



EB-2013-0015

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 McLean's
Mountain Wind Limited Partnership for an electricity
generation licence as a Feed-In Tariff Program participant.

BEFORE: Cynthia Chaplin
Vice-Chair and Presiding Member

Ellen Fry
Member

Emad Elsayed
Member

Decision and Order

June 13, 2013

McLean's Mountain Wind Limited Partnership ("McLean's") filed an application with the Ontario Energy Board (the "Board") dated January 17, 2013 under section 60 of the *Ontario Energy Board Act, 1998* (the "Act") seeking an electricity generation licence as a Feed-In Tariff ("FIT") Program participant.

In the application, McLean's states that in April 2010, the Ontario Power Authority ("OPA") awarded two FIT Program contracts to McLean's, relating to the purchase of electricity generated at its proposed McLean's Mountain Wind Farm in Little Current, Ontario. Further, McLean's has provided the Board with a "Notice to Proceed" for both FIT contracts related to the wind farm which are dated November 23, 2012 and November 26, 2012 and issued by the OPA to McLean's.

On April 26, 2013, the Board issued its Decision on Oral Hearing and Procedural Order No. 1, ("Procedural Order No. 1") in which it decided to proceed with a written hearing rather than an oral hearing.

The Board also determined in Procedural Order No. 1, in the light of the submissions to that point, that it has no jurisdiction in this licence proceeding "with respect to the siting, contracting, construction or impacts of the wind farm" and that Wikwemikong Unceded Indian Reserve ("Wikwemikong") had "identified no issue related to the Crown's duty to consult which is within the Board's jurisdiction in this licence proceeding". However, the Board permitted, and received, further submissions on the duty to consult issue from Wikwemikong, McLean's and Board staff.

Duty to Consult with Aboriginal Groups

McLean's submits that there is no causal connection between the conduct of the Crown in licensing it as an electricity generator and any potential infringement to Aboriginal or treaty rights. It also submits that in fact there has been significant consultation with Aboriginal groups concerning this project.

Wikwemikong takes the position that the duty to consult can be triggered both by decisions with direct impact on Aboriginal or treaty rights and by "higher level" decisions that may not themselves directly impact an Aboriginal or treaty right. Board staff also submits that the courts have adopted a broad approach when considering whether the honour of the Crown has been upheld in this context.

Wikwemikong submits that an electricity generation licence has a broad impact because it is "a main licence granted by a Board that justifi[ies] the construction of all other related electricity related infrastructure".

The Board does not consider that there are any potential direct impacts identified in this proceeding that trigger the duty to consult. The potential direct impacts that have been identified relate to the environmental impact of the wind farm generation facility or the transmission facilities that connect the generator to the electricity grid. As stated in Procedural Order No. 1, the scope of this proceeding does not include a review of the merits or impact of these facilities. These facilities are subject to environmental and other permitting processes that are not conducted by the Board. As noted in Procedural

Order No. 1, the transmission facilities were approved by the Board in a leave to construct proceeding, but that type of Board proceeding is limited by the Act and does not include environmental issues.

The Board also does not consider that this proceeding is a “higher level decision” with a potential indirect impact on Aboriginal or treaty rights that triggers the duty to consult. Wikwemikong is incorrect in describing the electricity generation licence as “a main licence granted by a Board that justif[ies] the construction of all other related electricity related infrastructure”. On the contrary, as explained both in Procedural Order No. 1 and below, the scope of this proceeding is confined to licensing McLean's itself, as an entity. It does not license the wind farm or imply that any other project will be approved by the Board.

In the view of the Board, the Board staff submission provides an accurate outline of the legal basis of the duty to consult and its application to the Board as a regulatory tribunal.

Authority of Mnidoo Mnising Power Limited Partnership (“MMP”)

The Manitoulin Coalition for Safe Energy Alternatives (“MCSEA”) and Anna Marie General submit that MMP's participation in the wind farm project has not been duly authorized by its constituents¹. The Board does not consider that this issue is a matter within the scope of this proceeding. Rather, it is an issue of internal governance for MMP, to be addressed between MMP and its constituents.

Board's Decision on the Application

This is an application by McLean's for an electricity generation licence. As stated in Procedural Order No. 1,

The scope of a generation licence application process has been articulated by the Board in its decision in EB-2009-0242 (York Energy Centre LP). In that decision, the Board stated:

¹ McLean's states that MMP is a limited partner of McLean's and also a 50% owner of the general partner of McLean's

In the exercise of its licensing function, the Board's practice is to review a licence application based on the Applicant's ability to own and/or operate a generation facility and to participate reliably in Ontario's energy market.

The Board uses three main criteria to assess an electricity generator licence applicant:

- The applicant's ability to be a financially viable entity with respect to owning and operating a generation facility in Ontario's energy market;
- The applicant's technical capability to reliably and safely operate a generator; and
- The applicant and its key individuals' past business history and conduct such that they afford reasonable grounds for belief that the applicant will carry on business in accordance with the law, integrity and honesty.

When an applicant for an electricity generation licence is a FIT Program participant, the OPA undertakes a rigorous assessment of the applicant's financial viability, technical capability and conduct. If the OPA is satisfied with the results of this assessment, the OPA grants the applicant a Notice to Proceed. Because of the rigour of the OPA assessment process, the Board will generally grant a generation licence to an applicant if it has received a Notice to Proceed from the OPA.

The Board grants the application. The Board is satisfied with McLean's financial viability, technical capability and conduct based on the fact that the OPA has entered into a FIT contract with McLean's and has provided McLean's with a Notice to Proceed.

A number of parties made submissions to the Board opposing the application. However, all of the objections raised were related to the wind farm project, which as the Board has explained above and in Procedural Order No. 1, is not the subject of this proceeding. No issues were raised that relate to the main criterion for issuing an electricity generating licence to a FIT Program participant, namely, that the applicant has received its Notice to Proceed from the OPA.

Compliance Issues

In addition, MCSEA raised concerns with respect to McLean's adherence to the Conditions of Approval in the Board's Leave to Construct Order for the wind farm

transmission facilities. Such matters are beyond the scope of this proceeding. However, the Board will review these matters separately and will initiate compliance action if warranted.

THE BOARD ORDERS THAT:

McLean's is granted an electricity generation licence , on such conditions as are contained in the attached licence.

DATED at Toronto, June 13, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary