



EB-2013-0233

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 East Durham
Wind, Inc. for an Order or Orders pursuant to subsection
41(9) of the *Electricity Act 1998*, S.O. 1998, c. 15, Schedule
A, as amended, establishing the location of East Durham
Wind Inc.'s distribution facilities within certain road
allowances owned by the Municipality of West Grey.

BEFORE: Emad Elsayed
Presiding Member

Ellen Fry
Member

DECISION AND ORDER

November 7, 2013

DECISION

The location of East Durham's distribution system on road allowances owned by the Municipality of West Grey ("the Municipality") is approved as described in this Decision and Order.

BACKGROUND

East Durham Wind, Inc., ("East Durham") filed an application dated June 14, 2013 with the Ontario Energy Board (the "Board"), under subsection 41(9) of the *Electricity Act, 1998, S.O. 1998, c. 15, Schedule A*, (the "Act") for an order or orders of the Board establishing the location of approximately 9.1 kilometers of East Durham's proposed distribution system within certain public streets, highways and right-of-ways owned by the Municipality in Grey County, Ontario.

The Board issued a Notice of Application and Written Hearing on July 9, 2013. The Municipality and Karen and Syd Parkin (the "Parkins") requested and were granted intervenor status. The Board also received letters of comment from a number of local residents.

The Parkins submitted evidence. The Parkins and Board staff submitted interrogatories on East Durham's evidence. No party filed interrogatories on the evidence submitted by the Parkins. East Durham provided responses to all interrogatories.

East Durham filed its argument-in-chief on September 4, 2013. The Board received submissions from the Municipality and the Parkins. East Durham filed its reply submission on September 19, 2013.

On October 2, 2013, the Board issued a letter requiring East Durham to provide a more complete response to Board staff interrogatory no. 2(ii) by providing the analysis and supporting documentation that underpins its determination that it is appropriate to locate its facilities 1-4 meters from abutting property lines. The letter also asked East Durham to confirm the accuracy of a map provided as part of East Durham's argument-in-chief.

East Durham submitted its response on both matters on October 4, 2013. The Parkins submitted their comments on Oct 7, 2013.

THE APPLICATION

East Durham has entered into a Feed-in-Tariff contract with the Ontario Power Authority and is in the process of developing a wind generation facility, called the East Durham Wind Energy Centre (the “Project”) in the Municipality. The Project will have a total generation capacity of up to 23 MW and includes generation and distribution assets.

As part of the Project, East Durham is proposing to construct an underground distribution system to transmit power generated by the wind turbines to the distribution system of Hydro One Networks Inc. (“Hydro One”) for delivery ultimately to the IESO-controlled grid. Specifically, East Durham is proposing to construct 28.3 kilometers of underground 34.5 kV distribution lines on private and public lands, which will convey power from each of the turbines to a transformer substation. From that point, an overhead 44 kV line will convey the electricity to Hydro One’s distribution system. The components of East Durham’s proposed distribution system are collectively referred to in this Decision and Order as the “Distribution System”.

East Durham proposes to locate approximately 9.1 kilometers of the underground portion of the Distribution System on road allowances that are owned by the Municipality. The road allowances at issue are referred to in this Decision and Order as the “Road Allowances”.

Subsections 41(1) and 41(9) of the Act provide as follows:

41. (1) A transmitter or distributor may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and lines.

41. (9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.

East Durham submits that it is a “distributor” within the meaning of subsection 2(1) of the Act. Accordingly, East Durham submits that it has the right to install facilities for the purpose of the Distribution System under “any public street or highway” pursuant to subsection 41(1) of the Act.

East Durham submits that it has been unsuccessful in its attempts to agree with the Municipality on the location of the portion of the Distribution System that would be on the Road Allowances. The Municipality does not dispute this. East Durham also submits that neither the Municipality nor any other party in this proceeding has proposed an alternate location. This is not disputed. Accordingly, East Durham is applying to the Board under subsection 41(9) for a determination of the location of the portion of the Distribution System that would be installed under the Road Allowances as described below.

- The Distribution System shall generally be located in the Road Allowances listed on Exhibit B, Tab 6, Schedule 1, Appendix A, as shown in the drawings included in Exhibit B, Tab 6, Schedule 1, Appendix B (and updated in section 2.0 of East Durham's argument-in-chief and in response to the Board's letter dated October 2, 2013).
- Where practicable, and where it meets all applicable engineering, environmental and health and safety standards, the Distribution System lines shall be located 1-4 meters from the abutting property line.
- Where practicable, and where they meet all applicable engineering, environmental and health and safety standards, the diagrams shown at Exhibit B, Tab 6, Schedule 1, Appendices C and D shall be followed in constructing the Distribution System within the Road Allowances.¹

The submissions of the Municipality and the Parkins regarding the various issues are described under Board Findings. Board staff declined to file a submission.

SCOPE OF THE BOARD'S JURISDICTION

As indicated above, the Board's authority in this proceeding is derived from section 41 of the Act.

Subsection 41(9) limits the scope of this proceeding to a determination of the location of the applicable portion of the Distribution System within the Road Allowances.

As indicated above, the Board received a number of letters of comment from local residents. These letters dealt with the location of the Project's wind turbines and their

¹ Pre-filed evidence of East Durham, Ex B/Tab 6/Schedule 1

impact on property values, health, and aesthetics. They also dealt with the Ontario Government's renewable energy policy in general and broad environmental issues.

Given the scope of subsection 41(9), it is not the Board's role in this proceeding to decide whether the Project should be approved, consider issues relating to wind turbines or renewable energy policy generally, or consider alternatives to the Project such as routes for the Distribution System that are outside of the Road Allowances. Accordingly, the concerns in the letters of comment described above are not within the scope of this proceeding.

BOARD FINDINGS

Is The Applicant a Distributor?

The Municipality submitted that the application should be denied because East Durham is not a "distributor" within the meaning of section 41. It submitted that this is the case because East Durham does not own or operate a distribution system and that, until it receives its Renewable Energy Approval ("REA") from the Ministry of the Environment ("MOE"), it will not have the authority to do so. Distinguishing this case from the Board's Decision in the Plateau case², the Municipality submitted that Plateau, at the time of its application, had received MOE approval to construct and operate its "renewable energy generation facilities" which also authorized Plateau to construct, own and operate a distribution system.

In response, East Durham submitted that the Act does not require all necessary approvals to be in place prior to being able to access the rights afforded to a distributor under section 41.

Concerning the Plateau case, East Durham submitted that whether or not Plateau had certain approvals in place at the time of its section 41 application was not cited as a basis for the Decision. East Durham also referred to the Board's more recent Wainfleet Decision³. In that case, according to East Durham, the Board granted the section 41 application prior to Wainfleet having received the REA for its project. East Durham further submitted that the Board's Decision and Order in that case was not made conditional on receipt of the REA.

² EB-2010-0253

³ EB-2013-0031

The Board agrees with East Durham that the Act does not require that all necessary approvals, such as the REA, be obtained prior to granting an application under subsection 41(9). Accordingly, the Board does not consider that there is any relevant basis to distinguish this application from the applications in the Plateau and Wainfleet cases, in which the applicants were considered to be “distributors”. The Board notes, however, that in order to proceed with construction of the Distribution System, East Durham will need to obtain all legally required permits and other approvals.

Proposed Location of the Distribution System

East Durham has provided maps that identify the starting and ending points of the various segments of the Distribution System within Road Allowances. Further, the table at section 2.0 of East Durham's argument-in-chief provides the length and location (i.e. western side of the Road Allowance) of each segment. Concerning the proposed setback of the Distribution System as indicated above, East Durham has proposed that, where practicable, and where it meets all applicable engineering, environmental and health and safety standards, the Distribution System lines shall be located 1-4metres from the abutting property line.

The Municipality submitted that East Durham's application should be denied because East Durham had not provided the “location” of the proposed lines within the Road Allowances. The Municipality submitted that what East Durham provided was not actual locations but merely “guidelines” for determining locations. Although the Municipality acknowledged that East Durham had refined its general description of the proposed locations in its argument-in-chief, it maintained that these locations were not sufficiently precise. The Municipality submitted that it is not its duty to propose locations, and that it should be East Durham who must propose locations.

East Durham submitted that it has proposed a “narrow corridor” which provides the best balance of environmental, social, technical and economic considerations. East Durham also submitted that, given that the Board will be determining the location of the Distribution System in this proceeding prior to the start of construction, the approved location must allow for some reasonable flexibility to ensure that East Durham can address any engineering, environmental, health and safety or other practical challenges that may arise during construction.

East Durham also submitted that in its view section 41 does not require the identification of a “precise” or “exact” location. Section 41, according to East Durham, only states that the “location” shall be agreed upon by the transmitter or distributor and the owner. East Durham argued that this wording makes it a mutual obligation on the distributor and the owner of the Road Allowance. East Durham also submitted that the Municipality, by its own admission, had refused to provide feedback to help refine the proposed locations. East Durham submitted that if the Municipality had provided comments regarding the location and any existing infrastructure in the area, it would have enabled East Durham to further refine the proposed locations.

The Board issued a letter to East Durham, dated October 2, 2013, requesting additional information to support East Durham’s proposed 1-4 meter location parameter. East Durham responded, by letter dated October 4, 2013. East Durham provided examples of municipalities and counties in the vicinity of the Municipality that have adopted policies regarding the location of underground infrastructure that are consistent with the considerations described by East Durham. This included a policy issued by the County of Grey, in which the Municipality is located, titled, Policy for Utility Place on Grey County Rights of Ways.

East Durham also submitted that, as part of its REA application, it undertook various studies in the project area, such as the Natural Heritage Assessment, the Water Assessment, and Archeological Assessment and consulted all stakeholders in keeping with the requirements in Ontario Regulation 359/09. Following these studies and others, East Durham states that its initial proposal was refined and revisions were incorporated where appropriate, to ensure that the proposed location represents the best balance of environmental, social, technical and economic considerations.

The Parkins submitted that the additional information filed by East Durham did not support the request for a 1-4 meter corridor. The Parkins submitted that the requirement for a 1.5 meter setback in the Municipality of Lambton Shores was for overhead utility lines and not underground lines. The Parkins, submitted that although in their view the Municipality would likely not agree, a 1 meter setback from street line would be acceptable to them. The Parkins recommendation was based on the Municipality of Lambton Shores’ Infrastructure Design Guidelines and Construction Standards, dated January 2002.

While section 41 requires that the Board determine a “location” under the road allowance, the Board agrees with East Durham that this wording does not require a precise location. The Board considers that the mapping and location information provided by East Durham is sufficient to determine the location for the purpose of this application.

The Board accepts the evidence of East Durham that it is appropriate to locate the Distribution System lines 1-4 meters from the abutting property line. The Board considers, however, that this location could probably have been refined further if there had been more communication between East Durham and the Municipality. The Board encourages East Durham and the Municipality to consult during construction to address any issues or concerns about the precise location that may arise. As indicated below, the Board has made provision in its decision for any agreement reached as a result of such consultation.

Stray Voltage

The Municipality and the Parkins have raised concerns about the possibility that the Distribution System will cause stray voltage problems. The Parkins filed a copy of a Private Member’s Bill concerning stray voltage and the Ontario *Green Energy Act*. East Durham argued that wind turbines do not cause stray voltage. East Durham further argued that Hydro One oversees stray voltage issues and has developed a protocol to proactively test for stray voltage and mitigate any concerns at no cost to the landowner. East Durham stated that it will assist any concerned landowner in the Project area in this process with Hydro One.

East Durham also argued there is no nexus between the evidence filed by the Parkins concerning stray voltage generally and the issue before the Board in this proceeding (i.e. where portions of the Distribution System should be located within the Road Allowances). East Durham submitted that the Parkins have not filed any evidence suggesting that East Durham’s Distribution System in particular will cause stray voltage or that, if so, the proposed location of a portion of the Distribution System in the Road Allowances is such that stray voltage would cause an adverse impact.

The Board agrees with East Durham that the evidence does not indicate that the portion of the Distribution System proposed to be located in the Road Allowances would necessarily cause stray voltage, or if so, that the proposed location in the Road Allowances would cause an adverse impact due to stray voltage. The Board also notes

that section 4.7 and Appendix H of the Board's *Distribution System Code* sets out the investigation procedures related to stray voltage.

THE BOARD ORDERS THAT:

1. The location of East Durham's Distribution System on Road Allowances owned by the Municipality is approved as follows:
 - a. The Distribution System shall be located in the Road Allowances listed on Exhibit B, Tab 6, Schedule 1, Appendix A, as shown in the drawings included in Exhibit B, Tab 6, Schedule 1, Appendix B (and updated in section 2.0 of East Durham's argument-in-chief and in response to the Board's letter dated October 2, 2013).
 - b. The Distribution System lines shall be located 1-4 meters from the abutting property line unless otherwise agreed between East Durham and the Municipality.
 - c. The diagrams shown at Exhibit B, Tab 6, Schedule 1, Appendices C and D shall be followed in constructing the Distribution System within the Road Allowances.

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DATED at Toronto, November 7, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary