Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2011-0063

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 Grand Renewable Wind LP for an Order granting leave to construct a new transmission line and associated facilities for the Grand Renewable Energy Park to be located in Haldimand County.

BEFORE: Paula Conboy
Presiding Member

Ken Quesnelle
Member

February 23, 2012

MOTION DECISION AND ORDER

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 filed by Six Nations Council (an intervenor in the proceeding) regarding the Board's Decision and Order (the "Decision") dated December 8, 2011. Six Nations Council referred to an apparent inconsistency between the language used in the 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 Decision approved a leave to construct application 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 in its December 12, 2011 letter 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 both 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 vary its Decision pursuant to 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.

The Board initiated a review of the Decision on its own motion. 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:

1. The appropriateness of tying approval of the Project i.e., the 19 kilometre transmission line and associated facilities, to the REA for the solar farm (as opposed to the REA that includes the Project); and
2. The extent to which the findings of the Customer Impact Assessment Report and System Impact Assessment Report (which contemplated the Project i.e., the 19 kilometre transmission line and associated facilities, serving both generation facilities) are still valid if the Project initially serves only the wind farm.

SUBMISSIONS OF PARTIES AND BOARD FINDINGS

The Board received submissions from Six Nations Council, GRWLP, Board staff, Hydro One Networks ("Hydro One") and the Independent Electricity System Operator ("IESO").

The submissions of parties and the Board findings are grouped under the following issues:

(A) Nature of the Review
(B) Tying the Project Approval to the Solar REA Approval
(C) Validity of the System Impact Assessment and the Customer Impact Assessment if the Project Serves initially the Wind Farm
(D) Varying the Decision and Order
(E) Other Matters: Submissions on the Duty to Consult

(A) Nature of the Review

Six Nations Council

On January 5, 2012, Six Nations Council filed a submission addressing its views regarding the Motion to Review and Procedural Order No.5. In particular Six Nations disagreed with the notion that its December 12, 2011 correspondence constituted a request for a motion to review the Board's substantive decision[1]. Six Nations stated that its letter was simply a request that the Board amend its formal Order so that Condition 1.6 of the Order "accurately reflects the Board's Decision on page 12 of the Decision". Six Nations further submitted that there was no reason to change the substance of the Decision[2], and that neither the "threshold test" nor the appropriate grounds for initiating a review, as established in Rules 44.01(a) and 45.01, had been satisfied. Six Nations therefore re-iterated its request from its December 12 letter, to vary the Condition of Approval to clarify the meaning of the word "Project" to read[3]:

1.1 Grand Renewable Wind LP ("GRWLP") shall construct the Project, **as described in the first paragraph of section II titled "SCOPE OF APPLICATION" in the Decision and Order,** in accordance with its Leave to Construct application, and evidence, except as modified by this Order and these Conditions of Approval.

and

1.6 GRWLP shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project **and required to construct, operate and maintain the Wind Project and the Solar**

[1] Submission of Six Nations Council, January 5, 2012, page 2
[2] Ibid
[3] Ibid, pages 2 and 3, under "**Variation Requested**"

Project, as described in the first paragraph of section II titled "SCOPE OF APPLICATION" in the Decision and Order, including the Renewable Energy Approval for both the Wind Project and the Solar Project , and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

In its reply submission dated January 30, 2012, Six Nations Council repeated its view that there are no valid reasons to review the condition that the Board intended to impose, as described in the Decision.

Board staff

Board staff submitted that[4] the Board's powers to conduct a review come from the *Statutory Powers Procedure Act* ("SPPA") and the Rules.

Board staff observed that this motion to review was initiated by the Board itself pursuant to Rule 43.01. Although the Board was responding to a concern raised by Six Nations Council, it initiated the review on its own motion. Board staff submitted that the Board is empowered to seek submissions on whatever issues it feels appropriate in the context of a review under Rule 43.01. Further, the threshold test (Rule 45.01) and the list of possible grounds for a review (Rule 44.01) only apply to reviews initiated by a party pursuant to Rule 42. As this review was initiated by the Board pursuant to Rule 43.01, Board staff submits that Rules 45 and 44 do not apply.

Board staff submitted that the Board was well within its jurisdiction to initiate the review on its own motion, and that there was nothing improper in the Board determining what issues it wanted to hear.

Grand Renewable Wind LP ("GRWLP")

GRWLP submitted that the powers granted to the Board to review the merits of its Decision in section 21.2 of the SPPA and section 43.01 of the Rules permit the Board to review a decision on its own motion whether a party requesting the review meets the threshold requirement or not. GRWLP further submitted that, having decided to conduct

[4] Board staff submission, January 16, 2012, page 3

a review, it is now required to determine the appropriateness of the Decision on its merits.[5] In other words, the power to review includes the power to reconsider.[6]

Board Finding

This review is being conducted on the Board's own motion. Although Six Nations Council raised the issue of the inconsistency between the Decision and the conditions to the order with the Board in its December 12 letter, it was the Board itself that set the exact issues to be addressed in this motion to review. The Board is well within its powers to do this, as both section 21.2 of the SPPA and the Board's own Rules permit it. It is important to note that the review was not commenced by a party pursuant to Rule 42.01; it was initiated by the Board pursuant to Rule 43.01. The "threshold test" (Rule 45) and the permitted grounds for a motion (Rule 44.01) – both of which are referred to by Six Nations Council in their submissions – do not apply to motions to review initiated under Rule 43.01.

In initiating the review, it was the Board's determination that there was an inconsistency between the Decision and Condition 1.6, and that it should ascertain whether the condition as drafted was appropriate. In setting the issues for the review, the Board is not limited to the issues suggested by Six Nations Council in its December 12 letter. The Board clearly set out the issues it wished to consider in Procedural Order No. 5. It gave parties full opportunity to make submissions on these issues. There is nothing inappropriate, or even particularly unusual, about the process surrounding this review.

(B) Tying the Project Approval to the Solar REA Approval

Grand Renewable Wind LP ("GRWLP")

GRWLP submitted that[7] it was very careful to define the components of the Grand Renewable Energy Park ("GREP")[8] 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.

[5] Macaulay, Robert, Practice and Procedure before Administrative Tribunals, Carswell, Toronto, 2004, vol. 3, at p. 27A-24.
[6] Shanahan v. Russell, 2000 CarswellOnt 4876 (Ont. CA).
[7] Applicant's Reply Submission, January 23, 2012 Re Motion to Review, page 3, par. 7
[8] Exh. A/Tab 2/Sch. 1/par. 6, defined the Grand Renewable Energy Park (the "GREP")

GRWLP further indicated[9] that the Project is being examined as part of the REA for the Wind Project, and that "therefore an approval of Wind Project REA would encompass the relevant environmental approval for the Project". There is a separate REA for the Solar Project. The Solar Project REA relates to the solar generating facility only.

GRWLP submitted that[10] as noted by Board staff in their submissions and supported by previous Board decisions, the Board does not exercise regulatory authority over generating facilities in this leave to construct proceeding[11].

GRWLP further submitted that[12] it is important to bear in mind that the Board's underlying reason for including an environmental approval-related condition in the Decision, and leave to construct decisions generally, arises out of the need to 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.

GRWLP concluded[13] 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 leave to construct approval would result in a *de facto* review of environmental issues related to generation facilities.

GRWLP also submitted[14] that apart from jurisdictional issues, 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. GRWLP also made note that both the IESO and Hydro One submitted that the Customer Impact Assessment and System Impact Assessment will continue to be valid if the Project serves only the wind farm.

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[9] Applicant's Reply Submission, January 23, 2012 Re Motion to Review, page 3, par. 8
[10] Ibid, par. 9
[11] EB-2011-0063, Board Staff Submissions dated January 16, 2012 ("Staff Submissions"), at p. 6.
[12] Applicant's Reply Submission, January 23, 2012 Re Motion to Review, page 3, par. 10
[13] Ibid, par. 11
[14] Ibid, par.12

GRWLP concluded[15] that with respect to the first issue as stated earlier in this Decision and Order, there is no need to tie the approval of the Project to the Solar Project.

Board staff

Board staff submitted[16] 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.

Board staff emphasized that GRWLP's application was for leave to construct transmission facilities (i.e. the Project), and was not an application for any approvals related to the generation facilities themselves.

Board staff observed that the Board's description of the condition at page 12 of the Decision is in the "Project Need" section.

Board staff further indicated that despite the fact that examining "need" for the Project is not, strictly speaking, within the matters directly itemized for the Board's consideration in a section 92 application, 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 submitted 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.

Six Nations Council

Six Nations Council submitted that the application was premised on the Project serving both generation facilities, and that there was no evidence on the record relating directly to possible impacts on reliability and quality of service if only the wind facility went into

[15] Ibid, par. 14
[16] Board staff submission, January 16, 2012, page 5, first paragraph

service. It further submitted that there has been no change in circumstances to justify changing the Board's decision to condition the leave to construct on obtaining the REA for both the Wind and Solar projects, as suggested by Board staff and GRWLP.

Board Finding

The Board finds that there is no compelling reason that the approval of the Project should be tied to the REA approval for the Solar Project. The Board's authority over the Project (i.e. the 19 kilometre transmission line and associated facilities) in this application does not extend to either of the generation facilities. Although it is common for the Board to examine "project need" in a leave to construct application, the need for the Project is amply demonstrated by *either* of the generation facilities. The REA for the Project encompasses the wind facility. Condition 1.6 to the Board's Order already requires GRWLP to obtain its REA approval before it commences construction of the Project (and indeed even absent any conditions imposed by the Board the Project could not be built without the REA approval). The rationale for the condition as described in the Decision was grounded in the need for the Project (i.e. the 19 kilometre transmission line and associated facilities). Need is demonstrated by the wind facility. Put simply, there is little if any rationale for a condition relating to REA approvals relating to the Solar Project.

The Board's determination with respect to the reliability and quality of electricity service are found in the section below.

(C) Validity of the System Impact Assessment and the Customer Impact Assessment if the Project serves initially the Wind Farm

Hydro One Networks Inc. ("Hydro One")

In response to the question posed in the Motion to Review and Procedural Order No.5 Hydro One submitted that[17] the results and conclusion of the Customer Impact Assessment that Hydro One conducted in support of the Grand Renewable Energy Park dated May 6, 2011, are equally valid if just the wind farm connects or if both the wind farm and the solar farm connect.

[17] Submission of Hydro One Networks Inc, January 12, 2012, page 1,par. 2

Independent Electricity System Operator ("IESO")

The IESO submitted that[18] the IESO's System Impact Assessment (SIA) review was conducted based on an assessment of the impact of injecting 254 MW of wind and solar power generation into the IESO-controlled grid via the proposed 230 kV transmission circuit. The IESO's SIA report concluded that this would not have a material adverse impact on the reliability of the IESO-controlled grid. The IESO confirmed that the SIA, including the findings and recommendation contained therein, will remain valid if the proposed transmission line initially serves only the wind farm (albeit, those findings and recommendations in the SIA report concerning the solar farm will, until such time as the solar farm is connected, not be applicable).

Six Nations Council

Six Nations Council submitted that Hydro One and the IESO's opinions on the validity of the CIA and SIA if only the wind facility were active were not part of the original record. Six Nations Council submitted that it was improper for the Board to seek this new evidence, and that it should be disregarded.

Board Finding

Based on the submissions of the IESO and HONI, the Board is satisfied that the SIA and CIA remain valid whether the Project (i.e. the 19 kilometre transmission line and associated facilities) serves both generation facilities or the wind facility only.

The Board generally relies on the CIA and SIA in determining any impacts of a proposed project on the reliability and quality of electricity service. There is nothing improper about the Board seeking clarification from the IESO and HONI with respect to any changes that might be required to the SIA or CIA if the Wind Project were to go online prior to the Solar Project.

The conditions to the Order relating to the SIA and CIA (1.3 and 1.4) will remain in effect.

[18] Submission of the Independent Electricity System Operator, January 16, 2012, page 1, par. 2

(D) Varying the Decision and Order

Grand Renewable Wind LP ("GRWLP")

GRWLP submitted[19] that based on (i) the irrelevance of the Solar Project REA to the Project, (ii) the fact that the underlying premises for the leave to construct 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 following amendment to Condition 1.6 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.*

GRWLP also submitted[20] that 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 REA and any other approvals necessary for ~~their~~ its construction pursuant to the Ontario Environmental Assessment Act, R.S.O. 1990, c. E.18.*

[19] Applicant's Reply Submission, January 23, 2012 Re Motion to Review, page 5, par. 18
[20] Ibid, page 5, par.19

Board staff

Board staff submitted[21] that to ensure consistency between the Decision and the 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.*

Six Nations Council

Six Nations Council asked that the conditions be amended to specify that the approval was conditional on an REA approval for both the solar farm and the wind farm.

Board Finding

The Board does not find it necessary to make a physical amendment to the original Decision. By way of this Decision on the Motion to Review, the Board confirms that Condition 1.6 in the original Decision and Order stands. The Board's approval of the Project is conditioned on the approval of the REA for the Project/wind farm, and not on the REA approval for the solar farm.

[21] Board staff submission, January 16, 2012, page 11 (last bullet) and page 12

(E) Other Matters: Submissions on the Duty to Consult

Six Nations Council's original letter seeking a review did not raise any issues relating to the Board's Decision respecting the Crown's duty to consult with Aboriginal peoples. Procedural Order No. 5 did not list the duty to consult as an issue the Board intended to review.

In its submissions, Board staff noted that Six Nations Council has filed an appeal with the Divisional Court on the decision, specifically with respect to the duty to consult. Unsure of whether Six Nations Council also intended to make similar arguments on this motion to review, Board staff included submissions on this issue. GRWLP adopted these submissions. In its reply submission, Six Nations Council indicated that it did not make any submissions on this issue because the Board did not indicate in Procedural Order No. 5 that it was prepared to reconsider this issue. Six Nations Council indicated that it would be inappropriate for the Board to consider Board staff's submissions on this issue in the absence of a specific process which specifically raised this issue.

The Board did not seek any submissions on this issue, and has not considered the submissions on the duty to consult of Board staff and GRWLP in reaching its determinations on this motion to review. The Board makes no findings on this review regarding the duty to consult.

COSTS

The Board reminds parties that were granted cost eligibility in its July 12, 2011 Decision and Order that cost eligibility will be considered to the extent that costs relate to matters directly within the scope of this proceeding. The Board will therefore make provision for eligible parties to file their claims for costs.

THE BOARD ORDERS THAT:

1. Parties that have been found eligible for an award of costs may file their cost claims by **Friday, March 2, 2012** and deliver a copy to Grand Renewable Wind LP, in accordance with the Board's Practice Direction on Cost Awards.

2. Grand Renewable Wind LP may object to any of the cost claims no later than **Friday, March 16, 2012**, by filing its submission with the Board and deliver a copy to the party whose cost claim is disputed.

3. If an objection to any of the cost claim is filed by Grand Renewable Wind LP, the party whose cost claim is disputed, will have until **Friday, March 23, 2012** to file a reply submission to the Board, with a copy to Grand Renewable Wind LP as to why its cost claim should be allowed.

4. Grand Renewable Wind LP shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number EB-2011-0063, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

ISSUED at Toronto on February 23, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary