

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

REPLY SUBMISSIONS OF GRAND RENEWABLE WIND LP

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Introduction and Summary

1. The issue in this proceeding is whether GRW LP is 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.
2. Subsection 4.0.2(1)(e)(ii) 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”
3. GRW LP’s submission in chief addressed the interpretation of this provision in light of its language and its purpose. Board staff responded to both of these areas.

Text of the Exemption Provision

4. With respect to the text of the provision, staff made two points.
5. First, staff argued that the terms “transmits electricity” in s. 4.0.2 (d) of the Exemption Provision and the term “conveying it to the IESO-controlled grid” in s. 4.0.2.(e) (i) are different and should therefore be given different meanings. Particularly, according to staff, the “it” in s. 4.0.2(e) (ii) does not refer to the electricity transmission referred to in 4.0.2 (d).

6. In response, while acknowledging that the words “transmit” and “convey” are different, it is difficult to see how that difference supports staff’s interpretation.
7. First, “transmit” is defined in the *OEB Act, 1998* as meaning “to convey electricity at voltages of more than 50 kilovolts”.¹ The terms “transmit” and “convey electricity” therefore have the same meaning under the *Act*. It is therefore not surprising that they can be used interchangeably.
8. These words are also used interchangeably in the Exemption Provision. Thus, s. 4.0.2 (d) refers to a generator that “transmits” electricity for the purpose of “conveying it into the IESO-controlled grid.” So the terms “transmit” and “convey” describe the same activity. If any further demonstration of this is required, the Board may consider s. 4.0.2(e), which provides an exemption for a transmitter that is a consumer that “transmits” electricity for (i) the purpose described in (c)(i) (which uses the word “convey”), or (ii) the purpose described in (c) (ii) (which uses the word “transmit”). Again, the words “convey” and “transmit” are used to describe the same activity.
9. Further, even if the Board does attribute different meanings to the words “transmit” and “convey electricity”, staff does not give any reason why that difference supports the position that the word “it” refers only to electricity that a generator generates itself, as opposed to the generation generated by a related company. In other words, there may be a difference in the wording, but it may be a difference without a meaning and no reasons are offered why this difference supports staff’s interpretation.
10. More important than the difference in the words “transmit” and “convey electricity” is the context in which those words are used in the Exemption Provision. The relevant way in which the Exemption Provision departs from the broader sense of transmission more generally is that the Exemption

¹ OEB Act, s. 3.

Provision is restricted to conveying electricity in a single direction – “into the IESO controlled grid”. The exemption cannot be relied upon to convey electricity from the IESO controlled grid to load customers. Ultimately, the protection of transmission rate paying customers from the market power of transmission utilities is the purpose of the OEB’s regulatory oversight. This unidirectional exemption may be the driver, if any, for the different use of the term “transmit” in one section of the Exemption Provision (which would otherwise apply to a bidirectional conveyance) and the term “convey electricity” in another section (which only applies to a conveyance to the grid).

11. Staff’s second textual argument is in response to GRW LP’s argument that the term transmitting electricity “for a price, if any, that is no greater than that required to recover all reasonable costs” is based on the premise that generator is carrying another generator’s power; otherwise the concept of cost recovery make no sense. Staff’s response to this point is that the Board should simply disregard these words because “the reference to price may instead have been included as it is applicable to other subsections.” Staff argues that this interpretation is possible because of the use of the term “if any” in the opening words in s. 4.0.2 (1).
12. However, the term “if any” qualifies the price that is paid for conveying electricity. In other words, it contemplates electricity being conveyed at no price. The term “if any” does not qualify the applicability of the subsections. Staff is simply asking the Board to add the words “if applicable” to the opening words of s. 4.0.2.
13. This is an unusual proposition. It involves re-writing the Exemption Provision in a manner that clearly departs from the normal meaning of words and grammatical structure of sentences. Under staff’s proposed approach, some of the opening words in s. 4.0.2 apply to some of the subsections, but not all of them; and other words should be deleted and

substituted with words that have a different meaning. It is not clear which subsections would be made subject to which opening words and why.

14. This is a surprising position generally, and particularly surprising in light of staff's purported acceptance of the "purposive approach" of statutory interpretation. That approach, according to the quotation from *Sullivan and Dreidger on the Construction of Statutes* included in staff's submission states that "an interpretation that is appropriate" includes "its plausibility, that is its compliance with the legislative text". Staff's suggestion that the Board should apply a selective application of some provisions (i.e., those respect to charging a price) is not a plausible compliance with the legislative text.

Purpose of the Exemption Provision

15. With respect to the purpose of the exemption provision, staff makes a number of points.
16. First, staff argues that, if GRW LP's interpretation is accepted, then GRW LP would not be required to provide open access. This, according to staff, "may not be in the public interest, especially when such transmission facilities are built on public road allowances."
17. This argument should not be considered by the Board because it has nothing to do with the interpretation of the Exemption Provision.
18. Staff's argument that transmission connection facilities should be subject to open access if facilities are built on public road allowances, if adopted by the Board, would apply to all generation connection facilities, regardless of whether a generator carried another generator's power or not. In other words, staff is suggesting that the Board should develop a new policy on the fly – that all generators who use public road allowances should be subject to transmission licencing. The implications of this interpretation are dramatic and would fundamentally transform the generation licencing regime in

Ontario. It would also flatly contradict the provisions of the Exemption Provision which do not align at all with this interpretation.

19. Staff's second purposive argument relates to the fact that, under GRW LP's proposed approach, GRW LP, and not GRS LP would be the transmission customer of Hydro One and therefore only GRW LP and Hydro One would be bound by the TSC and a Connection Agreement.
20. It is not clear why staff has concerns with this outcome and, in particular, whom the staff's proposal is meant to protect. Hydro One has not raised any concerns with this approach. To the contrary, Hydro One has explicitly stated to the Board that "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."²
21. Further, GRS LP and GRW LP are not seeking this protection either. Given that no other parties are impacted by this arrangement, it is not clear how addressing this concern impacts the public interest.
22. Staff also makes the assertion that licensing is required to "ensure the continued reliability and integrity of the provincial transmission system." This is a remarkable proposition.
23. First, the LTC addressed the issue of the impact of the proposal on "the reliability and quality of electricity service."³ The Board heard submissions from all parties in that proceeding and concluded that the project would not have an adverse impact on reliability.
24. Importantly, in the LTC proceeding, the IESO addressed the system reliability impacts of the proposal and did not raise any concerns related to reliability with the proposed arrangement. Even in response to the Board's

² Hydro One Submissions in EB-2011-0063, January 12, 2012.

³ OEB Act, s. 96(2).

specific questions with respect to the licencing issue, the IESO indicated simply that clarification of the Board's interpretation would be helpful. It did not raise any concerns respecting reliability.⁴

25. To the contrary, in response to a specific question directed by the Board in that proceeding, the IESO stated:⁵

"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*. In response to the Board's specific question, 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 finding and recommendations in the SIA report concerning the solar farm will, until such time as the solar farm is connected, not be applicable)."

26. The IESO was also invited to make submissions in this proceeding and did not do so. Given that the IESO's mandate and expertise relates to the reliability of the IESO controlled grid, the Board can take comfort from the fact that if the IESO had concerns related to system reliability, it would have raised them. Staff's submissions are thus entirely speculative and not informed by any agency with substantive expertise in this area.

27. Finally, staff took issue with GRW LP's submissions that forcing it to become a licenced transmitter would effectively require it to fundamentally restructure its business. GRW LP's submissions in this regard were as follows:

"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:

⁴ IESO Submissions in EB-2011-0063, September 23, 2011.

⁵ IESO Submissions in EB-2011-0063, Motion to Review, January 16, 2012.

- Exit the generation business;
- Establish a stand-alone transmission company;
- Apply for OEB approved rates;
- Meet requirements under the TSC, including the requirements to:
 - o Expand its system to meet anticipated load requirements;
 - o 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 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.

28. Staff suggests that some of these restrictions may not apply, or may not be as impactful on the applicant's business, and that the Board has the power to grant various exemptions from certain conditions.
29. Specifically, staff argues that the restriction on a single company carrying on both the transmission and generation business in s. 71 of the Act "do not make a distinction between a licenced transmitter and a transmitter that is exempt from being licenced". Staff further requests that GRW LP "clarify its position" on this point.

30. In response, GRW LP points out that the Exemption Provision provides an exemption s. 57 (b) of the *OEB Act* (the licencing provision), as well as from the provisions listed in s. 4.0.2 (2), which include ss. 71, 78, 80 and 86. Thus, those provisions only apply to licenced transmitters.
31. GRW LP's submissions reflect the current requirements and expectations of the Board with respect to regulated utilities. GRW LP is not aware of utilities that operate outside of this model in Ontario.
32. It is respectfully submitted that the Board should not use this proceeding to develop a new transmission licencing regime. That approach would cause confusion and uncertainty for the applicant, and other stakeholders, including generators, transmitters and consumers.

The Forbearance Issue

33. Finally, staff noted GRW LP's alternative argument that if the Board determines that GRW LP does not fall within the Exemption Provision, then GRW LP submitted 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*.
34. 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.”
35. Staff's argument here is that the Board should avoid addressing this issue and it may be out of scope.
36. This is not a reasonable approach.

37. Section 29 states that the Board “shall” forbear if it makes the enumerated findings of fact. It is not open to the Board to simply not deal with this issue because staff prefers not to.
38. Further, the Board has determined, in the s. 81 application 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.” The two issues are intimately related and it is not clear why the Board can make a finding on one and not the other.
39. Staff submits that the Board should, if it seeks to deal with this issue, “create a broader process to examine the matter further.”
40. With respect, the LTC application was filed in February, 2011. The issue of the use of the transmission line was canvassed in that case. The Board’s decision in December, 2011 indicated that it would not address the licencing issue in that decision, but that “it is one that ultimately needs to be addressed.”
41. It has now been six months after the Board made that statement. Staff has been aware for some months that GRW LP had planned to address this issue. There is simply no need to create new processes. If the Board does determine that the Exemption Provision does not apply to GRW LP, then, with respect, the Board should also make a determination on whether it should nonetheless forbear from treating GRW LP on the grounds that competition is sufficient to protect the public interest.

Conclusion

42. 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.
43. 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, June 14, 2012

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