

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, as amended* (the “OEB Act”);

AND IN THE MATTER of an application by Grand Renewable Wind LP (the “Applicant”) for an order under section 92 and subsection 96(2) of the OEB Act granting leave to construct an electricity transmission line and related facilities.

MOTION TO REVIEW

APPLICANT’S REPLY SUBMISSIONS

INTRODUCTION

1. On December 22, 2011 the Board issued Procedural Order No. 5 initiating a review of its decision and order (the “Decision”) dated December 8, 2011. Specifically, the Board requested the parties to this proceeding to make submissions on two issues:
 - (i) The appropriateness of tying approval of the Project¹ to the renewable energy approval (“REA”) for the solar farm (the “Solar Project”) (as opposed to the REA that includes the Project); and
 - (ii) The extent to which the findings of the Customer Impact Assessment Report (“CIA”) and System Impact Assessment Report (“SIA”)(which contemplate the Project serving both generation facilities) are still valid if the Project initially serves only the wind farm (collectively, the “Review Issues”).
2. For the reasons outlined below, the Applicant submits that, with respect to (i) it is inappropriate to tie the approval of the Project to the REA approval for the Solar Project because the Solar Project REA is not relevant to the Project. With respect to (ii), as noted by both the IESO and Hydro One, the CIA and the SIA will continue to be valid if the Project serves only the wind farm.
3. Accordingly, it is submitted that the Board should not amend the conditions attached to the Decision to require issuance of the Solar Project REA as a prerequisite to the construction of the Project. Rather, the Board should specify that the conditions related to REA approval apply to the wind farm only. The Applicant’s proposed language respecting this amendment is at paragraph 18 below.
4. Before addressing these substantive points, it is worth addressing the nature of this review.

The Nature of this Review

5. In response to the Board’s request for submissions on the Review Issues, Six Nations questioned the appropriateness of addressing these issues on the grounds that the threshold test for a review set out in Rule 44.01(a) and Rule 45.01 of the Rules of Practice and Procedure has not been met.

¹ “Project” is defined by the Board in the Decision as those facilities consisting “of approximately 19 kilometres of 230 kilovolt (“kV”) transmission line, a collector substation consisting of two step-up transformers (34.5kV:230 kV), two transition stations to accommodate construction of an underground portion of the proposed 230 kV transmission line, and an interconnection station to connect to an existing Hydro One Networks Inc. owned 230 kV transmission line.” In short, “Project” can be used interchangeably with “Transmission Facilities”, which Transmission Facilities are subject of the Board’s approval in this proceeding.

6. However, the powers granted to the Board to review the merits of its decision in section 21.2 and section 43.01 of the *Statutory Powers Procedure Act* permit the Board to review a decision on its own motion whether a party requesting the review meets the threshold requirement or not. Further, having decided to conduct a review, it is now required to determine the appropriateness of the decision on its merits.² In other words, the power to review includes the power to reconsider.³

Question (i): Tying the Project Approval to the Solar REA Approval

7. As noted by the Board, there are two REA processes associated with Grand Renewable Project (the “GREP”). The Applicant was very careful to define the components of the GREP separately in its original application and noted that the GREP will consist of (i) a 153.1 MW wind power generating facility (the “Wind Project”, owned by the Applicant), and (ii) the Solar Project, being a 100 MW solar photovoltaic generating facility, to be owned by Grand Renewable Solar, LP.
8. The Project is being examined as part of the REA for the Wind Project. There is a separate REA for the Solar Project. The Solar Project REA relates to the solar generating facility only.
9. As noted by Board staff in their submissions and supported by previous Board decisions, the Board does not exercise regulatory authority over generating facilities.⁴ Therefore an approval of Wind Project REA would encompass the relevant environmental approval for the Project.
10. In this regard, it is important to bear in mind the Board’s underlying reason for including an environmental approval-related condition in the Decision, and leave to construct decisions generally. The reason for including this condition arises out of the need to

² Macaulay, Robert, *Practice and Procedure before Administrative Tribunals*, Carswell, Toronto, 2004, vol. 3, at p. 27A-24.

³ *Shanahan v. Russell*, 2000 CarswellOnt 4876 (Ont. CA).

⁴ EB-2011-0063, Board Staff Submissions dated January 16, 2012 (“**Staff Submissions**”), at p. 6. See, for example, EB-2005-0478 where the Board stated:

“The Board is without the authority to review environmental issues for electricity transmission line projects or for electricity projects as a whole. It is therefore clear that the Board does not have the jurisdiction over environmental matters relating to the construction of new generation facilities. In fact proponents are not required to apply to the Board for any approvals associated with the construction of a generating station. Therefore, the Board has no inherent jurisdiction to review any aspect of the construction of the GEC [generating facility], including a review of the environmental impacts, if any, associated with the construction of the GEC.

Given then that the Board has no jurisdiction to conduct an environmental review of the transmission line and has no jurisdiction to review any part of the construction of the GEC, it follows that the Board is without the jurisdiction to conduct a combined review of the potential adverse environmental impacts of both the transmission line and the plant.”

ensure compliance with section 12.2(2) of the Ontario *Environmental Assessment Act* (the “EAA”), which prohibits the issuance of approvals that authorize proceeding with a project prior to EAA approval. As stated by the Board in EB-2005-0315:

“As is clear from the Board’s legislative mandate, and as has been confirmed by the Board on a number of occasions, the Board does not have the legal authority to review environmental issues in considering the approval of electricity projects. *The environmental issues are entirely within the authority of the Ministry of Environment under the Environmental Assessment Act (“EAA”). Section 12.2(2) of that Act provides that “No person shall issue a document evidencing that an authorization required at law to proceed with the undertaking has been given until the proponent receives approval under this Act to proceed with the undertaking.” As a result, any order or direction provided by the Board does not authorize proceeding with an undertaking until all necessary environmental approvals have been obtained.*”⁵ (emphasis added)

11. It follows that the Board need only condition its approval on the environmental approvals that relate to the Wind Project. This is because the Wind Project encompasses the environmental approval for the Project described in the EAA and is thus captured by s. 12.2(2) of the EAA. To go further and require that the Solar Project REA, which has no bearing on the Project, to be completed as a condition to LTC approval would result in a de facto review of environmental issues related to generation facilities.
12. Further, apart from jurisdictional issues, the Solar Project can be unbundled from the Wind Project for LTC purposes. While the Project is needed in order to connect both Generating Facilities, it is also needed independently to connect the Wind Project even if the Solar Project does not get developed. In other words, the need for the Project can be established on the Wind Project alone.
13. Importantly, whether the Solar Project connects to the Project is irrelevant for the purposes of the physical design and layout of the Project. Pole placement (in particular alignment with the municipal right of way) land requirements and crossings would all remain the same. Furthermore, as the Project is being funded entirely by the Applicant, the Project will not impact transmission rates in Ontario, a finding which was confirmed by the Board.⁶
14. To conclude on this point, with respect to Question (i), the Applicant submits that there is no need to tie to approval of the Project to the Solar Project.

⁵ EB-2005-0315, Decision and Order dated November 22, 2005, at p. 13.

⁶ Decision, at p. 8.

Question (ii): System Impact Assessment and Customer Impact Assessment

15. The IESO and Hydro One both confirmed that the SIA and CIA will remain valid if the Project initially serves only the Wind Project.
16. The Applicant adopts the IESO's and Hydro One's submissions in this regard.

Duty to Consult

17. Although Six Nations did not address duty to consult issues in the Six Nations Letter or the Six Nations Submissions, the issue was raised in the Staff Submissions.⁷ The Applicant agrees with Board staff's position with respect to the duty to consult and will not add anything further at this point. However, the Applicant reserves the right to respond to any new issues that are raised by Six Nations that were not presented in the Six Nations Letter or Six Nations Submissions, including duty to consult issues.

Order Sought

18. Based on (i) the irrelevance of the Solar Project REA to the Project, (ii) the fact that the underlying premises for the LTC approval are not affected if only the Wind Project were to connect, and (iii) the fact that reliability would not be affected if the Wind Project were to connect exclusively to the Project initially, the Applicant seeks the following amendment to the Condition 1.6, which amendment (see underline) would serve to clarify the Board's previous ruling:

GRWLP shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, which, for greater certainty, shall not include any approvals related to the Solar Project, and shall provide copies of all such written approvals, permits, licenses and certificates upon the Board's request.

19. Because the operative legal instrument in a proceeding is the order, and not the reasons for decision, the Decision itself does not technically have to be amended. However, to avoid confusion, it may be preferable to amend the last paragraph on p.12 of the Decision as follows:

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~~ Wind Project receiving the

⁷ *Supra*, note 3, at p. 6.

REA and any other approvals necessary for ~~their~~ its construction pursuant to the Ontario *Environmental Assessment Act*, R.S.O. 1990, c. E.18.

All of which is respectfully submitted.

Kristyn Annis
McCarthy Tétrault LLP

Telephone 416-601-7624
Email: kannis@mccarthy.ca

George Vegh
McCarthy Tétrault LLP

Telephone 416-601-7709
Email: gvegh@mccarthy.ca

McCarthy Tétrault LLP
Suite 5300
Toronto Dominion Bank Tower
Toronto-Dominion Centre
Toronto, Ontario M5K 1E6