



EB-2014-0226

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 wpd Fairview
Wind Incorporated for an order or orders pursuant to section
41(9) of the Electricity Act, S.O.1988, c.15, Schedule A,
establishing a location for the applicant's distribution
facilities on public road allowances owned by the
Corporation of the Township of Clearview, as set out in this
application.

BEFORE: Emad Elsayed
Presiding Member

Ken Quesnelle
Member and Vice Chair

DECISION AND ORDER
January 15, 2015

DECISION

The location of wpd Fairview Wind Inc.'s (the "Applicant" or "Fairview Wind") distribution system on road allowances owned by the Township of Clearview (the "Township") is approved as described in this Decision and Order.

BACKGROUND

Fairview Wind is a wind generation developer that intends to build, own and operate a wind generation facility in the Township of Clearview that will produce 16.4 MW of renewable energy ("Fairview Wind Project") which it will deliver to the provincial electricity grid pursuant to a Feed-in-Tariff ("FIT") contract with the Ontario Power

Authority (“OPA”). In order to deliver the electricity to Ontario’s electricity grid, Fairview Wind needs to install 44 kV underground collector lines and an overhead line (the “Distribution System”) within certain public streets, highways and right-of-ways, some of which are owned by the Township (the “Road Allowance”). Fairview Wind submits that it has attempted but not been able to engage in discussions with the Township in order to reach an agreement with respect to the location of some of the Distribution System, namely 2 km of underground collector line to be located under Fairgrounds Road (the “Fairgrounds Collector Line”).

Fairview Wind therefore filed an application (the “Application”) dated July 22, 2014 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 the Fairgrounds Collector Line.

The Board issued a Notice of Application and Written Hearing on August 1, 2014. The Township and numerous individuals requested intervenor status and/or provided letters of comment. The Applicant submitted an affidavit confirming service of the Board’s notice on September 9, 2014.

In Procedural Order No.1 dated October 21, 2014, the Board granted the Township intervenor status and declined intervenor status to the rest of the requestors.

In accordance with the Board’s order, on October 30, 2014, Board staff submitted interrogatories to Fairview Wind. On November 4, 2014, the Township submitted its interrogatories to Fairview Wind.

On November 14, 2014, Fairview Wind provided responses to interrogatories of the Board staff and the Township. Also on November 14, 2014, Board staff submitted interrogatories to the Township. In a letter dated November 25, 2014, Fairview Wind advised that it did not intend to submit interrogatories to the Township. The Township responded to Board staff’s interrogatories on November 27, 2014.

In an email correspondence on December 4, 2014, Mr. Michael Wynia, Director of Community Planning and Development for the Township wrote to Board staff seeking clarification from the Board with respect to “due process” related to the Environmental Registry for the Fairview Wind Project. The Board responded in a letter dated December 12, 2014 and indicated that the Application before the Board can proceed

concurrently with the Renewable Energy Approval (“REA”) process and that the Township’s concerns in this regard should be included in its submission to the Board.

In accordance with the Board’s Procedural Order No. 2, on December 9, 2014, Fairview Wind filed its Argument-in-Chief with the Board and the parties. On December 18, 2014, the Township filed its argument with the Board and the parties. On December 19, 2014, Board staff filed its submission in regard to the proceeding. Fairview Wind filed its reply submission on December 23, 2014.

THE APPLICATION

Fairview Wind’s application is made pursuant to section 41(9) of the Act.

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.

Fairview Wind submits that it is a “distributor” within the meaning of subsection 2(1) of the Act and therefore has the right to install facilities for the Distribution System under “any public street or highway” pursuant to subsection 41(1) of the Act.

The Township does not dispute that it has not reached an agreement with Fairview Wind regarding the location of the Distribution System in the Road Allowance. Neither the Township nor any other party in this proceeding has proposed an alternate location for the Distribution System.

Fairview Wind’s proposed location for the Distribution System is set out in the Application and its interrogatory responses and particularly in response to Board staff interrogatories 2(a) and 2(b).

The submissions of the Township and Board staff regarding the various issues are described under Board Findings.

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 Allowance.

As indicated above, the Board received a number of letters of comment from local residents. These letters dealt with the location of the Fairview Wind Project's wind turbines and their impact on property values, health, and aesthetics. They also dealt with the Ontario Government's renewable energy policy in general and broader environmental issues.

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

BOARD FINDINGS

The Board has identified five main issues for consideration in rendering its decision. These are addressed under the following headings. However, the Board will first address a concern raised by the Applicant regarding evidence submitted by the Township in its final submission dated December 18, 2014. The Applicant submitted that the evidence provided by the Township is incomplete and untested and should not be taken into account by the Board.

The Township responded in an email dated December 24, 2014 stating that, according to Procedural Order No. 1, it was not directed to provide any evidence other than with respect to an alternative location for the Distribution System. In addition, the Township

noted that it was directed by the Board in its December 12, 2014 letter to the Township to address any concerns with respect to the REA process and its relevance to these proceedings in its final submission pursuant to Procedural Order No. 2.

Given that most of the evidence provided by the Township in its final submission relates to the REA process and its relevance to these proceedings, and given the direction provided to the Township by the Board in its December 12, 2014 letter, the Board will consider the information provided in the Township's submission and give it proper weight taking into account the fact that this information has not been available for probing or challenge by other parties.

1. Is the Applicant a “distributor” for the purposes of the Act?

The Township submitted that the Application should be denied because there is no evidence to show that the Applicant currently owns or operates a distribution or transmission system independent of that proposed through the REA process, or that it has a service area and is authorized by a license to distribute electricity. The Township also submitted that the Applicant does not have a FIT contract with the OPA.

Fairview Wind cited several Board decisions¹ in which applicants in very similar circumstances as Fairview Wind were found to be “distributors”. With respect to the FIT contract, Fairview Wind submitted that while this is irrelevant in terms of defining a distributor for the purposes of the Act, it is also incorrect in that Fairview Wind is in fact the entity that actually holds the FIT contract for the Fairview Wind Project. In its reply submission, Fairview Wind filed a copy of an Assumption and Acknowledgment Agreement dated August 23, 2014 whereby it assumed the FIT contract, with the consent of the OPA.

The Board agrees with Fairview Wind's submission that the Act does not require that all necessary approvals, such as the REA, be obtained prior to the Board granting an application under subsection 41(9) of the Act. Accordingly, the Board does not consider that there is any relevant basis to distinguish this Application from the earlier Board decisions referenced by the Applicant in which the applicants were considered to be “distributors”. The Board notes, however, that in order to proceed with construction of the Distribution Facilities, Fairview Wind will need to obtain all legally required permits and other approvals.

¹ Plateau Wind Inc. EB-2010-0253 and East Durham Wind Inc. EB-2013-0233

2. *Did the Applicant engage the Township to seek agreement regarding the location of the Distribution System within Road Allowance prior to filing its Application with the Board?*

The Applicant submits that it has repeatedly attempted to engage in discussions with the Township to negotiate an agreement regarding the location of part of the Distribution System. The Applicant provided a significant amount of email correspondence between itself and the Township and stated that these attempts started as early as October 23, 2012 and continued for 16 months until February, 2014. The Applicant states that despite its efforts, the Township has refused its requests to meet on the basis that the requests were premature. As a result of the Township's refusal to engage with it, Fairview Wind states that it was unable to provide the Township with any information about the Distribution System or to negotiate an agreement regarding the location of such facilities within the Road Allowance.

Board staff submitted that the Applicant appears to have made several attempts to engage the Township in order to complete a Road Use Agreement ("RUA") with respect to locating its Distribution System on the Road Allowance on Fairgrounds Road. Board staff noted that the Township declined to approve the RUA for reasons including that it was premature due to the ongoing REA process; that information was not provided regarding destruction at the Distribution System's end of life; and delays by the Ministry of the Environment ("MOE") in answering the Township's questions.

The Township submitted that, in its view, all correspondence with the Applicant took place in the context of the REA process, not a separate and distinct process with respect to the location of the Distribution System which would subsequently become the subject of the Application before the Board. The Township submitted that an email from the Applicant dated February 27, 2014 was the first time the Applicant indicated an intention to submit the proposed routing (and location of the Distribution System) to the Board.

In its reply submission, Fairview Wind submitted that it is the Township's obligation to educate itself about the regulatory process and about what rights the Applicant has under section 41 of the Act. The Applicant also suggested that the Township would have been better informed of the process if it had met with the Applicant on any of the number of occasions that it attempted to consult with the Township. Fairview Wind noted that, even after the Township became aware of the possibility of this Application, it made no effort to meet or to inform the Applicant of its concerns regarding the location of the Distribution System within the Road Allowance. In particular, Fairview Wind noted that throughout these proceedings, the Township has provided no evidence identifying any substantive concerns regarding the location of the Distribution System.

The Board agrees with the submissions of the Applicant and Board staff that the Applicant made several attempts to meet with the Township to discuss, among other things, the Road Allowance issue. In reviewing the email correspondence between the Applicant and the Township, the Board finds that the Township consistently refused to meet with the Applicant citing the REA process as the reason for such refusal. For example, emails from Fairview Wind to the Township dated January 14, 2013, June 11, 2013, June 14, 2013, September 13, 2013, and February 27, 2014² specifically refer to “public road access for our Fairview Wind Farm”, “location of the line work within the Township’s roads (Fairgrounds)”, “detailed design work of our line on the public right of ways”, “road agreements, line designs and other municipal issues such as permitting, road agreements and other municipal issues related to our project”, and “meeting to discuss the cable line routing along Fairgrounds Road”.

The Township’s response to these meeting requests has been consistently to the effect that these meetings would be “premature” and linking the timing of such meetings to progress in the REA process. Even after the MOE deemed Fairview Wind’s REA application “complete”, the Township responded on December 18, 2013 to a December 10, 2013 email from Fairview Wind requesting a meeting by stating, “We must therefore regretfully decline the opportunity to continue our mutual efforts at conducting a meaningful municipal consultation until such time as the Ministry retracts its decision”.

The Township refers to the February 27, 2014 email as being the first indication by the Applicant that it intended to submit the proposed routing to the Board. However, the Township did not respond until June 20, 2014 after a follow-up email from the Applicant on May 22, 2014. In that response, the Township repeated its position that it was premature to meet and again based its decision on the outstanding responses from the MOE related to the REA process.

On the basis of the evidence and submissions filed by all the parties, the Board finds that the Applicant has attempted to engage the Township to seek agreement regarding the location of the Distribution System within the Road Allowance prior to filing its Application with the Board.

3. Is the proposed location of the Distribution System satisfactory to the Board? Are there alternative locations proposed that the Board should consider?

Fairview Wind provided detailed information about its proposed location for the Distribution System within the Road Allowance³. In the Board’s Procedural Order No.1,

² Exhibit D, Tab1, Sch2, Appendices A to F

³ Response to Board staff Interrogatory No.2, App. A to D

dated October 21, 2014, the Township was requested to provide an alternate proposal, if any, for the location of the Distribution System. The Township responded on November 4, 2014 that it was not in a position to provide the requested information at that time, “but will do so at its earliest opportunity on reviewing the responses to its interrogatories”. However, the Township has not proposed alternative locations and has not provided any specific comments on, or concerns about, the location proposed by the Applicant.

Given the lack of any evidence to the contrary, the Board concludes that the proposed location for the Distribution System is satisfactory. However, in rendering its decision to approve the proposed location, the Board would add that this approval includes any subsequent refinements that are mutually agreed to by Fairview Wind and the Township.

4. Did the Township actively participate in this proceeding to obtain information from the Applicant that it requires in order to establish a position in response to the Application?

In response to Procedural order No.1, the Township submitted eleven interrogatories to the Applicant. The Applicant responded to one interrogatory (Interrogatory No.1) and indicated that the other ten were outside the scope of this proceeding.

Subsequently, the Township did not comment on the Applicant's responses to its interrogatories other than claiming that Interrogatory No.10 contained specific questions about the Distribution System (“both directly and indirectly”). Board staff submitted that the questions under Interrogatory No.10 had more to do with the interface and consistency with an adjoining section on County Road 91 (which is outside the scope of this proceeding) than with the details of the Fairgrounds Collector Line (which is within the scope of this proceeding).

The Board agrees with the Applicant's and Board staff's submissions that the Township's interrogatories were outside the scope of this proceeding, with the possible exception of Interrogatory No.1.

The Board, therefore, concludes that the Township should have used the opportunity available to it through the interrogatory process to pose questions and obtain responses that are within the scope of the proceeding and whereby its concerns, if any, regarding the location of the Distribution System within the Road Allowance could have been addressed.

5. *Is the Application premature given that the REA process is not concluded?*

The Township submits that it recognizes that the Board may make a decision in this proceeding despite a lack of approval for the project under the REA process. However, it is the Township's position that it has been prevented from carrying out proper consultation on road matters under REA process and that the Applicant should not be allowed to by-pass the requirements of the REA process by availing itself of subsection 41(9) of the Act.

Board staff referred to the Board's December 12, 2014 response to the Township's December 4, 2014 email where the Board stated that the REA process and the Board's consideration of the Application may occur concurrently, and that the Board believes that this is the most efficient process. Board staff added that a Board order issued under subsection 41(9) of the Act, if issued prior to the REA approval or other approvals, may contain a condition that the Applicant "shall obtain and comply with all necessary approvals, permits, licenses, certificates and easement rights required to construct, operate and maintain the project".

The Board finding on this issue is consistent with its letter to the Township dated December 12, 2014, which stated that the Act does not require all necessary approvals such as the REA be obtained prior to the filing of an application under section 41(9) of the Act or a Board decision on the matter. The letter noted that the Board believes that concurrent REA and OEB proceedings are the most efficient process. The Board's letter also noted that, in order for the Applicant to proceed with construction of the Distribution System, it will need to get all legally required permits and other approvals, which would include the REA.

THE BOARD ORDERS THAT:

1. The location of Fairview Wind's Distribution System on the Road Allowance owned by the Township is approved as follows:
 - a. The Distribution System shall be located in the Road Allowance listed in Fairview Wind's responses to Board staff Interrogatories 2(a) and 2(b), as Appendices A through D. Specifically:
 - b. The Distribution System shall be located within the Road Allowance shown in the table in Appendix A to the responses to Board staff interrogatory 2(a).
 - c. The Distribution System shall be located along the Road Allowance in

accordance with the response to Board staff interrogatory 2(b) per the diagrams shown in Appendices B through D.

2. The Applicant shall obtain and comply with all necessary approvals, permits, licenses, certificates and easement rights required to construct, operate and maintain the Fairview Wind Project and the Distribution System.
3. This approval includes any subsequent refinements regarding the location of the Distribution System within the Road Allowance which are mutually agreed to by Fairview Wind and the Township.

ISSUED at Toronto, January 15, 2015

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary