid if the Project initially serves only the wind farm.

On January 5, 2012, Six Nations filed a submission addressing its views regarding the noted Motion to Review and Procedural Order No.5, dated December 22, 2011. In particular Six Nations disagreed with the notion that its December 12, 2011 correspondence implied that it was a request for a motion to review the Board's substantive decision. Six Nations stated that instead it was a request that the Board amend its formal Order so that Condition 1.6 of the Order reflected the Board's decision on page 12 of the Decision in question.

BOARD STAFF SUBMISSION

A. The nature of this motion to review

In its January 5 submission, Six Nations observed that its initial request to vary the order did not seek any change to any substantive element of the decision; it asked only that the actual conditions attached to the order be varied to match the description of the relevant condition at page 12 of the decision. Six Nations further submitted that there was no reason to change the substance of the decision, and that the "threshold test" for conducting a review, as established in Rules 44.01(a) and 45.01, had not been met regarding any substantive change. Six Nations therefore re-iterated its request from its December 12 letter, and asked that the conditions be varied to ensure they matched the decision.

The Board's powers to conduct a review come from the Rules and the *Statutory Powers Procedure Act* ("SPPA"). Sections 44 and 45 of the Rules state:

> 44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:
>
> (a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and
> (b) If required, and subject to **Rule 42**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.
>
> 45.01 In respect of a motion brought under **Rule 42.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The Board also has the power to review a decision or order on its own motion:

> 43.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

The ultimate authority for the Board's review powers is s. 21.2(1) of the SPPA:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary suspend or cancel the decision or order.

As the Board noted in Procedural Order No. 5, although Six Nations asked for a variance to the order, it did not actually frame its request as a formal motion to review (it was not, for example, actually filed as a motion). The Board considered the Six Nations letter and determined that it was appropriate to initiate a review. However, the Board is well within its rights to frame the "questions" in this review as it sees fit, and need not be limited to those specifically requested in Six Nations' December 12 letter. Put simply, there is an apparent inconsistency between the decision and the conditions attached to the Board's order. The Board is seeking submissions from parties on how best to resolve any inconsistency. It is within the Board's powers to amend the decision, the conditions attached to the order, both, or neither. Although not specifically requested by Six Nations, the Board is empowered by Rule 43.01 and s. 21.2 of the SPPA to frame the review in whatever fashion it feels is appropriate. There is nothing improper about seeking submissions regarding the appropriateness of the reasons or the conditions.

By framing the questions for the review as it has, the Board has essentially already dealt with the "threshold" issue. Both Rule 44 and Rule 45 apply to parties making motions to review before the Board. They do not apply where the Board is setting its own parameters for a review.[1] By initiating the review through Procedural Order No. 5 the Board has already determined that the issue will be heard. Any variances from the original decision need not be limited to those requested by Six Nations in its December 12 letter.

[1] It should also be observed that Rule 45 is discretionary, and that the list of grounds listed in Rule 44 is not exhaustive.

B. The appropriateness of tying approval of the Project to the REA for the solar farm

The first issue for which the Board has sought submissions is: "The appropriateness of tying approval of the Project to the REA for the solar farm (as opposed to the REA that includes the Project)." Board staff submits that it is not necessary for the leave to construct approval to be conditioned on the completion of the REA for the solar farm, provided that the REA that combines the Wind farm and the Project (the Transmission Facilities) has been approved.

As the Board has observed repeatedly in this proceeding, GRWLP's application was for leave to construct transmission facilities (i.e. the Project). It was not an application for any approvals related to the generation facilities themselves.

The rationale for any condition relating to the completion of the REA for the solar project is not clear. As noted in several places in the decision, the matters that the Board can consider in a s. 92 leave to construct application is strictly limited by section 96(2) of the Act, which provides:

> In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

Project Need

The Board's description of the condition at page 12 of the decision is in the "Project Need" section. Prior to discussing the condition, the Board noted that there may be some question regarding whether or not "project need" is even something the Board should consider, given the limits placed on its jurisdiction by section 96(2) – which

does not mention “need” as a consideration. Despite this, the Board found that there was little reason to doubt that there would be an actual need for the Project, as the applicant had executed power purchase agreements for the wind farm and the solar farm with the Ontario Power Authority, and the Project was the only means by which the power produced by the generation facilities could be conveyed to the IESO-controlled grid. Board staff submits that it was in this context that the Board stated that a condition relating to REA approval for the generation facilities would be appropriate, i.e. to ensure that the Project would actually be “needed” because it would be attached to a generation facility.

Even absent a condition relating to the REA for the solar farm, there is no danger that the Project will be constructed without a generation facility connected at the other end. As noted above, the REA for the Project (completion of which is required by condition 1.6 to the existing order) is also the REA for the wind farm. An REA approval for the Project, in other words, is also an REA approval for the wind farm. Even if no solar farm were contemplated at all (which is obviously not the case), the need for a transmission line would be well established by the wind farm alone.

It bears repeating that, in addition to the limits placed on its jurisdiction by section 96(2), in this proceeding the Board has no approval authority over the generation facilities. Any conditions imposed by the Board as part of an order should relate directly to the application that is actually before the Board. Since any “project need” issues are satisfied by the existing condition relating to the REA for the Project/wind farm, there appears to be little justification for an additional condition relating to the solar farm (see additional discussion on the duty to consult below).

Board staff therefore submits that the rationale for the condition as expressed in the decision relates to project need, and is not related to the duty to consult (as discussed below). It is not necessary that any condition seeking to ensure there is need for the Project require REA approval for the solar farm in addition to the REA approval for the wind farm/Project.

Duty to consult

Six Nations arguments in support of a condition requiring approval of the REA for both generation projects all relate to ensuring that the description of the condition at page 12 of the decision matches the condition as it actually appears in the order. Although

the Board invited Six Nations to make additional submissions in support of its proposed variance through Procedural Order No. 5, Six Nations did not use this opportunity to provide any further substantive reasons for the variance (although it did make additional submissions regarding the issues on the review as defined by the Board and the "threshold" test, which are discussed above).

It is Board staff's understanding that Six Nations' ultimate concern with the condition as it currently appears in the order is that it may lead to a failure by the Board to ensure the Crown's duty to consult is satisfied before the Project is constructed. Although this is not mentioned in any of Six Nations' submissions relating to the review, Six Nations original final argument before the Board (filed September 23, 2011) focused heavily on the duty to consult. Six Nations has also filed a separate Notice of Appeal before the Divisional Court, dated January 4, 2012. The appeal before the Divisional Court concerns the same issue that is before the Board on this review: the fact that the condition in the order does not specify that construction of the Project cannot commence until the REA for both generation facilities has been completed. The grounds provided in the Notice of Appeal, however, relate almost entirely to the duty to consult.

As nothing relating to the duty to consult is mentioned in Six Nations' letters of December 12 and January 5, it is not clear that Six Nations is arguing on this motion to review that the condition as it appears in the order should be varied because of concerns related to the duty to consult. However, Board staff will address this issue as it appears to be the underlying rationale for the proposed variance. If Six Nations does not pursue the duty to consult issue, this portion of Board staff's argument can be disregarded. To the extent that Six Nations attempts to raise any fresh arguments respecting the duty to consult in its reply argument, Board staff may seek the Board's permission to address these arguments as they were not presented in Six Nations' initial submissions on this review.

Board staff submits that it is not appropriate to attach a condition relating to the completion of the REA for the solar farm for any reasons relating to the duty to consult for two reasons: 1) the Board has no approval authority over the generation facilities; and 2) the Board's statutory grant of power does not allow it to consider Constitutional issues (including the duty to consult) in a section 92 application.

As discussed above, the applicant has sought no approvals from the Board relating to the generation facilities in this proceeding. The generation facilities are therefore both outside the scope of this proceeding, and outside the Board's jurisdiction. In considering duty to consult issues, the Supreme Court has cautioned that tribunals (where they have the statutory authority to consider the duty to consult at all) should limit their deliberations to impacts arising directly from the matter actually before the tribunal:

> [The Respondent First Nation] argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. […] I cannot accept this view of the duty to consult. Haida Nation negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration. [Emphasis in original][2]

In its original final argument in this proceeding, Six Nations referred to a recent decision of the British Columbia Court of Appeal: *West Moberly First Nation v. British Columbia (Minister of Mines)*.[3] This case is not binding in Ontario and is also readily distinguishable from the facts in the current case. West Moberly involved an application by a coal mining company for an exploration permit. A local First Nation argued that if the permit were granted it would have adverse impacts on a caribou herd that the First Nation had an Aboriginal right to hunt. The British Columbia Court of Appeal ultimately found (in a split decision) that the Crown had not adequately discharged its duty to consult with regard to the issuance of the permit. The potential

[2] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43 ("Rio Tinto"), paras. 52-53.
[3] [2011] BCCA 247 (CanLii).

adverse impacts to Aboriginal rights, however, arose from the activities for which a permit was sought themselves. This was not a case in which the court found that the permitting authority was required to consider potential adverse impacts from other activities over which it had no authority

The Board has itself also rejected the idea that its consideration of the duty to consult encompasses projects that are not the subject of the application before the Board nor within the Board's jurisdiction to approve. In EB-2011-0725 ("Red Lake") the Board held that, although it could consider duty to consult issues related to a natural gas pipeline itself in a leave to construct application, it would not consider consultation issues relating to other projects that might be served by the new pipeline, over which the Board had no authority.[4]

The second reason that the Board should not consider duty to consult issues related to the generation projects (or for the Project itself, for that matter), is that the Board has no jurisdiction to do so. The Board addressed this issue in the Decision:

> GRWLP relies on the Board's decision in EB-2009-0120 ("Yellow Falls"), in which the Board determined that it did not have the jurisdiction to consider Aboriginal consultation issues in a section 92 leave to construct case except possibly where the Aboriginal or treaty right in question could be directly tied to prices, reliability, or the quality of electricity service.45 The reason for this finding was that section 96(2) of the Act specifically limits the Board's consideration to these factors46. The Supreme Court's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* ("Rio Tinto"), which was issued after Yellow Falls, appears to support the Board's conclusions. The Court stated:
>
> > *"[t]he power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power."*

[4] This decision has been appealed to the Divisional Court. Note that the Board's jurisdiction in gas pipeline leave to construct applications is much broader than its jurisdiction in electricity leave to construct applications. Section 96(2) only applies to section 92 (electricity).

> The Board does not dispute that, to the extent any Aboriginal or treaty rights are potentially affected by the Project, the Crown's duty to consult will have to be discharged. However, the forum for that discussion is the REA process. One of the conditions to this approval is that construction cannot commence until (amongst other things) GRWLP has obtained an REA approval. The Board can be satisfied, therefore, that the Project will not be built until any duty to consult issues are addressed. To the extent that the Six Nations Council is not satisfied with the results of the REA process, it can pursue its remedies (for example) through the courts. The Board will therefore not defer its decision.

As described above, the matters the Board is permitted to consider in electricity leave to construct applications is strictly limited by section 96(2). Put simply, the legislature has specifically excluded from the Board's authority the jurisdiction to consider anything other than the interests of consumers with respect to prices and the reliability and quality of electricity service, and where applicable the promotion of the use of renewable energy sources. The Board does not have the power to consider Constitutional issues, including the duty to consult, in electricity leave to construct proceedings. This position is consistent both with previous Board decisions (for example Yellow Falls) and Supreme Court precedent (Rio Tinto).

None of this is to say that the duty to consult is not an important issue, or that Six Nations has no means to pursue this issue. It appears to be agreed by all that the duty to consult will be considered in the REA process. As the Board indicated in its decision, if Six Nations is not satisfied with the terms of any approval arising from the REA, it is free to pursue remedies (for example) through the courts. The Board, however, has no approval authority over the REAs, and no jurisdiction to consider the duty to consult in electricity leave to construct applications.

For these reasons, Board staff submits that the condition as requested by Six Nations should not be included in the order for any reasons relating to the duty to consult.

C. Implication of Solar REA Delay

Board staff expects that in the event that the Solar REA is delayed, and GRWLP receives the REA for the Wind Project and the transmission facilities, the submission

by the IESO and Hydro One Networks Inc. ("Hydro One") would lead to one of two scenarios:

Scenario 1:

The IESO or Hydro One provide additional conditions to either the SIA report by the IESO or the CIA report by Hydro One, or to both Reports, but essentially both parties indicate that a delay of the Solar Project will not negatively impact either the system reliability (SIA report) or the neighboring transmission customers (CIA Report); or

Scenario 2:

The IESO or Hydro One indicate that delay of the Solar Project would necessitate a fundamental update to either the SIA Report by the IESO or the CIA Report by Hydro One, which it is expected would take considerable time, and until completed, the transmission facilities should not commence conveying electricity from the Wind Project to the IESO-controlled system.

Board staff submits that under *Scenario 1*, the Board should consider the following changes:

- If Hydro One requires that additional conditions be added to its CIA report, Condition 1.4 of the Conditions of Approval in the Board's December 8 Decision and Order, would need to be amended as follows:
  Existing Condition 1.4
  GRWLP shall satisfy the Hydro One Networks Inc. requirements as reflected in the Customer Impact Assessment document dated May 6, 2011,
  Proposed amendment to Condition 1.4
  GRWLP shall satisfy the Hydro One Networks Inc. requirements as reflected in the Customer Impact Assessment document dated May 6, 2011, and such further and other conditions which may be imposed by Hydro One Networks Inc. at a later time.

- To ensure consistency between its Decision and its Order in the December 8, 2011 Decision and Order, the Board should consider varying its Decision on page 12 as follows:

Existing [last paragraph, page 12]

The Board accepts that the Project is needed in order to transmit the electricity generated by the two generation facilities. The Board's approval will be conditioned, however, on the two generation projects receiving the REA and any other approvals necessary for their construction.

Proposed amendment [last paragraph, page 12]

The Board accepts that the Project is needed in order to transmit the electricity generated by either or both of the new generation facilities. The Board's approval will be conditioned, however, on the REA that combines the Wind farm and the Project i.e.,the Transmission Facilities [Renewable Energy Approval], and any other approvals necessary for their construction.

All of which is respectfully submitted.