



# **ONTARIO ENERGY BOARD**

## **BOARD STAFF SUBMISSION**

**Proceeding on the Board's Own Motion to  
Determine Whether Grand Renewable Wind  
Limited Partnership Requires an Electricity  
Transmission Licence**

**EB-2012-0235**

May 31, 2012

## **A. BACKGROUND**

On 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 determine whether Grand Renewable Wind Limited Partnership ("GRWLP") is exempt from holding an electricity transmission licence pursuant to section 4.0.2(1)(d)(i) of Ontario Regulation 161/99 ("O.Reg. 161/99").

GRWLP was established for the purpose of developing, constructing, and operating a 153 MW wind generating facility (the "Wind Project"). Grand Renewable Solar LP ("GRSLP"), a related company, was established for the purpose of developing, constructing and operating a 100 MW solar generating facility (the "Solar Project"). In addition to the Wind Project, GRWLP intends to 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 was subject to a leave to construct application with the Board that was approved with conditions through the Board's Decision and Order dated December 8, 2011 (EB-2011-0063).

Both GRWLP and Grand Renewable Solar LP have stated that they intend to apply for electricity generation licences with the Board in due course. GRWLP maintains it does not require an electricity transmission licence for the Transmission Facility pursuant to an exemption under section 4.0.2(1)(d)(i) of O.Reg 161/99. The Board heard argument on the licence exemption issue in the EB-2011-0063 proceeding. Board staff argued that it was not clear that GRWLP is in fact entitled to the exemption in O. Reg. 161/99 and had concerns over access to the Transmission Facility. Ultimately the Board determined that it did not need to make a determination on that issue in the EB-2011-0063 proceeding, and that the issue could be addressed at a later date.

On February 24, 2012, GRWLP filed a Notice of Proposal under section 81 of the Act. As part of its proposal GRWLP sought confirmation from the Board that it was exempt from holding an electricity transmission licence pursuant to section 4.0.2(1)(d)(i) of O. Reg. 161/99 for the transmission assets that it is building to connect its wind generation facility to the IESO controlled grid. On April 19, 2012, the Board issued a letter indicating that it intended to review the section 81 Notice of Proposal.

On May 4, 2012 the Board issued a Decision and Order approving the section 81 Notice of Proposal. The Board determined that a section 81 proceeding was not the appropriate forum to consider the issue of whether or not GRWLP is exempt from holding an electricity transmission licence, and indicated that it would commence a proceeding on its own motion under section 19(4) and 57 of the Act to address the issue.

Board staff has been assisted in its analysis of this issue by the argument in chief of GRWLP.

## **B. THE ISSUE**

The question posed to the Board in this proceeding is as follows:

1. Is GRWLP 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?

Section 4.0.2(1) of O. Reg. 161/99 provides:

**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,**

(a) the transmitter owns or operates a transmission system that is entirely or partially located on land on which one or more of the types of buildings or facilities described in subsection 4.0.1 (1) is also located;

(b) the transmission system owned or operated by the transmitter was in existence on January 1, 2002 and, since that day has been used, if at all, for the sole purpose of permitting another person that holds a licence authorizing the other person to own or operate a transmission system to convey electricity from the IESO-controlled grid to consumers;

(c) the transmitter is a consumer and transmits electricity only for,

(i) the purpose of using it for the transmitter's own consumption, or

(ii) the purpose described in clause (b), if the transmission system owned or operated by the transmitter was in existence on January 1, 2002 and, since that day, has been used, if at all, for the sole purpose described in clause (b);

**(d) the transmitter is a generator and transmits electricity only for,**

**(i) the purpose of conveying it into the IESO-controlled grid,**

(ii) the purpose of transmitting electricity during,

(A) planned outages as defined in the market rules that have been approved by the IESO in accordance with the market rules,

(B) forced outages as defined in the market rules, or

(C) emergencies as defined in the market rules, or

(iii) the purpose described in clause (b), if the transmission system owned or operated by the transmitter was in existence on January 1, 2002 and, since that day has been used, if at all, solely for the purposes described in clause (e)

(e) the transmitter is a consumer and a generator and transmits electricity only for,

(i) the purpose described in subclause (c) (i),

(ii) the purpose described in subclause (d) (i) or (ii), or

(iii) the purpose described in clause (b), if the transmission system owned or operated by the transmitter was in existence on January 1, 2002 and, since that day, has been used, if at all, for the sole purpose described in clause (b).

*[Bolding added to show the subsection relied upon by GRWLP]*

Pursuant to section 26(1) of the *Electricity Act*, licensed transmitters in Ontario are required to provide generators, retailers and consumers with non-discriminatory access to their transmission systems. Many of the details on how non-discriminatory access is to occur are contained in the Transmission System Code ("TSC"), which also applies to licensed transmitters.

If a transmitter is not licensed, it is not covered by the provisions of section 26(1) of the *Electricity Act*, or generally by the provisions of the TSC. Un-licensed transmitters, therefore, do not have any legal obligation to provide non-discriminatory access to their systems.

Board staff submits that the Board has no discretion with respect to this section: if GRWLP is captured by this exemption, the Board cannot require it to hold a licence.

## **C. STAFF SUBMISSION**

In assessing the applicability of the exemption in O. Reg. 161/99 to GRWLP, it appears that there are certain principles of statutory interpretation over which Board staff and GRWLP are in agreement. In its argument in chief, GRWLP spoke favourably of the “purposive approach” described in *Sullivan and Driedger on the Construction of Statutes*, which was referred to in Board staff’s submission in the leave to construct proceeding:

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.

The extent to which the exemption applies to the applicant needs to be explored through the purposive approach to statutory interpretation. As described above, GRWLP will own and operate both the proposed Transmission Facilities and the Wind Project. The Solar Project, which will also use the proposed Transmission Facilities, will be owned by a separate but related company, GRSLP.

### ***Wording of the regulation***

There appears to be little question that GRWLP will be both a transmitter and a generator. There appears to be little question that the GRWLP will be using the proposed facilities to convey the electricity it produces through its generation facility (i.e. the Wind Project, which it also owns) to the IESO-controlled grid. What is not clear, however, is whether the GRWLP will be a generator that is transmitting electricity only for the purpose of transmitting it to the IESO-controlled grid. The question arises because GRWLP proposes to also convey the electricity generated by GRSLP.

In order to answer this question, it is necessary to determine what the word “it” in 4.0.2(1)(d)(i) is referring to (i.e. “the transmitter is a generator and transmits electricity only for the purpose of conveying **it** into the IESO controlled grid”). Is “it” referring to the transmission of electricity generally, or does “it” refer only to the transmission of electricity that was generated by the transmitter itself? Contrary to the suggestion of GRWLP in its argument in chief, Board staff did in fact question the (in GRWLP’s wording) “literal conclusion that the term “it” referred to electricity without reference to who generated the electricity.” Board staff submits instead that the answer to this question is not obvious, and does not agree with GRWLP’s assertion that its interpretation is the “literal” one. “It” could be referring to either electricity generally, or electricity produced by the generator specifically. If “it” referred to the transmission of electricity generally, then it appears that any generator in the province could build a transmission line anywhere and be exempt from licensing (provided it charged other parties using the line prices not in excess of its costs). Only if the subsection refers to the former interpretation does the exemption apply to GRWLP.

Although the exemption GRWLP believes it qualifies for is in subsection 4.0.2(1)(d)(i), it is helpful to look at the rest of the section for clues regarding what “it” refers to. 4.02(1)(d) in its entirety states:

**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,

- (d) the transmitter is a generator and transmits electricity only for,
  - (i) the purpose of conveying it into the IESO-controlled grid,
  - (ii) the purpose of transmitting electricity during,
    - (A) planned outages as defined in the market rules that have been approved by the IESO in accordance with the market rules,
    - (B) forced outages as defined in the market rules, or
    - (C) emergencies as defined in the market rules
  - (iii) the purpose described in clause (b), if the transmission system owned or operated by the transmitter was in existence on January

1, 2002 and, since that day has been used, if at all, solely for the purposes described in clause (e)

In *Sullivan and Driedger on the Construction of Statutes*, Professor Sullivan describes a principle known as the presumption of consistent expression:

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. ... Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.<sup>1</sup>

Professor Sullivan continues:

Given the presumption of consistent expression, it is possible to infer an intended difference in meaning from the use of different words or a different form of expression. As Malone J.A. explains in *Jabel Image Concepts Inc. v. Canada*: “When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.”<sup>2</sup>

Note that 4.0.2(d)(ii) uses the term “transmitting electricity”, whereas 4.0.2(1)(d)(i) instead uses the phrase “conveying it to the IESO-controlled grid”. Section 4.0.2(1)(d)(ii) is clearly referring to the transmission of electricity generally. Why then was a different term used in 4.0.2(d)(i)? The use of different language suggests that the drafters of the regulation intended that the words have a different meaning, particularly where they are in adjoining subsections. Otherwise, why not use the same terminology? This suggests that the “it” in 4.0.2(1)(d)(i) does not in fact refer to electricity generally (in which case we would expect it to say “transmitting electricity”, as was done in 4.0.2(1)(d)(ii)), but instead refers to electricity that the transmitter has itself generated.

In its argument in chief, GRWLP points to the reference to the transmission of electricity “for a price”, and observes that this reference would not make sense if

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<sup>1</sup> Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> Edition, p. 162.

<sup>2</sup> *Ibid.*, p. 164.

it was not intended that the transmitter could transmit some other party's electricity. However, it is not clear that the language regarding price has any relevance to subsection (d), which is the subsection under which the GRWLP asserts it is licence exempt. It may have been the intent of the regulation that the references to price do not apply to subsection (d) (which specifically states: "for a price, *if any*,..."). The reference to price may instead have been included as it is applicable to other subsections; for example subsection (a) or subsection (b) (for ease of reference section 4.0.2(1) is quoted in full above).

The applicability of section 4.0.2(1)(d)(i) to GRWLP, therefore, is not certain. GRWLP intends to allow a third party (GRSLP) to use its transmission facilities to transmit electricity to the IESO-controlled grid. If the word "it" refers only to electricity produced by the generator that owns the transmission assets (i.e. GRWLP), then GRWLP is not entitled to the exemption. If "it" refers to any electricity produced by any generator, then GRWLP is entitled to the exemption (Board staff has no reason to question GRWLP's statements that it will be charging GRSLP a price no greater than that required to recover all reasonable costs).

### ***Purposive approach***

In its argument in chief regarding the "purposive approach", GRWLP submitted that its interpretation was most consistent with the purpose of transmission regulation and Board policy. GRWLP states that the purpose of the exemption provision is to exempt persons from the regulatory obligations accompanying the transmission business where there is no public interest reason to impose these obligations. Board staff generally agrees with this statement, and also believes that GRWLP has provided some useful commentary on some of the reasons why an exemption for GRWLP might be in the public interest. There are also, however, certain public interest concerns that might arise if the exemption is interpreted in favour of GRWLP.

#### ***i) Non-discriminatory access***

One of the issues raised by Haldimand County Hydro Inc. ("HCHI") in the leave to construct hearing related to its inability to access the Transmission Facilities



(or the right of way) for its possible future transmission needs.<sup>3</sup> Pursuant to section 26(1) of the *Electricity Act*, licensed transmitters in Ontario are required to provide generators, retailers and consumers with non-discriminatory access to their transmission systems. Many of the details on how non-discriminatory access is to occur are contained in the TSC, which applies to licensed transmitters.

If a transmitter is not licensed, it is not covered by the provisions of section 26(1) of the *Electricity Act*, or the provisions of the TSC. Un-licensed transmitters, therefore, do not have any legal obligation to provide non-discriminatory access to their systems.

In the EB-2011-0063 proceeding, GRWLP expressed its views in its Argument-In-Chief<sup>4</sup>, in regard to its responsibility to provide access to its Transmission Line. GRWLP stated in part that:

*...its transmission line like all other connection lines in the province will be private property. Like all property, its use is always subject to negotiations between its owner and third parties (such as HCHI). These negotiations may lead to a mutually acceptable agreement. However, in the absence of such an agreement, the Board's power to order the Applicant to provide access to HCHI would have to be explicitly provided in legislation.*

HCHI expressed its views in regard to access<sup>5</sup>, and followed with justification for its need for a new transformer station<sup>6</sup> to meet its load growth.

Board staff submits that it is important to point out that denying access to transmission facilities to meet need by a distributor (or other potential user) may not be in the public interest, especially when such transmission facilities are built on public road allowances. There are only a limited number of easily accessible rights of way available in many parts of Ontario. Where an un-licensed transmitter occupies a right of way, it will in many cases prevent other entities

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<sup>3</sup> Leave to Construct proceeding (EB-2011-0063), HCHI's Submission, page 16, paragraphs 83 - 89, September 23, 2011

<sup>4</sup> Leave to Construct proceeding (EB-2011-0063), GRWLP's Argument-In-Chief, paragraphs 41 - 47, September 16, 2011

<sup>5</sup> Leave to Construct proceeding (EB-2011-0063), HCHI submission/pages 15 - 16, September 23, 2011.

<sup>6</sup> Leave to Construct proceeding (EB-2011-0063), HCHI's evidence, filed on August 30, 2011 justifying HCHI's need to a new transformer station

(such as licensed distributors) from using that right of way for its own needs. This does not represent an optimal use of a sometimes scarce asset, and is generally not in the public interest.

*ii) Connection agreement*

There also may be a public interest concern with respect to the relationship between Hydro One Networks Inc. and GRSLP.

Board staff notes that section 4.1.1 of the TSC directs transmitters to conclude a connection agreement to provide transmission service, and section 3.0.5 of the TSC indicates that, the TSC will only be binding on any such customers (the Solar Project in this case) if the transmitter (the GRWLP in this case) has a transmission licence. For clarity section 3.0.5 of the TSC states in part that:

**3.0.5** ....this Code applies to all licensed transmitters and to all transactions and interactions between a licensed transmitter and its customers and between a licensed transmitter and its neighbouring Ontario transmitters.  
[underlining added for emphasis]

Board staff also notes that the Form of Connection Agreement (“FCA”), Appendix 1 of the TSC, Version B for Generator Customers, at section 3.1, states that:

**3.1** *The Code is hereby incorporated in its entirety by reference into, and forms an integral part of, this Agreement. Unless the context otherwise requires, all references in this Agreement shall be deemed to include a reference to the Code.*

Can HONI conclude a Connection Agreement with the Solar Project

Board staff refers to a Compliance Order<sup>7</sup> (attached to this submission) where the Board found that the entity (Cardinal Power) that directly connects to the transmission system of Hydro One Networks Inc. (“HONI”) is the customer of HONI, but not the entity that does not connect directly to HONI (Casco). With

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<sup>7</sup> Compliance Order, dated September 24, 2003, proceeding RP-2002-0143/EB-2002-0423

respect to the relevance of the Casco case to the case in question, GRWLP will be a customer of HONI, but the Solar Project will not be a HONI customer. Therefore HONI cannot conclude a Connection Agreement with the Solar Project, and consequently the technical requirements of the TSC and FCA will not be binding on the Solar Project.

Board staff further submits that a GRWLP's proposal<sup>8</sup>, as an unlicensed transmitter, to conclude a connection agreement similar to the TSC's FCA, with the Solar Project, is a private agreement between two parties that does not bind the Solar Project to the TSC and FCA requirements noted above.

#### Importance of TSC and FCA Technical Requirements to System Integrity

Board staff submits that when a customer connects its facilities to a licensed transmitter, it is the combination of the TSC technical requirements in addition to the technical installation and operating requirements set out in the FCA<sup>9</sup>, that ensure the continued reliability and integrity of the provincial transmission system. The noted FCA requirements include initial activities such as the right of the incumbent licensed transmitter to witness the commissioning tests<sup>10</sup> of a customer's equipment and ongoing maintenance procedures, while section 4.6 of the TSC ensures long term continued compliance of equipment to the TSC standards<sup>11</sup> as such standards change over time. To elaborate, as the transmission system expands over time, equipment standards may change, and the noted section 4.6 of the TSC would ensure continued compliance of equipment at any given site with these revised standards.

Board staff submits further that continued reliability and integrity of the provincial transmission system would be maintained if the TSC requirements were binding on all transmission facilities and equipment, whether owned by entities directly connected or indirectly connected to a licensed transmitter. To clarify, the facilities owned by the GRSLP include 230 kV facilities (a transformer and a breaker) classified as "Transmission Facilities", and should be compliant with the

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<sup>8</sup> Leave to Construct proceeding (EB-2011-0063), Applicant Response to Board staff Interrogatory # 10, Question(i), page 16, August 15, 2011

<sup>9</sup> The Form of the Connection Agreement, Appendix 1 of TSC– (version B), Part Nine "TECHNICAL AND OPERATING REQUIREMENTS"/Section 24 - 28, June 10, 2010

<sup>10</sup> Ibid, sections 24.1 – 24.6 "Facility Standards"

<sup>11</sup> TSC, section 4.6 "Compliance Of Facilities With Standards"

TSC technical requirement. These technical requirements would change as the transmission system expands and evolves over time. Compliance with these changing technical requirements will not be binding on GRSLP if GRWLP is exempt from holding a transmission licence.

Board staff concludes that under the currently proposed arrangement the provisions of the TSC will not be binding on the Solar Project, and there will be no connection agreement between Hydro One and GRSLP. Given the role of the TSC in (amongst other things) protecting the integrity of the provincial transmission network, this may give rise to public interest concerns.

#### Restrictions on Business Activity for Transmitters

In its argument GRWLP states that:

“Further, if GRWLP 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;”

In addition GRWLP states that “...the Board’s regulatory restrictions on transmitters are such that GRWLP must choose between being a generator or a transmitter – it cannot be both.”

Board staff is unclear on the basis for these statements as GRWLP has not provided any support regarding the “regulatory restrictions” and the “requirement to exit the generation business and establish a stand-alone transmission company”. Board staff assumes that GRWLP is referencing section 71 of the Act, the restriction on business activity for distributors or transmitters. Section 71 of the Act states:

#### **Restriction on Business Activity**

**71. (1)** Subject to subsection 70 (9) and subsection (2) of this section, a transmitter or distributor shall not, except through one or more affiliates, carry on any business activity other than transmitting or distributing electricity. 2004, c. 23, Sched. B, s. 12.

Board staff submits that section 71 does not make the distinction between a licensed transmitter and a transmitter that is exempt from being licensed. Board staff submits that a transmitter is restricted, whether licensed or not, from the

business activity under section 71 of the Act. Whether or not GRWLP is a transmitter as defined under the Act is not at issue in this proceeding. Board staff submits that in its reply argument GRWLP should clarify its position on the “regulatory restrictions” that would create the need to establish a new business entity and to exit the generation market if the Board finds that it should be licensed as a transmitter.

#### Abbreviated Licence and Licence Conditions

Board staff submits that if the Board decides that GRWLP must be licensed as a transmitter then it has the power to approve an “abbreviated” transmission licence for GRWLP to reduce the regulatory requirements as the Board deems appropriate and in the public interest. The Board has, in the past, granted licences that reduce some of the restrictions and obligations of a licensee, granted exemptions from codes while maintaining obligations that it finds are in the public interest. The Board has also, in the past, removed certain provisions in an entity’s licence that do not apply to that distinct entity in a unique situation. Board staff submits that if the Board finds that GRWLP should be licensed as a transmitter the Board can impose only those conditions it deems to be appropriate and in the public interest to do so.

#### **D. SECTION 29 OF THE ACT**

It is not clear to Board staff that this would be an appropriate case for the Board to exercise forbearance under section 29 of the Act.

The Board did not seek submissions on this issue, and as this proceeding has been initiated on the Board’s own motion, submissions with respect to section 29 are arguably out of scope. Regardless, Board staff offer the following thoughts.

Section 29 states:

##### **Refrain from Exercising Power**

**29(1)** On an application or in a proceeding, the Board shall make a determination to refrain, in whole or 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. 1998, c. 15, Sched. B, s. 29 (1).

The power GRWLP is asking the Board to refrain from exercising (if necessary), is the requirement to hold a transmission licence. The “service” that GRWLP asks the Board to refrain from regulating is its transmission service. It is not clear what “competition” there is for transmission services that are sufficient to protect the public interest.

As discussed above, there are limited easily accessible rights of way for transmission or distribution lines in many parts of Ontario. In this very case the local distribution company has raised concerns about its inability to access the right of way of GRWLP. Absent regulation by the Board, GRWLP will have monopoly use of a scarce public resource (i.e. the right of way). If another generator were to be built in the area, it would have no right to access the Project.

The Board has exercised its powers under section 29 only rarely. A decision that regulation is not necessary is a decision that may have significant impacts on stakeholders that are not represented in this particular proceeding, and would generally require broader industry participation. The NGEIR proceeding, which is certainly the best known example of the Board exercising its section 29 powers, is instructive in this regard. That proceeding was conducted on the Board’s own motion and saw wide participation by a variety of stakeholders. Certainly not every section 29 proceeding would have to be as intensive as NGEIR; however this precedent shows that the Board recognized the broader public interests at play in a section 29 proceeding.

There are also likely other parties with an interest in this issue. There are a variety of generators who might either support or oppose a decision by the Board to refrain from exercising its powers under these circumstances (in fact NextEra has been given permission by the Board to make submissions in this proceeding, though it is not known by Board staff if it will speak to the section 29 issue). The IESO, Hydro One, and other transmitters might also be interested (the IESO and Hydro One have been deemed as intervenors in this proceeding, but as the section 29 issue was not part of the question asked by the Board it is not known if they will comment). In other words, the issue may have impacts on stakeholders that are not party to this hearing.

Board staff submits that the Board should resist the invitation to invoke section 29 under these circumstances. If the Board believes that this is an issue that deserves more consideration, it can create a broader process to examine the matter further.

All of which is respectfully submitted.