



EB-2013-0203

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 Niagara Region
Wind Corporation for an order or orders pursuant to section 92
of the *Ontario Energy Board Act, 1998* granting leave to
construct transmission facilities in Haldimand County and
Niagara Region.

BEFORE: Ken Quesnelle
Vice Chair and Presiding Member

Ellen Fry
Member

Peter Noonan
Member

DECISION AND ORDER
July 03, 2014

INTRODUCTION

This is an application filed with the Ontario Energy Board (the "Board") under section 92 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the "Act") for leave to construct certain electrical transmission facilities and approval of forms of agreement to be offered to landowners.

For the reasons given below the Board approves the application.

SUMMARY OF APPLICATION

Niagara Region Wind Corporation (the "Applicant") filed an application on May 7, 2013 with the Board for an order granting leave to construct two substations, a transmission line, a transition station and an interconnect station (collectively, the "Transmission Facilities"). The Transmission Facilities will be located in Haldimand County and Niagara Region. The affected municipalities are the townships of West Lincoln, Lincoln and Wainfleet. The Transmission Facilities will be used to transmit power generated by the Niagara Region Wind Farm, a 230 MW renewable energy generation facility, to the provincial electricity grid.

SUMMARY OF THIS PROCEEDING

The Board issued a Notice of Application ("Notice") on July 5, 2013, and directed the Applicant to serve and publish the Notice. An error was subsequently discovered in the Notice and an amended Notice was published the week of August 19, 2013. Pursuant to the Notice several requests to intervene in this proceeding were filed with the Board.

The Board issued Procedural Order No. 1 on November 1, 2013, which granted intervenor status to: Hydro One Networks Inc. ("Hydro One"), the Independent Electricity System Operator ("IESO"), the Township of West Lincoln (the "Township"), Walker Road Landowners, Given Farms Ltd., Canadian White Feather Farm Products, Archie and Nancy Huizinga, Ken and Susan Durham, Norman Vaughan and Peter and Nelly Oosterhoff.

The Board also sought submissions from the parties on two preliminary questions of law. Firstly, the Board asked parties to make submissions on whether an approval under section 97 of the Act is required for the form of road use agreement that a proponent may offer to a municipality. Secondly, the Board requested that parties make

submissions with respect to the meaning of the words “approved route” in section 97 of the Act.

In a *Decision on Threshold Questions and Procedural Order No. 2*, issued on February 4, 2014 (as amended) the Board determined that:

- i) in this proceeding it does not require the Applicant to submit a document to the Board showing a proposed form of agreement with the Township for purposes of section 97 of the Act; and,
- ii) the “approved route” in section 97 is “the route or location approved by the Board in response to an application under section 92, approved in accordance with the criteria set out in section 96”.

The Board also set a timeline for the filing of interrogatories and for intervenors to indicate any intent to file evidence. Only the Township and Board staff filed interrogatories. The Applicant filed answers to the interrogatories on February 28, 2013. No party filed evidence in this proceeding.

In accordance with the timelines in Procedural Order No. 3 issued March 14, 2014, the Board received the Applicant's argument-in-chief, intervenor argument from Hydro One and the Township, and the Applicant's reply argument.

The Board also received a number of letters of comment in relation to this application. The letters of comment raised several procedural issues, which were addressed in the Board's Procedural Orders. The letters of comment also raised several substantive issues, which are addressed below.

SCOPE OF THIS PROCEEDING

The Board's power to grant an applicant leave to construct electricity transmission facilities is set out in subsection 92 (1) of the Act which states:

92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

In discharging its duties under section 92 the Board is governed by the provisions of section 96 of the Act which states:

96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

(2) In an application under section 92, the Board shall only consider the following when, under subsection 1, it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

In addition, section 97 of the Act states:

97. In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.

The wording of subsection 96(2) requires the Board to consider only the factors specified in subsection 96(2) in determining whether the proposed Transmission Facilities are in the public interest. Accordingly, issues raised in the letters of comment concerning impacts on property values, health impacts, the Government of Ontario's renewable energy policy, environmental impacts, or the Niagara Region Wind Farm are outside the scope of this proceeding.

In considering the interests of consumers with respect to prices under subsection 96(2) of the Act the Board limits its review to the direct price impact of the Transmission Facilities. Accordingly, the issues raised in some letters of comment concerning the impact of renewable generation on electricity prices in general, or the impact of the

Government of Ontario's renewable energy policy on electricity prices, are not within the scope of this proceeding.

Submissions of the Township

The Township's submissions raised two issues: Firstly, the Township submitted that the Applicant did not consider the adverse impacts of the Transmission Facilities on the Township, and the Township's future needs in relation to growth. Secondly, the Township submitted that the route of the transmission line should have been selected based on the criteria set out in subsection 96(2).

The Applicant submitted that the matter of the Township's future planning needs is not within the scope of the proceeding, as determined by the Board at the outset of the proceeding in Procedural Order No. 1. On the second issue, the Applicant did not concur with the submission that the route should be selected based on the criteria set out in subsection 96(2). The Applicant submitted that the purpose of subsection 96(2) is to set out the criteria which the Board is to consider in deciding whether to grant leave to construct and that there is no basis for applying these criteria in a route selection study. Further, the Applicant submitted that the Board's filing requirements clearly state that the Board will either approve or not approve a proposed route and that it will not select a solution from among the alternatives that were evaluated as part of the route selection study.

Board Finding

As stated by the Board previously, the issue of impacts on future municipal land use planning is outside of the Board's jurisdiction in this proceeding. As regards to the issue of route selection, in a subsection 96(2) application the Board is required to either approve or reject the proposed route. The Board is not empowered to select an alternate route based on the criteria set out in subsection 96(2).

INTERESTS OF CONSUMERS WITH RESPECT TO RELIABILITY AND QUALITY OF ELECTRICITY SERVICE

The Applicant filed a system impact assessment by the IESO and a customer impact assessment by Hydro One.

System Impact Assessment

The IESO issued a System Impact Assessment Report in respect of the Niagara Region Wind Farm on July 27, 2012 and an Addendum Report on September 23, 2013 (collectively the “SIA”).

The SIA assesses whether the proposed connection of the Niagara Region Wind Farm to the provincial electricity grid (via Hydro One's Q5G line) will have an adverse impact on the reliability of the provincial electricity grid.

The SIA concludes that the proposed connection is expected to have no material adverse impacts on the reliability of the provincial electricity grid, subject to the requirements specified in the SIA being met. No party objected to this conclusion.

Customer Impact Assessment

Hydro One issued a Customer Impact Assessment Report on August 3, 2012, and an Addendum Report on August 15, 2013 (collectively the “CIA”).

The CIA assesses the impact of the connection of the Niagara Region Wind Farm on Hydro One transmission customers in the area. The assessment was conducted by Hydro One pursuant to the requirements of the Transmission System Code (“TSC”).

The CIA concludes that the proposed connection will not adversely impact existing Hydro One transmission customers in the area subject to the requirements specified in the CIA. No party objected to this conclusion.

Board Finding

Based on the conclusions of the SIA and the CIA, the Board is satisfied that the proposed connection will not adversely impact the interests of consumers with respect to reliability or quality of electricity service if the conditions in the SIA and CIA are met.

INTERESTS OF CONSUMERS WITH RESPECT TO PRICESCosts

The Applicant has stated that it will pay for the costs of constructing and connecting the proposed Transmission Facilities and that accordingly the Transmission Facilities will not have any adverse impact on provincial transmission rates. No party objected to the assertions of the Applicant with respect to this matter. The Board notes that Hydro One

is obligated by the TSC to calculate and collect costs related to the connection of the Transmission Facilities in accordance with the methodology stipulated in the TSC. The methodology ensures that ratepayers will not incur costs associated with the connection of the Transmission Facilities.

Board Finding

The construction and connection of the proposed Transmission Facilities will have no impact on transmission rates in Ontario because these costs will be borne by the Applicant. The cost of connection will be governed by the normal provisions of the TSC. The Board therefore finds that the construction and connection of the proposed facilities will not have an adverse impact on the price of electricity service.

Potential Future Costs

Certain sections of the proposed transmission line are to be located on the opposite side of the right-of-way from existing Hydro One distribution lines. Hydro One submitted that the proposed route of the transmission line may require a number of cross-overs with its distribution facilities in order to serve future customers. Hydro One submitted that these cross-overs would introduce new considerations relating to safety, reliability and the economic provision of customer service.

Hydro One submitted that this issue is within the scope of the Board's jurisdiction in this application because in its view, as stipulated in subsection 96(2), the Board's jurisdiction under section 92 also extends to distribution facilities. Hydro One further submitted that the Board in its Decision in an application by Grand Renewable Wind LP (EB-2011-0063) notes that "the consideration of prices, reliability and quality of electricity service can include consideration of impacts on neighbouring transmission and distribution electricity systems and the customers connected to them". Hydro One further submitted that:

...in the Board's Decision respecting the Summerhaven Wind LP Application (EB-2011-0027, page 4), the Board notes that it is within the Board's jurisdiction to review any potential negative impacts of the proposed transmission facilities on a distributor and, by extension, on its respective ratepayers. As the Board uses the phrase, 'any potential negative impacts', in the Summerhaven Decision, it implies, by its own use of the word 'potential',

the consideration of both current and future direct impacts of the proposed transmission facilities on a distributor and its ratepayers.

Hydro One submitted that it has been working with the Applicant to resolve these matters and requested that the Board either defer its decision in the application until an agreement can be reached or make its decision conditional on the confidential filing of a signed agreement no later than the commencement of construction.

The Applicant submitted that it is agreeable to the filing of an agreement as proposed by Hydro One but is opposed to the proposal that the Board defer its decision, arguing that significant delays had already occurred in this proceeding and that further delays are not acceptable.

Board Finding

In the Board's view the matter of potential future costs as raised by Hydro One is outside of the scope of this proceeding. This finding is consistent with the Board's Decision in Grand Renewable Wind LP where the Board stated that potential alterations to future plans are not properly within the scope of subsection 96(2). The Board stated:

In its assessment of impacts on prices, reliability and quality of electricity service the Board considers it appropriate that GRWLP [the proponent] be responsible to pay for any direct impacts its Project causes to the quality or reliability of the electricity service provided by HCHI's [the distributor's] existing system. HCHI has made claims that both its current and future use of its system will (or may) be negatively impacted. In the context of the current proceeding, the Board does not consider it appropriate that GRWLP be held responsible for any alteration that HCHI may have to make to its future plans. This consideration would be beyond the scope of this proceeding and is not supported by any governing planning framework. [Emphasis Added]

Given the Board's finding on this issue the Board does not consider it necessary to provide further time for the parties to reach a negotiated settlement.

POLICIES OF THE GOVERNMENT ON THE PROMOTION OF THE USE OF RENEWABLE ENERGY SOURCES

The Applicant was awarded a contract in respect of the Niagara Region Wind Farm by the Ontario Power Authority ("OPA") under the Government of Ontario's Feed-in-Tariff

("FIT") Program. As indicated above, the proposed Transmission Facilities are needed to convey electricity from the Niagara Region Wind Farm to the provincial electricity grid.

Based on the award of the FIT contract, and the fact that the proposed Transmission Facilities are needed to connect the Niagara Region Wind Farm to the provincial electricity grid, the Applicant submits that the Transmission Facilities are in the public interest as contemplated by subsection 96(2) of the Act. No party objected to the Applicant's submissions in this matter.

Board Finding

The Board agrees with the submissions of the Applicant that the approval of the Transmission Facilities is consistent with policies of the Government of Ontario concerning the promotion of the use of renewable energy sources.

FORMS OF AGREEMENTS OFFERED TO LANDOWNERS

Section 97 of the Act requires that the Board be satisfied that the Applicant has offered or will offer each landowner affected by the approved route or location an agreement in a form approved by the Board.

The land required for the proposed Transmission Facilities consists of:

- a) the lands required for the substations, the transition station and the interconnect station (collectively the "Stations");
- b) the lands required for the transmission line, and
- c) any other lands that may be required either on a temporary basis for construction purposes or on an ongoing basis for access purposes.

The Stations will be located on private lands, while the transmission line is to be situated within a combination of private easements and municipal road right-of-way ("ROW").

The Applicant submitted the following forms of land use agreements for the Board's approval:

- Exclusive Option Agreement for Substations

- Land Use Agreement for Transmission Line
- Exclusive Option Agreement for Stations and Transmission Line

Land Requirements for the Stations

The Stations will be located on private lands. The Applicant states that it has executed agreements with all of the private landowners in relation to the Stations.

No party raised any concerns with the forms of agreements offered by the Applicant in relation to the Stations.

Land Requirements for the Transmission Line

The transmission line route is located almost entirely within municipal ROWs, except for the portions that are in the immediate vicinity of the Stations.

The Applicant states that it has entered into agreements with all affected private landowners and has submitted the forms of agreements that were offered to landowners.

In accordance with the ruling of the Board in the *Decision on Threshold Questions*, the Applicant has not submitted a document to the Board showing a proposed form of agreement with the Township for the purposes of section 97 of the Act.

Board Finding

The following are the majority reasons of Presiding Member Ken Quesnelle and Board Member Ellen Fry with respect to section 97 approvals.

The Board's mandate under section 97 of the Act is to approve a form of agreement that the Applicant has offered or will offer to landowners affected by the project. The Applicant in this case has entered into agreements with the affected private landowners and has provided executed agreements for approval under section 97 of the Act.

The Board has previously provided its findings on the parameters of its approval of the form of agreement. The Board is not required by section 97 to approve the final terms of the agreement between the parties, only the form of the agreement offered. Approving the form of the agreement may include the identification of subject matters that the Board considers to be appropriate for the parties to consider in their negotiations.

Where agreements are not reached between the parties other legislative provisions can be brought into play to deal with the disputed issues.

None of the landowners have indicated to the Board that they were unwilling to sign these agreements because they had issues with the form of agreement offered to them by the Applicant.

However, given the Board's mandate to only approve the form of an agreement, the Board is not providing its approval for the final terms of agreement that the parties have negotiated. The executed agreements could contain, or omit, subject matter that the Board would want to be included or omitted had a form of agreement been provided to the Board for approval prior to execution of the agreements.

The Board's practice in cases where executed agreements have been provided for approval under section 97 has been to accept the executed agreement as the form being applied for and to approve it noting that its approval does not necessarily imply that the Board would or would not approve these forms of agreement in any future proceedings.

The Board does so again in this case, emphasizing that none of the terms of the executed agreements require the approval of the Board and that not all subject matters included in or omitted from the executed agreements are necessarily as considered appropriate by the Board.

In exercising its jurisdiction under section 97, the Board's approval of the application takes into account the Applicant's reliance in its arrangements with the Township on its statutory rights under section 41 of the *Electricity Act*.

The following are the minority reasons of Board Member Peter Noonan with respect to section 97 approvals.

Section 97 of the Act requires the Board to approve the form of agreement that has been or will be offered to an Ontario landowner before the Board grants leave to construct authority to an applicant under section 92 of the Act. Thus, section 97 of the Act operates as a condition precedent to the exercise of power under section 92 of the Act. It is essential that the form of the agreement that was, or is, to be offered to an Ontario landowner be satisfactory to the Board. Once an approved agreement has

been offered to a landowner however, the landowner and an applicant can negotiate final terms, or revised final terms of agreement that are satisfactory to themselves without further reference to the Board. As the Ontario Divisional Court recently stated in *Conserve Our Rural Environment v Dufferin Wind Power Inc.* (2013) ONSC 7307: “It is important to understand that what the Board approved was a form of agreement which is the subject of subsequent negotiation between the parties. It represents terms from which the party propounding the project may not unilaterally resale.”

In an application under section 97 of the Act for approval of the form of agreements there are three components of the agreements that are germane: the physical structure or appearance of the agreement, the contents of the agreement, and the substance of the agreement. As the majority of this panel stated in its February 4, 2014 *Decision on Threshold Questions* only the first two components are within the jurisdiction of the Board:

In approving the form of agreements to be offered to landowners the Board may determine the appropriate content or structure of the form of agreement to be offered. Section 97 does not give the Board any power to make a substantive determination of any matters in dispute between the negotiating parties.¹

Thus the actual covenants between the parties are matters of substance and are not within the jurisdiction of the Board to decide. Matters of substance are solely within the purview of the parties to the agreement to determine.

In the *Decision on Threshold Questions* the panel majority also expressed its views, on how the Board should implement its discretion to approve the forms of agreement, stating:

Under section 97, the Board exercises discretion to approve the form of the agreements that an applicant may offer to an Ontario landowner. The Board thereby ensures that the forms of agreements provided to landowners are

¹ *Decision on Threshold Questions*, February 4, 2014, p. 8-9. The same principle was also articulated by a differently constituted panel in a recent decision involving the grant of leave to construct authority to a pipeline company. In *Re Leave to Construct the Parkway West Project* EB-2012-0433, January 30, 2014, p. 16-17. the Board stated:

Under section 97 of the Act, the Board ensures that the forms of agreement provided to landowners who are located along the approved route of the pipeline are appropriate. The Board determines the appropriate subject-matter of the form of agreement to be offered to an Ontario landowner, as well as the technical format of the document but not the substance of the agreements, which are left to the landowner and the pipeline company to negotiate.

appropriate in the circumstances. It is noteworthy that the Board's jurisdiction is limited in a number of ways by the Act. Firstly, under section 97 of the Act the Board is concerned with agreements in relation to land and is not concerned with other agreements that may pertain to other types of legal relationships, such as those of a commercial or personal nature. Secondly, the powers of the Board are limited to approving the form of the agreements. Finally, the form of the agreements approved by the Board must be in relation to the approved route of the proposed transmission or distribution line. [Emphasis added]

The forms of agreement submitted to the Board for approval in this case contain many of the terms and conditions that would ordinarily be found in a standard easement agreement. In at least one respect however, the proposed agreements differ from a standard easement agreement. Clause 14.9 of the proposed Land Use Agreement² requires a landowner to execute a form of agency agreement and consent appended to the easement agreement as Schedule D. That schedule requires a landowner to appoint the Applicant as his or her agent to act in the landowner's behalf to make all manner of applications, agreements and other instruments with public authorities for the purposes of obtaining a wide variety of permissions pursuant to the public law of Ontario. Landowners promise to cooperate and assist the agent in prosecuting the various applications. The agreement stipulates that the landowner's cooperation and assistance to the agent will not be at the landowner's expense, although there is no explicit promise of reimbursement for any costs incurred by the landowner. The landowner is also required to provide a licence for the County to enter onto his or her property for the conduct of any necessary inspections, or investigations, required in relation to the facilities owned by the agent.

An agency agreement is an agreement of a personal nature rather than an agreement in relation to the land itself, such as an easement agreement, and it is not a form of relief that the Board could grant to the holder of a leave to construct order pursuant to the expropriation provisions of the Act. As the majority stated in the February 4, 2014 *Decision on Threshold Questions* "the Board is concerned with agreements in relation to land and is not concerned with other agreements that may pertain to other types of legal relationships, such as those of a commercial or personal nature." This type of agreement is therefore outside of the scope of the forms of agreement to be approved by the Board for the purposes of Section 97 of the Act.

² Exhibit F, Tab 1, Schedule 2; as revised by NRW IR Responses, Schedule D

The Consent authority for the County to enter upon the lands of the landowner to conduct inspections is a form of licence agreement which is also an agreement of a personal nature, rather than an agreement creating an interest in lands. No evidence was submitted to show why the Applicant would need to secure such authority for the County. Presumably, an Ontario County would possess statutory powers to enter upon lands within its territorial boundaries in order to investigate and enforce its jurisdiction. As with the agency clause, the licence in favour of the County is outside the scope of the forms of agreement to be approved by the Board for the purposes of Section 97 of the Act.

In conclusion, Schedule D of the proposed Land Use Agreement, as revised, falls outside of the scope of the forms of agreement for which the approval of the Board is necessary and appropriate under section 97 of the Act, as defined in the majority views expressed earlier in this proceeding in the *Decision on Threshold Questions*. The remainder of the forms of agreements submitted to the Board in this application are, however, satisfactory. Accordingly, I grant approval for the forms of agreement submitted for approval pursuant to Section 97 of the Act with the exclusion of the last sentence of clause 14.9 and all of Schedule D of the proposed Land Use Agreement³.

BOARD DECISION

The Board finds that it is in the public interest to grant the Applicant leave to construct the Transmission Facilities pursuant to section 92 of the Act and accordingly grants the application subject to the conditions below.

Pursuant to section 97 of the Act, the Board approves the forms of agreements offered by the Applicant to landowners.

The Board's approval of the application is conditional on the existence of a FIT contract between the Applicant and the OPA, the fulfillment of the requirements of the SIA and CIA and the Applicant commencing construction within 12 months of the date of the Board's Decision.

³ Section 97 of the Act does not preclude the Applicant and a landowner from entering into a separate agency agreement outside of the regulatory process administered by the Board under the Act. The limitation is in relation to the jurisdiction of the Board to approve agreements of a personal or commercial nature under the Act. There is no limitation on the rights of parties with legal capacity to enter into such contracts.

The Board notes that the Applicant is responsible for complying with all legal and contractual requirements to construct, operate and maintain the proposed Transmission Facilities.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of the Act, the Board grants Niagara Region Wind Corporation leave to construct the proposed Transmission Facilities in accordance with the Board's Decision in this proceeding. The Board's approval of the application is conditional on the existence of a FIT contract between the Applicant and the OPA, the fulfillment of the requirements of the SIA and CIA and the Applicant commencing construction within 12 months of the date of the Board's Decision.
2. The Applicant shall pay the Board's costs incidental to this proceeding immediately upon receipt of the Board's invoice.

ISSUED at Toronto, July 03, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary