



**association to protect
AMHERST ISLAND**

Without prejudice to all our rights

Feb.13, 2015

Ontario Energy Board
P.O. Box 2319
2300 Yonge St, 27th Floor
Toronto, Ontario, M4P 1E4

File No. EB-2014-0300

Attn: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

Re: Windlectric Inc. Proposed Amherst Island Wind Energy Project

APAI Request and Rationale for an Oral Hearing

The Association to Protect Amherst Island (“APAI”) writes this letter in support of its request for an oral hearing. Although APAI has formally written to the Board on this issue (together with other issues), it has since had an opportunity to seek legal counsel and review, in detail, the responding submissions of Windlectric Inc. (“Windlectric”) opposing an oral hearing.

APAI believes this letter will assist the Board in deciding the important question of whether to hold an oral hearing in the matter of Windlectric’s application for leave to construct.

Background

On November 26, 2014, the Board issued Procedural Order No. 1, granting APAI (and IESO) intervenor status in these proceedings.

On December 15, 2014, APAI wrote a brief letter to the Board, raising its request for an oral hearing.

On January 7, 2015, counsel to Windlectric provided detailed submissions as to why, in its view, an oral hearing should be refused.

On January 8, 2015, the Board issued Procedural Order No. 2, wherein it stated that it “expects to decide whether it will hold a written or oral hearing following the completion

of the steps set out in this Procedural Order.” The last step contemplated by Procedural Order No. 2 is responses to interrogatories by intervenors, due by February 12, 2015 (since extended to February 20, 2015).

Submissions

As noted by Windlectric in its letter dated January 7, 2015, the Board has previously recognized that an oral hearing is required where it would be an appropriate means of acquiring additional factual evidence, or allowing for cross-examinations.

Both of these reasons favour granting an oral hearing in this case, as do considerations of natural justice and procedural fairness.

As a preliminary matter, APAI notes that Windlectric’s opposition to an oral hearing is based, in large part, on its view that APAI’s arguments and evidence largely fall outside the scope of this hearing’s jurisdiction. APAI disagrees. To be clear, APAI recognizes that the two main considerations that the Board must assess in the context of this application are set out in s. 96(2) of the *Ontario Energy Board Act, 1998* (the “*Act*”). If granted an oral hearing, APAI will focus its efforts on presenting evidence relating to these two considerations. However, APAI also submits that the text of ss. 92 and 96 of the *Act* ought to be interpreted and applied purposively, in a manner that reflects the statute’s objectives. That requires the Board to be guided by the objective of facilitating the “rational expansion of transmission and distribution systems” (emphasis added).

Ultimately, then, APAI submits that the issues it is raising and evidence it relies upon are relevant not only to the strict considerations in s. 96(2), but to the broader statutory objectives that must guide the Board’s exercise of discretion when interpretation and applying those considerations.

i. Additional factual evidence

APAI submits that an oral hearing will allow it to introduce and explain additional factual evidence that is most easily understood in the form of live testimony. In particular, at this juncture, APAI anticipates calling evidence from:

- Dr. John Harrison (professor emeritus Queen’s University [retired]) on the economic viability of the project, and its concomitant impact on the cost, reliability and quality of electricity service;
- Denise Wolfe (researcher) on the inconsistency of the Windlectric project with the laws policies of the Government of Ontario, including the *Green Energy Act, 2009*, S.O. 2009, c. 12, sched. A and O. Reg. 359/09 made under the *Environmental Protection Act*; and the Species at Risk Act.
- Dr. Ross R. McKittrick (professor of economics at the University of Guelph) on the impact of the Windlectric project on electricity prices in Ontario.

APAI may also seek to introduce evidence from representatives of HONI and/or the IESO/OPA on issues relating to the cost and market impact of the Windlectric project. As HONI is not a participant in these proceedings, and the IESO/OPA is another intervenor, it would be most efficient and workable for APAI to obtain the necessary evidence from representatives of these organizations by way of an oral hearing, rather than by interrogatories or some other written method.

ii. Cross-examinations

The paper record in this proceeding is voluminous and complex. Although APAI has done its best to review the documents and seek clarification through written interrogatories, serious questions remain that will most effectively and efficiently be dealt with by way of direct cross-examinations in an oral hearing. Given the seriousness and complexity of the issues at stake, it is only fair and reasonable that APAI be given a right to directly face Windlectric's representatives in order to examine them. Interrogatories are not a sufficient substitute in the circumstances of this case.

iii. The right to be heard

Although the Board has discretion as to whether or not to hold an oral hearing in this matter, APAI submits that this discretion must be exercised in a manner that is consistent with the tenets of procedural fairness and natural justice. In the circumstance of this application, these considerations strongly favour an oral hearing.

In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada outlined a non-exhaustive list of five factors relevant to determining what the duty of fairness requires in any given case – including whether an oral hearing may be required. Those factors are: (i) the nature of the decision being made and the process followed in making it; (ii) the nature of the statutory scheme; (iii) the importance of the decision to the individuals affected; (iv) the legitimate expectations of the person challenging the decision; and (v) the choices of procedure made by the agency/board itself.

With respect to factors (i) and (iii), it is important for this Board to consider that the decision being made in this case is one that directly impacts a broad range of individuals. Although it is a decision with certain polycentric dimensions, it is also one that will inevitably affect individual interests. Indeed, as this Board recognized in granting APAI intervenor status, APAI has a substantial interest in the outcome of this proceeding.

Many of APAI's 350 members will be seriously impacted by whether this Board grants leave to construct. Correspondence from individual members to the Board demonstrates the high stakes and strong feelings engaged by Windlectric's application. By way of example only, the letters of comment filed by members of the Little family describe how their long-time home is only a few hundred meters away from the proposed substation, and how the stress of potentially having to leave the Island has already had a direct and

severe impact on their lives. In these circumstances, fairness requires giving APAI an opportunity to present evidence, cross-examine and make submissions in an oral hearing.

Factors (ii) and (v) also support ordering an oral hearing, insofar as they demonstrate that this Board has been given the power under statute to hold oral hearings and has exercised this power in previous leave to construct proceedings where appropriate. Although this Board has elected to follow a written procedure in the leave to construct application thus far, the nature of the statutory scheme and its choice of procedure in other broadly similar proceedings point to an ability and a willingness, to order oral hearings where circumstances so require. Put differently, while written proceedings may be the ‘default’ option, the *Act*, the Board’s *Rules* and the Board’s practice all contemplate an oral hearing where appropriate, as in this case.

Finally, with respect to factor (iv), APAI’s legitimate expectations are grounded in, among other things, the Board’s own public documents. In its guide titled “*Getting to Know the Ontario Energy Board: Resource Guide for Regulated Entities*”, the Board states: “Public hearings enable individuals or groups who may be affected by the OEB’s ruling to express their views and participate in the decision-making process.” APAI submits that its legitimate expectation of *meaningful* participation in the process requires an oral hearing in the circumstances of this case.

iv. An opportunity to provide oral comments on the record

At an oral hearing – and even if an oral hearing on the evidence is not ordered to proceed – APAI requests that certain of its representatives and/or members be given an opportunity to provide oral comments on record, in accordance with rule 23.05 of the *Rules of Practice and Procedure*. APAI submits that this is an important aspect of ensuring individuals who will be directly affected by the outcome of these proceedings are given a meaningful ability to participate and be heard by the Board.

APAI reiterates its request that any oral hearing be heard in or near Lennox-Addington, to maximize the ability of its members to attend, participate in giving evidence and/or make oral comments on the record.

Thank-you in advance for considering this request.

Yours truly,
Original signed by:

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cc: Parties