EB-2012-0235

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 a proceeding on the Board's own motion under section 19(4) and section 57 of the OEB Act for Grand Renewable Wind LP

ARGUMENT IN CHIEF OF GRAND RENEWABLE WIND LP

George Vegh
Kristyn Annis

McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Suite 5300, Box 48
Toronto, ON M5K 1E6

gvegh@mccarthy.ca
kannis@mccarthy.ca

Tel: (416) 601-7709
Fax: (416) 868-0673

Counsel for Grand Renewable Wind LP

PART I – Introduction

The Parties

1. Grand Renewable Wind LP ("GRW LP") is a special purpose vehicle established for the purpose of developing, constructing and operating the Grand Renewable Wind Project (the "Wind Project").

2. GRW LP has entered into a power purchase agreement (the "Wind PPA") with the Ontario Power Authority ("OPA") for the energy generated by the Wind Project. The Wind Project is a 153 MW wind power generating facility that is to be located in Haldimand County. Upon completion of the Wind Project GRW LP will be the licenced owner and operator.

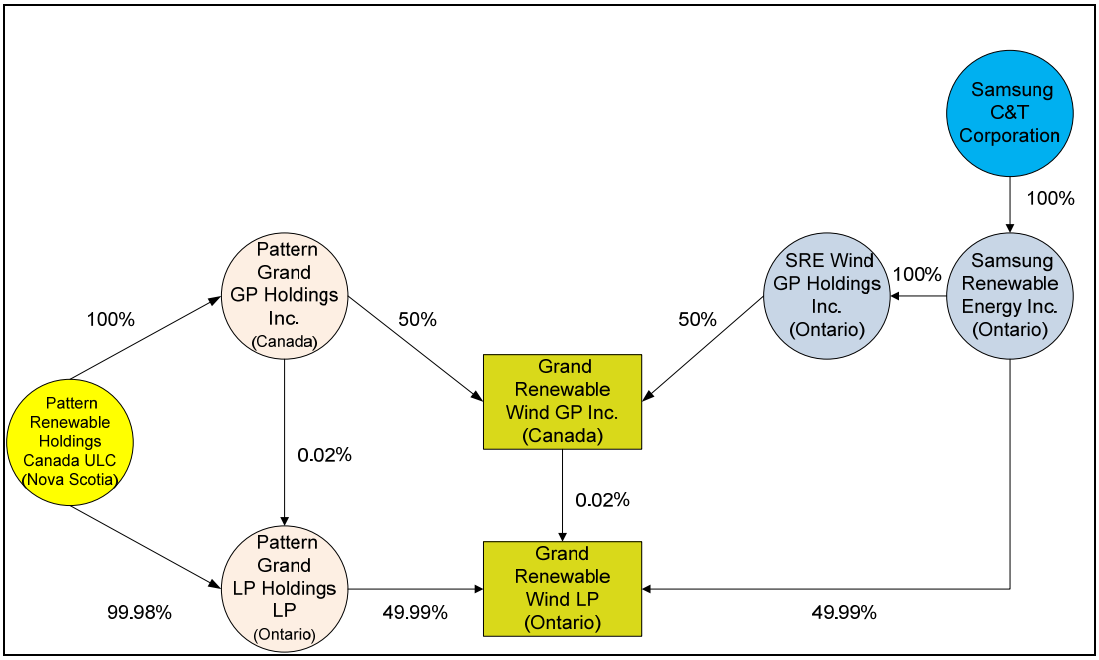
3. Grand Renewable Solar LP ("GRS LP") is a special purpose vehicle established for the purpose of developing, constructing and operating the Grand Renewable Solar generating facility (the "Solar Project").

4. GRS LP entered into a power purchase agreement (the "Solar PPA") with the OPA for the energy generated by the Solar Project. The Solar Project is a 100 MW wind power generating facility that is to be located in Haldimand County within close proximity to the Wind Project.

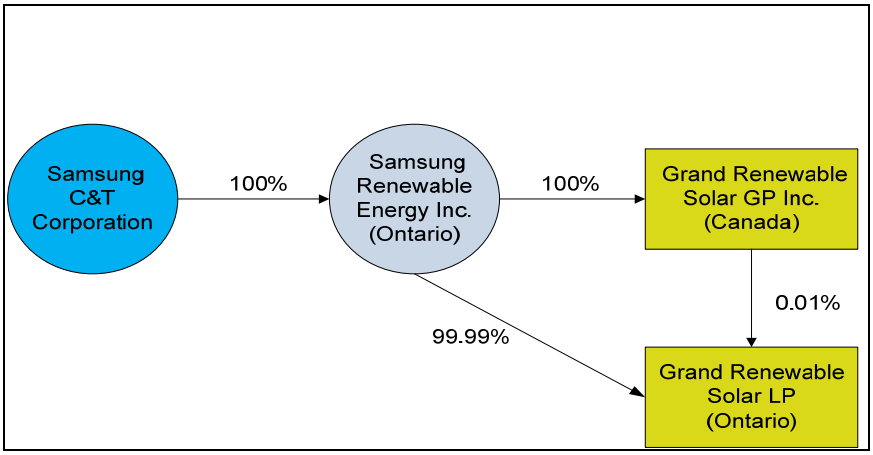
5. The Ownership structure of GRW LP and GRS LP is set out below.[1]

[1] See: GRW LP Application for Approval under OEB Act, s. 81 Response to Question 1.2.2, EB-2012-0075; See also, GRW LP Response to IESO IR 1(c), Schedule A.

Grand Renewable Wind LP Ownership Structure



Grand Renewable Solar LP Ownership Structure



6. As appears from this illustration, GRW LP and GRS LP are closely related companies.[2] They are directly owned by different companies because of the technological and commercial differences attributable to wind and solar projects.

[2] They are not "Affiliates" as defined in the *Business Corporations Act* because, although SREI owns 100% of the direct owner of GRS LP and a 49.99% direct interest and controls 50% of a 0.02 % interest in GRW LP, it does not directly "control" GRW LP as that term is defined in the *Business Corporations Act.* follows:

The Transmission Facility and Related Regulatory Approvals

7. In addition to the Wind Project, GRW LP will own and operate the interconnection facilities (the "Transmission Facility") used to connect both the Wind Project and the Solar Project to the IESO-controlled grid. The Transmission Facility is a "connection facility" as that term is defined in the Transmission System Code ("TSC")[3].

8. The Transmission Facility has sufficient capacity to carry the power from the Wind Project and the Solar Project, but no excess capacity beyond that amount.[4]

9. The Board has granted two regulatory approvals with respect to the Transmission Facility: Leave to Construct the Transmission Facility under s. 94 of the Act[5] and

---

1 (5) For the purposes of this Act, a body corporate shall be deemed to be controlled by another person or by two or more bodies corporate if, but only if,

(a) voting securities of the first-mentioned body corporate carrying more than 50 per cent of the votes for the election of directors are held, other than by way of security only, by or for the benefit of such other person or by or for the benefit of such other bodies corporate; and

(b) the votes carried by such securities are sufficient, if exercised, to elect a majority of the board of directors of the first-mentioned body corporate.

The *Business Corporations Act* concept of related companies is one way, but not the only way, in which related companies are addressed in the Ontario electricity sector.

For example, the Board has taken the status of related companies into account even where those companies are not technically affiliates. Thus, for example, in a Board policy document accompanying the release of the Affiliate Relationships Code for Gas Utilities, the Board stated:

"For rule-making purposes, "affiliate" is defined in the Act, but not for rate-making purposes. As part of its prudence review, the Board will pay close attention in rate hearings if the utility or affiliate outsources to a third-party who is not technically an affiliate of the utility *but is still economically related to the same corporate group.*" (Understanding the proposed amendments to the Affiliate Relationships Code for Gas Utilities: An OEB Background Policy Paper (Draft) March 15, 2004).

In a letter accompanying the release of the Gas ARC, the Board stated:

"The Board notes that some stakeholders raised questions or concerns over the discussion in the draft Policy Paper about review, in future rates cases, of transfer prices paid to non-affiliates that have economic links to the utility. The Board believes that concerns over possible non-arm's length terms remains a potential rates issue in such circumstances." Letter dated September 3, 2004 (RP-2004-0140).

In addition, the OPA's contract rules take a different approach to related companies than that of the *Business Corporations Act*. It defines "Control" for the purposes of determining affiliates as requiring a 50% interest (as opposed to the greater than 50% interest in the *Business Corporations Act*: see, FIT Contract, Appendix A, Standard Definitions, s. 9 and 62.

[3] TSC, s.2.0.13

[4] See Response to Board Staff Interrogatory 10(iii) in EB-2011-0063.

[5] Decision and Order in GRW LP's LTC Application (EB-2011-0063), December 8, 2011.

Approval of a Proposal to own both transmission and generation under s. 82 of the Act. [6]

10. In granting the orders under ss. 92 and 81, respectively, the Board determined that the following criteria have been met:

- That constructing the Transmission Facilities to service the Wind and Solar Facilities is in the "public interest" in light of:

> "1. The Interests of consumers with respect to prices and the reliability and quality of electricity service; and
>
> 2. Where applicable and in a manner consistent with the policies of the government of Ontario the promotion and use of renewable energy resources."[7]

- That the proposal by GRW LP to transmit the power generated at the Wind and Solar Facilities "would not adversely affect the development and maintenance of the competitive market."[8]

11. These public interest considerations should be kept in mind when considering whether to impose a licencing requirement on GRW LP because, as is more fully addressed below, GRW LP will not be in a position to use the Transmission Facilities to transmit GRS LP's electricity if the Board requires it to be licenced. As a result, in that event, the considerations that led the Board to conclude that the construction and operation of the Transmission Facilities is in the public interest would be frustrated.

Transmission Licencing

12. By Notice of Written Hearing dated May 8, 2012, the Board commenced a proceeding on its own motion under section 19(4) and section 57 of the *Ontario Energy Board Act, 1998* (the "Act") to make a determination of law on the following issue:

> "Is GRW LP exempt from holding an electricity transmission licence with respect to its intention to transmit electricity generated by both the Wind Project and the Solar Project to the IESO controlled grid through its Transmission Facility, pursuant to section 4.0.2(1)(d)(i) of O.Reg. 161/99?"

[6] Decision and Order in GRW LP's s. 81 Proposal (EB-2012-0075), May 4, 2012.
[7] Act, s. 96.
[8] Act, s. 82.

13. There is no suggestion that GRW LP would require a transmission licence to carry its own electricity; the sole issue in this proceeding is whether GRW LP's proposal to transmit the power of its related company, GRS LP triggers an obligation to be a licenced transmitter.

14. The practical effect of the Board's determination of this issue is that, if GRW LP is required to be a licenced transmitter, then it would not be permitted to provide access to its related company, GRS LP as contemplated in the LTC and the Proposal. Further, if GRW LP were required to be licenced it would be subject to the entire OEB regulatory regime for transmitters, including the requirement to:

    - Exit the generation business;
    - Establish a stand-alone transmission company;
    - Apply for OEB approved rates;
    - Meet requirements under the TSC, including the requirements to:
        - Expand its system to meet anticipated load requirements;
        - Development, maintain and publish detailed written policies respecting such things as customer connections, customer impact assessments, economic connection evaluation for new load customers, contestability of electrical contracting work , agreements with other transmitters , and customer dispute resolution; and
        - Comply with the Affiliate Relationships Code in dealing with any affiliate companies and thus be bound by extensive regulation, addressing matters such as the physical and financial separation of transmitters and affiliates, detailed prescription of the content of services agreements with affiliates (including outsourcing and transfer pricing) shared corporate services, the transfer of assets, etc.

15. As a practical matter, the Board's regulatory restrictions on transmitters are such that GRW LP must choose between being a generator or a transmitter – it cannot be both. From a business perspective, GRW LP is a generator and not a transmitter: it does not have a rate base, does not have a regulatory department, and does not maintain any of the regulatory requirements that apply to transmitters.

16. Thus, if the Board finds that GRW LP may only transmit GRS LP's electricity as a licenced transmitter, then GRW LP will simply not be in a position to transmit GRS LP's electricity. The immediate impact of this would be that GRW LP cannot provide GRS LP with access to the grid to provide electricity at cost. This cost is obviously lower than the cost that would be incurred if GRS LP was required to construct its own connection line.

17. On the other hand, if the Board does not impose a licencing requirement, GRW LP can provide GRS LP access to the grid in a manner that is consistent with the public interest considerations that informed the Board's approval of the LTC and the Proposal and which does not adversely impact any electricity customer or generator. [9]

Summary of the GRW LP's Positions

18. GRW LP's position on the licencing issue is that it is falls within the exception of the Exemption Provision (defined below) because it is transmitting only its own power and the power of its related company, GRS LP, at cost. This issue is addressed in Part II of these submissions.

19. In the alternative, if the Board determines that GRW LP does not fall within the Exemption Provision, then GRW LP submits that the Board should nonetheless forbear from imposing transmission licencing obligations on GRW LP pursuant to its exemption power under s. 29 of the *OEB Act, 1998*. Section 29 provides that the Board shall refrain from exercising any power if it finds that a "licensee, person, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest." GRW LP's submissions in support of forbearance rely on the same competition related issues that are relevant to the Board's conclusions on the s. 82 Issue, namely, that the impact of the Proposal "would not adversely affect the development and maintenance of a competitive market."

[9] All generators are responsible to connect their facilities to the grid. As a result, they will have to do so whether GRW LP connects GRS LP or not. See, for example, FIT Program Rules, s. 2.3 (a), which provides that a generator "shall arrange, at its sole expense, for all Facility connection requirements in accordance with Laws and Regulations to permit the delivery of Delivered Electricity to the Connection Point." Similarly, the TSC imposes this obligation on generations except for the special case of enabler facilities which is not applicable here.

20. The essence of the submission on this point is that GRW LP does not have market power. The Board therefore does not have to regulate to address a market failure resulting from a failure of competition. Further, the public interest is protected by forbearing from regulation because GRW LP and GRS LP have come to an arrangement that lowers costs and the use of public infrastructure. They have done so in a manner that imposes no cost to rate payers and has no impact on any other market participant. If there ever was a case where regulation was not necessary to protect the public interest, this is it. This issue is addressed in Part III.

PART II – Transmission Licensing

21. Section 57(a) of the *OEB Act, 1998* provides that no person shall, unless licenced to do so, "own or operate a transmission system." Subsection 4.0.2(1)(d) of Ontario Regulation 161/99 (the "Exemption Provision") provides the following exemption from transmission licencing:

> (d) "4.0.2 (1) Clause 57 (b) of the Act and the other provisions of the Act listed in subsection (2) do not apply to a transmitter that transmits electricity for a price, if any, that is no greater than that required to recover all reasonable costs if,
>
> (e) the transmitter is a generator and transmits electricity only for,
>
> (i) the purpose of conveying it into the IESO-controlled grid"

22. There are thus 3 conditions that must be in place for s. 4.0.2(1)(d)(i) to apply:

- The transmitter is a generator;
- The transmitter charges no more than the recovery of its costs; and
- The transmitter only transmits electricity for the purpose of conveying it to the IESO-controlled grid.

23. In the LTC application, Board staff, which was the only other party to make submissions on this point, did not challenge the application of the first two criteria, or the literal conclusion that the term "it" referred to electricity, without reference to who generated the electricity.

24. This literal interpretation is inescapable given the opening words of s. 4.0.2(1)(d) refer to "a transmitter that transmits electricity for a price, if any, that is no greater than that required to recover all reasonable costs…" The section therefore presupposes that the transmission service will be provided on a basis that recovers "reasonable costs". Those costs must be paid for by someone other than the transmitter. It does not make sense to refer to one person paying its own "reasonable costs". There are thus at least two entities contemplated in the Exemption Provision.

25. Notwithstanding the literal interpretation of the Exemption Provision, staff questioned whether, from a purposive perspective, the term "it" in Exemption Provision included the power generated by a company other than GRW LP, in this case, GRW LP's related company, GRS LP.

26. Staff put forward the following description of the "purposive approach" to statutory interpretation (with which GRW LP agrees:[10]

> "There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just."

27. GRW LP submits that the purposive interpretation of the Exemption Provision would apply to GRW LP's transmission of power generated by GRS LP.

28. First, as indicated, GRW LP's proposed interpretation is compliant with the legislative text, and much more plausible than the interpretation which ignores the reference to one party compensating another's "reasonable costs".

29. Second, it takes into the account the purpose of transmission licencing and the purpose for exempting companies from the requirement to be licenced. The purpose of the Exemption Provision is to exempt persons from the regulatory

[10] Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes (3rd ed.), Butterworths (Toronto), 1994, p. 131

obligations accompanying the transmission business where there is no public interest reason to impose these obligations. The regulatory obligations accompanying transmitters are considerable. As indicated above, if GRW LP were required to be licenced it would be required to:

- Exit the generation business;
- Establish a stand-alone transmission company;
- Apply for OEB approved rates;
- Meet requirements under the TSC, including the requirements to:
    - Expand its system to meet anticipated load requirements;
    - Development, maintain and publish detailed written policies respecting such things as customer connections, customer impact assessments, economic connection evaluation for new load customers, contestability of electrical contracting work , agreements with other transmitters , and customer dispute resolution; and
    - Comply with the Affiliate Relationships Code in dealing with any affiliate companies and thus be bound by extensive regulation, addressing matters such as the physical and financial separation of transmitters and affiliates, detailed prescription of the content of services agreements with affiliates (including outsourcing and transfer pricing) shared corporate services, the transfer of assets, etc.

30. The point here is not to question the Board's approach with respect to regulating transmission generally – it reflects common approaches to utility regulation. The issue is whether doing so here furthers the purpose of transmission regulation (and hence the reasons for the exemption from generation).

31. In GRW LP's submission, imposing this obligation is both contrary to the specific language of the Exemption Provision and is inconsistent with a purposive approach to transmission regulation.

32. The third component of a purposive interpretation is to adopt an approach where the "outcome is reasonable and just."

33. The reasonableness and justness of the proposed approach is informed by the fact that sharing transmission facilities by related generators is consistent with, and

even encouraged by OEB policy. Thus, for example, when establishing changes to the TSC which would, for the first time, allow transmitters to temporarily include generator connection lines in rate base, the Board noted that the current policy of generators constructing and paying for their own facilities "remains appropriate where single proponents (whether one generation facility or of several that are intended to connect to the same transmission connection facility) are involved and where coordination issues therefore do not arise."[11] If the Board thought that its current policy violated licencing obligations, presumably it would have said so.

34. Further, in giving effect to this enabler policy, the Board treats related generators as a *single* proponent, not multiple proponents. Specifically, enabler policy treatment is only made available where a connection line is used to connect a "renewable resource cluster." That term is defined in the TSC as follows:[12]

> "a geographic area where resources suitable for renewable generation are present and where the renewable generation facilities are not, or are not expected to be, owned or controlled by the same person …"

35. Thus, when generation facilities are owned or controlled by the same person they are considered to be a single proponent and the enabler policy does not apply.

36. Applying that rationale here, where generation facilities are owned or controlled by the same person, i.e., when they are related companies such as GRW LP and GRS LP, they should be considered to be a single proponent for the purposes of the Exemption Provision. The result is that the exemption would apply because GRW LP is carrying GRS LP's electricity.

37. A purposive interpretation of the Exemption Provision is also consistent with Board staff's stated policy that generators who coordinate a common transmission facility do not run afoul of licencing obligations. Thus, on October, 20, 2009, Kruger Energy Inc. ("Kruger") wrote a letter to the Board Secretary requesting that the Board confirm that a transmission licence was not required for "generators who convey, at cost, electricity generated by a third party."

[11] Notice of Proposal to Amend the Transmission System Code, October 29, 2008, p. 9 (EB-2008-0003) (emphasis added).

[12] TSC, s. 2.0.57A (Emphasis Added).

38. In response to this letter, the Manager of Licence Applications stated that "after conferring with other Board staff" his recommendation was that a transmission licence would not be required under that circumstance.[13] True, Board staff cannot bind the Board, but staff's position would clearly have been informed by the public interest as expressed by Board policy. In other words, staff would not have adopted a policy that it thought was not "reasonable and just".

39. GRW LP therefore submits that it is Board policy to treat related companies as having common interests with each other. This means that the electricity supply of GRS LP can, for regulatory purposes, be considered the electricity supply of GRW LP. As a result, even if the Board interprets "it" to be the transmitting generator's power (which is inconsistent with the literal interpretation of the Exemption Provision), then GRS LP's power can qualify as GRW LP's power for the purposes of the regulation.

40. In the LTC application, as indicated, Board staff did not disagree with GRW LP's literal interpretation of the Exemption Provision (i.e., that "it" referred to electricity without necessarily linking the electricity to the power of the generator/transmitter). Board staff also did not provide a policy reason why the Board should restrict generators to delivering their own electricity and not the electricity of other generators. Instead, Board staff provided the following hypothetical in support of an alternative interpretation:

> Consider the following example: Company A owns a generation facility in Thunder Bay and wishes to build a transmission line for some other purpose in Kingston. If the word "it" refers to the transmission of electricity generally (as opposed to electricity produced by the generation facilities owned and operated by Company A), then Company A would be exempt from holding a transmission licence, even though there is no physical connection between its generation facility and transmission facility. Surely this could not be the intended meaning of the section. The most reasonable interpretation, therefore, is that "it" refers to electricity produced by the generator (which is also the transmitter) itself.

41. This example fails to provide any policy rationale for requiring a licence under this circumstance. Staff's example posits a generator/transmitter that provides access to transmission services to another person where "there is no physical connection between its generation facility and transmission facility." It presents this example

[13] This correspondence is attached as Schedule B in EB-2011-0063.

as unacceptable and something which the Exemption Provision should not permit. It is worth considering this example.

42. It should be noted that staff's hypothetical assumes that the two companies are unrelated, which is not the case here.

43. In any event, even on its own terms, staff's example does not provide a policy reason for requiring licencing in the example posed.

44. First, for this example to apply here, the other person receiving transmission services could not be a load transmission customer – under the Exemption Provision, power can only be transmitted "to the IESO controlled grid," and not to load customers. Thus, the only scenario where staff's example would apply is in relation to generators, not load customers.

45. Second, for the example to apply, the power can only be transmitted at cost, without a profit.[14]

46. As a result, the only scenario that staff can provide of harm that would result is where a generator decides that it will build a transmission facility at its cost, so that it can provide a transmission service to other, unrelated generators on a not for profit basis. It is almost impossible to conceive of a scenario where any company would have any reason to do this or, even if they did, what harm that would cause. In other words, the example fails to provide a purposive interpretation of the Exemption Provision. Protecting against this scenario can hardly be the harm that the Exemption Provision is meant to avoid.

47. For the foregoing reasons, it is submitted that the Exemption Provision applies to GRW LP in order to allow it to transmit power from GRS LP.

[14] For the conclusion that the Exemption Provision does not permit a profit as a component of cost, see: the Board's decision in Service Area Amendment Proceeding (RP-2003-0044), where the Board stated:

"The Board notes that section 4.0.1 of Ontario Regulation 161/99, as amended, provides an exemption from licensing for owners and operators of distribution systems in a broad range of settings including condominium buildings, residential complexes, industrial, commercial, or office buildings, and shopping malls. The exemption extends to distribution systems located entirely on land owned or leased by the distributor. For the exemption to apply, the distributor must simply recover its reasonable costs associated with the distribution, and not impose upon consumers a price which includes a profit." (at para. 183).

PART III

Section 29 of the OEB Act

48. For the reasons set out above, GRW LP submits that its proposal falls within the terms of the Exemption Provision and that GRW LP is therefore not required to be licenced. In the alternative, if the Board determines that the Exemption Provision is not applicable here (which GRW LP does not accept), then GRW LP submits that the Board should exempt it from the licensing obligations under the Act on the grounds that competition is sufficient to protect the public interest in accordance with s. 29 of the *OEB Act, 1998*.

49. This conclusion is consistent with the Board's determination in the Proposal application that GRW LP's proposal to transmit GRS LP's electricity "would not adversely affect the development and maintenance of a competitive market."

50. GRW LP's basic position here is that it has no market power with respect to GRS LP or any other participant in the Ontario market. There is therefore no "market failure" which makes it necessary for the Board to regulate in order to protect the public interest. Instead, the Board can allow GRW LP and GRS LP to enter into a commercial, free market arrangement, such as they have done here.

51. Further, the public interest is met here by the arrangement entered into by GRW LP and GRS LP which lowers costs and the use of public infrastructure compared to alternative transmission arrangements. This arrangement imposes no cost to rate payers and has no impact on any other market participant.

52. Section 29 of the Act provides as follows:

> "29(1) On an application or in a proceeding, the Board shall make a determination to refrain, in whole or in part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest."

53. The Board has applied the forbearance power in the *NGEIR Decision*,[15] where it determined that it would refrain from regulating the rates for a number of storage

[15] *NGEIR Decision* (November 7, 2006) (EB-2005-0551).

services provided by natural gas utilities. In coming to this conclusion, the Board indicated that there were two main rationales for exercising the forbearance power. The first rationale is the belief that "competition provided adequate safeguards in workably competitive markets". The second "related to regulatory costs".[16]

54. On the first point, for the reasons set out below, it is clear that GRW LP does not have market power in the electricity market and therefore regulation of access to the connection line is not necessary.

55. With respect to regulatory costs, the Board stated the following in *NGEIR*:[17]

> "Those [regulatory] costs are not limited to the financial burden on utilities and ultimately consumers. As the Federal Communications Commission noted, the costs include reducing the firm's ability to react rapidly to the changing market conditions, dampening incentives to innovate and wasting resources through the regulation of firms that have no market power."

56. In this light, GRW LP submits that it would be a waste of OEB resources to seek to regulate GRW LP's provision of transmission services to its related company, GRS LP.

57. Each of these points will be addressed in greater detail below.

The Market Power Analysis

58. Determining whether the provision of transmission services from GRW LP to GRS LP is a "service or class of services is or will be subject to competition sufficient to protect the public interest" first involves an analysis of how market power is to be measured in this context.

59. To address this, it is helpful to bear in mind the underlying objectives of requiring OEB approval of vertical integration of generation and transmission. The challenge of vertical integration is the risk that a generator/transmitter may block access to a transmission network and thus prevent a competing generator from selling its power in the market. This is why vertical integration is the exception in electricity regulation and why, as a first step in developing an electricity market, it is

[16] *NGEIR Decision* (November 7, 2006) (EB-2005-0551), at p.24.
[17] *NGEIR Decision* (November 7, 2006) (EB-2005-0551), at pp.24-25.

necessary to separate, or unbundle electricity supply from transmission, distribution and system operations:[18]

> "These last three functions (system operations, transmission and distribution) remain monopolies because no one could economically provide competing service. But all competitors require access to them – they are 'essential facilities' – and without non-discriminatory access for generators to reach their customers, there will be no competition."

60. Thus, from a first principles perspective, the competitive market addressed in s. 29 is the market for electricity. The issue here is whether permitting GRW LP to provide transmission to GRS LP prevents access to an "essential facility" that adversely affects the ability of any other generator to sell its power to the market.

61. In this regard, it is helpful to consider the treatment of "essential facilities" more generally and within the context of other regulated industries, such as telecommunications.

62. Adversely impacting competition through blocking access to "essential facilities" is well developed in the context of in competition law and policy. In that context, the Competition Bureau has addressed this issue in the following terms:[19]

> "In an allegation of abuse of dominance involving denial of access to a facility, the conduct at issue would be an actual or constructive denial of access to the facility to a competitor. In this context, the denial could refer to a facility that a competitor had access to prior to the denial, or to a facility to which the competitor has never had access. Generally speaking, denial of access to a facility is a common practice that will raise issues under the Act only in limited circumstances. For such a denial to raise an issue under the Act, the following conditions must be present:
>
> (i) A vertically integrated firm that has market power in the downstream (or retail) market for the market in which the facility is used as an input in the time period following the denial;

[18] Sally Hunt, *Making Competition Work in Electricity* (Wiley, 2002), at p. 38 (emphasis added).

[19] Competition Bureau, Updated Enforcement Guidelines on the Abuse of Dominance Provisions. See also Roger Ware and Jeffrey Church, *Abuse of Dominance under the 1986 Canadian Competition Act*, 13 Review of Industrial Organization (1998), 85. Professors Ware and Church provide a description of essential facilities doctrine in the United States and Canada at pp. 124-125. While there are subtle differences, the main thrust of the Competition Bureau's analysis are consistent with the approaches described by Ware and Church.

(ii) a denial of access to the facility has occurred for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete; and

(iii) the denial has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market."

63. This basic approach applies to other network industries as well, such as telecommunications. Thus, when new entrants build components that connect to the network, the issue is whether they should be required to provide access to competitors (much like the issue here of whether GWR LP can provide access to GRS LP only). The issue is the same as here in that the regulator looks at the impact on the market. The focus is, again, the downstream market for telecom services. After applying the same basic test discussed above in the generic context of vertical integration, the Competition Bureau focuses on the impact on the retail market in the following terms:[20]

> "The ability of the allegedly dominant firm to exercise market power in the downstream market will depend on the willingness and ability of consumers to switch to alternative providers who do not rely on access to that allegedly dominant firm's facility. If that firm does not have market power downstream, the denial of access to the facility cannot amount to an abuse of dominance."

64. This is a helpful approach because it addresses the location of the competitive market, in this case, the market for the electricity supply. The issue is thus whether GRW LP's provision of transmission to GRS LP has an adverse impact on the market for electricity supply.

65. With this context in mind, the next step is to consider and apply the criteria suggested by the Competition Bureau. Each will be addressed in turn.

(i) **A vertically integrated firm that has market power in the downstream (or retail) market for the market in which the facility is used as an input in the time period following the denial**.

66. The first consideration is whether GRW LP has market power in the retail market for electricity.

[20] Competition Bureau, Draft - Information Bulletin on the Abuse of Dominance Provisions as applied to the Telecommunications Industry: Part 4 - Anti-Competitive Acts.

67. As indicated in the application for EB-2012-0075, the total capacity of contracted power for GRW LP and GRS LP is 253 MW. The total installed capacity as of January, 2012 is 34,079 MW.[21] As a result, GRW LP and GRS LP have a combined market share of less than 1% of the electricity market. By way of comparison, in the context of the gas storage market, the Board has determined that neither Union Gas nor Enbridge – with market shares in the range of 7.1% to 13.1% - had market power.[22]

68. By any measure, GRW LP and GRS LP clearly do not have market power in the electricity supply market. Accordingly, it is simply not possible for GRW LP to adversely impact competition in electricity supply by transmitting GRS LP's electricity.

(ii) a denial of access to the facility has occurred for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete.

69. GRW LP's reason for "excluding" generators other than GRS LP is clearly not for the purpose of preventing anyone else from competing in the electricity market. GRW LP and GRS LP are related companies[23] that are looking to reduce their total costs through a cost sharing arrangement. Access is provided on a not for profit basis. GRW LP is not in a position to offer not for profit transmission services to unrelated parties and certainly cannot offer for profit transmission services to third parties – that would clearly require a transmission licence.

70. Further, GRW LP's transmission of GRS LP' electricity has no impact whatsoever on any other generator's ability to compete. Third party generators are required to have their power delivered to market and are not impacted one way or another by the Proposal.[24]

(iii) the denial has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market.

[21] IESO, 18-Month Outlook Update, February 24, 2012, p. 7.

[22] *NGEIR Decision* (November 7, 2006) (EB-2005-0551), at p. 39.

[23] As will be addressed in greater detail below, their related status is also relevant to the licencing issue.

[24] See footnote 2, above.

71. Given the lack of market power by GRW LP and GRS LP, and given that renewable power contracts are granted by the OPA under Direction of the Minister, it is self-evident that the Proposal will not lessen competition at all, let alone substantially lessen competition.

Regulatory Costs

72. As indicated, with respect to the regulatory costs rationale for forbearance, the Board stated the following in *NGEIR*:[25]

> "Those [regulatory] costs are not limited to the financial burden on utilities and ultimately consumers. As the Federal Communications Commission noted, the costs include reducing the firm's ability to react rapidly to the changing market conditions, dampening incentives to innovate and wasting resources through the regulation of firms that have no market power."

73. This point is particularly relevant here. GRW LP and GRS LP have come to an arrangement that lowers costs and the use of public infrastructure. They have done so in a manner that imposes no cost to rate payers and has no impact on any other market participant. If there ever was a case where regulation was not necessary to protect the public interest, this is it.

[25] *NGEIR Decision* (November 7, 2006) (EB-2005-0551), at pp.24-25.

PART IV –

Conclusion

74. For the foregoing reasons, GRW LP respectfully requests that the Board determine that GRW LP's proposal falls within the exception of the Exemption Provision.

75. In the alternative, if the Board determines that GRW LP does not fall within the Exemption Provision, then GRW LP submits that the Board should nonetheless forbear from imposing transmission licencing obligations on GRW LP pursuant to its exemption power under s. 29 of the *OEB Act, 1998*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, MAY 17, 2012

George Vegh
Kristyn Annis

McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Suite 5300, Box 48
Toronto, ON M5K 1E6

gvegh@mccarthy.ca
kannis@mccarthy.ca

Tel: (416) 601-7709
Fax: (416) 868-0673

Counsel for Grand Renewable Wind LP