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Report

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Will OPA amend Integrated Power System Plan to satisfy stakeholder concerns?

In May 2011, the Ontario Power Authority (OPA) released its much anticipated 2011 IPSP Planning and Consultation Overview document to generally critical reviews by stakeholders. The IPSP is a comprehensive plan that sets out how Ontario will meet its electricity needs today and for 20 years into the future. It is based on the Ontario Government's Long-Term Energy Plan (released in November 2010) and the Minister of Energy's Supply Mix Directive (issued February 17, 2011).

The OPA held stakeholder consultation sessions in late May and early June. OPA staff provided a general overview of the IPSP consultation document, and reviewed its approach to demand forecasting, conservation, supply and transmission. During these consultation sessions, it became clear that stakeholders had a number of concerns, including

- the use of targets from the Long-Term Energy Plan and the Supply Mix Directive as the ceiling for additional renewable and clean energy generation
- the lack of information and assumptions used to determine data, such as future electricity demand
- use of conservation targets as a ceiling for conservation efforts and additional conservation initiatives only where is it "cost effective"
- targets for increasing hydroelectric power exist only until 2018, with the current assumption that there will not be any further hydroelectric procurement post-2018
- the lack of a regional plan for electricity demand and transmission requirements.

Inside …

Results of provincial election may have far reaching impact on energy policy

During the recent Ontario election, no other issue was as fiercely debated as was energy policy. The depth of issues included the ongoing implementation of the *Green Energy Act*, the siting of wind turbine and natural gas powered generating stations, the continuation of generous feed-in tariffs for renewable energy sources, the "Smart Meter" program and other aspects of electricity pricing, and the eventual phase-in of carbon taxes, emission trading systems or other greenhouse gas controls. The ability of the McGuinty Liberals to survive, albeit as a minority government, should ensure the continuation of many of these undertakings but not without some compromise. These could include further examination of the health impacts of wind power, greater input by local authorities on the siting and setback for such facilities, the revival of energy retrofit rebates, and the removal of HST on gasoline, hydro and home heating. We will closely track these developments in upcoming issues of this newsletter.

The OPA also held regional consultation meetings with First Nation representatives during June and July. Unfortunately, many of the meetings attracted small turnouts, and First Nations participants were given until September 23, 2011, to provide written comments to the OPA.

With that deadline passed, the OPA is now reviewing the comments received, finalizing the IPSP and developing the evidence required to justify the Plan. The final IPSP will be submitted to the Ontario Energy Board (OEB) for review. It will be interesting to see how the stakeholder comments and concerns are addressed in the final version.

Once the IPSP is before the OEB, Aboriginal communities and stakeholders may have another opportunity to consider the IPSP's targets and predictions, as well as its underlying assumptions. In addition, Aboriginal communities and stakeholders will be invited to make submissions to the OEB. The OEB will then consider these submissions, as well as all the evidence before it, to decide if the IPSP will be approved. Initial expectations were that the OPA would file the IPSP with the OEB before the end of 2011.

Increased support for development of transmission lines by Aboriginal groups

On August 25, 2011, the Minister of Energy directed the Ontario Power Authority (OPA) to increase the funding available to Aboriginal communities engaged in the delivery and construction of transmission lines. With development poised to explode in Northern Ontario, Aboriginal communities may choose to partner with existing transmission providers or establish their own companies for economic development purposes.

The Aboriginal Energy Partnerships Program (AEPP) has been amended to increase funding to Aboriginal communities that are "exploring equity positions in future, planned, major transmission lines in Ontario where the OPA has identified a need for transmission capacity." Each proposed transmission line situated within the traditional territory of an Aboriginal community may be considered for funding support of up to $500,000.

The OEB's role in transmission planning

Section 57 of the *Ontario Energy Board Act* prohibits proponents from owning or operating a transmission system without a transmission license. The proponent must apply to the Ontario Energy Board (OEB) to obtain the necessary license. A new regulated transmitter must also be licensed in order to undertake development work on any transmission network expansions or enabler lines identified by the OPA as necessary to connect to renewable energy generation.

The Board oversees transmission planning through a two-step process for regulated transmitters. Step one, the designation process, involves the Board's preliminary assessment of the proponent's technical capacity and financial viability, as well as the timing and delivery of a transmission development plan. The Board may then issue an order for designation, which will allow the proponent to proceed with step two: "leave to construct" in order to request permission to construct the transmission system.

The approval route for load customers, such as mining companies, is via Section 92 of the *OEB Act*. Proponents (whether they are regulated or non-regulated) submit a leave to construct application in order to proceed with the construction phase of the transmission project. Detailed information about transmission plans are required under this process, and may include the following: a project summary and location description, explanation of the need for the project, design specifications, operation details, the construction and in-service schedule, land matters (such as land rights, service of notices, and the land acquisition process), a site impact assessment (IESO Connection Assessment and Approval), a customer impact assessment, community and stakeholder consultation, and connection project impacts on transmission system.

For further details, refer to the following Ontario Energy Board publications:

- *Filing Requirements: Transmission Project Development Plans* (G-2010-0059), August 26, 2010
- *Board Policy: Framework for Transmission Project Development Plans* (EB-2010-0059), August 26, 2010
- *Filing Requirements for Transmission and Distribution Applications* (EB-2006-0170), November 14, 2006

Proposed mining activities in Northern Ontario will significantly increase electricity demand and require the construction of new transmission lines to developments in the "Ring of Fire" area, situated within the traditional territories of many Aboriginal communities in the James Bay lowlands. The Aboriginal communities can play a key role in energy planning and development for the mining projects. Mining companies should consider how they can connect remote communities to the Ontario grid and/or establish microgrids for these communities as part of the consideration for entering into an Impact Benefit Agreement with an affected community. Proponents that opt to engage affected Aboriginal communities early, either as partners or otherwise, may be able to expedite their approval timelines.

Ottawa commits to two more years of 'ecoENERGY Efficiency'

On September 7, 2011, Natural Resources Canada announced that Ottawa will invest $78 million in additional energy efficiency initiatives over the next two years. The ecoENERGY Efficiency funding is intended to improve energy efficiency, reduce greenhouse gas emissions, improve air quality and save money for individuals and businesses. The move follows the federal government's August 2nd announcement of the $97-million ecoENERGY Innovation Initiative to support the research, development and demonstration of clean energy technologies and the earlier July 13th extension of the popular ecoENERGY Retrofit – Homes program.

The ecoENERGY Efficiency initiatives will include a mix of new standards, tighter regulations, more informative labelling systems and updated benchmarking tools to help Canadians use energy more efficiently. Ottawa will also work with the provinces and territories to establish a more stringent National Energy Code for Buildings, as well as upgrade the new home energy rating systems to reflect the latest technologies. According to the announcement, the initiatives will

- Aid the adoption of an energy management standard for industry, accelerate energy-saving investments in factories, and support the exchange of best-practices information within Canada's industrial sector
- Introduce or raise energy efficiency standards for a wide range of products, and promote energy-efficient products through the ENERGY STAR program
- Encourage the construction and retrofit of low-rise residential housing to improve energy efficiency
- Provide information and benchmarking tools to improve building energy performance of new and existing buildings
- Provide "decision-making tools," such as improved vehicle fuel consumption labels and a light-duty tire information system, to help Canadians reduce fuel consumption in the purchase and operation of their vehicles.

M'Chigeeng First Nation receives first Aboriginal loan guarantee

The Mother Earth Renewable Energy Project on M'Chigeeng First Nation's land on Manitoulin Island is one of the first recipients of support under the Aboriginal Loan Guarantee Program (ALGP), administered by the Ontario Financing Authority. The $250 million loan guarantee program, first announced as part of Ontario's 2009 Budget, facilitates First Nation and Métis participation in renewable energy projects. The program provides loan guarantees covering up to 75 percent of an Aboriginal corporation's equity in an eligible renewable generation and transmission project up to a maximum of $50 million per project. Construction on the two 2MW wind turbines began June 21, 2011, and is expected to be completed by spring 2012. M'Chigeeng First Nation expects to repay the $8.5 million in loans through revenues earned under the Ontario Power Authority's FIT program. A conditional offer for loan guarantees has also been issued for Moose Cree First Nation's investment in the Lower Mattagami Project, and $150 million in other projects are currently in the works with additional announcements expected shortly. Information on the ALGP is available on-line at www.**ofina.on.ca/algp/** or by contacting Sandy Roberts, Director of the Strategic Project Finance Branch, at 416-325-1557.

ecoENERGY funds clean energy projects in Aboriginal & northern communities

Ottawa's ecoENERGY for Aboriginal and Northern Communities Program has been extended for another five years to provide funding for clean energy projects, such as hydro or wind energy. It will also help remote communities, which rely on diesel power generation, to improve energy efficiency, install heat recovery systems or adopt alternative energy sources. The deadline for submitting applications for funding in fiscal year 2011-2012 was October 3, 2011.

Eligible communities may receive up to $250,000 to implement renewable energy technologies that generate energy or improve efficiency. Up to $100,000 is also available for energy-related building improvements for both new and existing community buildings, such as health centers, schools, arenas, water treatment plants and band offices. Clean energy sustainability for off-grid diesel generator dependent communities were identified as a key area of concern.

Funding is available for all stages of project development, including project identification and inception, feasibility and planning studies, financial and project management, equity partnerships, power purchase agreements and project completion. Projects are approved on a case-by-case basis based on the quality of the proposal.

Aboriginal communities must be consulted on renewable energy projects

The Ontario Ministry of the Environment has laid out a rough, though still incomplete, roadmap for working with Aboriginal communities on proposed renewable energy projects, including wind, water, solar, biomass and biogas power. The draft *Renewable Energy Approval (REA) Aboriginal Consultation Guide* is intended to help proponents fulfill the Aboriginal consultation requirements set out in Ontario Regulation 359/09 (Renewable Energy Approvals), under the *Environmental Protection Act*. However, the new policy is vague on how any concerns that may be raised during those consultations will be addressed.

The new policy does not specify or supersede the Crown's own consultation obligations. Nor does it address a proponent's requirements to consult with the public, municipalities or local authorities. The draft guide was posted to the province's Environmental Registry on August 2, 2011, for 90 days for public comment. The deadline for submissions was October 31, 2011.

While the province has delegated, in large part, procedural aspects of the duty to consult with Aboriginal communities to the applicants of renewable energy projects, the Guide remains vague about how the resulting dialogue will progress and provides few opportunities for Aboriginal communities to voice their concerns with a project, aside from writing a letter or two. It appears that applicants will have to listen to Aboriginal concerns, but they don't actually have to do anything in response except document the community's grievances.

According to O. Reg. 359/09, an applicant must submit a Project Description Report to the Ministry and request an Aboriginal consultation list which the MOE will then provide. This consultation list will include Aboriginal communities that: (1) have constitutionally protected Aboriginal rights, either established or asserted, which may be adversely impacted by the proposed project; or (2) may have an interest in any negative environmental effects of the proposed project.

The applicant is required to distribute notice of the project, hold two public hearings, and request comments from Aboriginal communities on the consultation list. These public meetings are open to all. No exclusive meetings are required between the applicant and Aboriginal communities to receive and discuss their comments or concerns with the project.

Released almost two years after the regulatory requirements were first unveiled, it was hoped that the consultation policy would be more substantive. For example, applicants are "encouraged" to work with Aboriginal communities to resolve any concerns or disputes, but are not required to make any changes to the project based on those concerns. Applicants are only expected to "inform the community about how their concerns were considered and whether the proposal was altered in response." Similarly, the Guide states that the consultation process "may lead to partnerships or economic opportunities (e.g. employment opportunities,

direct awards for contract services, etc.)," but these arrangements are not required.

First appeal of a Renewable Energy Approval is denied, but raises questions about wind power

It took almost eight months, but the first appeal of a Renewable Energy Approval (REA) for a renewable energy project has further clouded the future of wind turbines in Ontario. In *Erickson v. Director, Ministry of the Environment*, the Environmental Review Tribunal (ERT) dismissed the appeal and confirmed the approval of a wind farm project near Thamesville, Ontario, noting that the appellants presented evidence about the risk of wind turbines in general, but did not provide enough evidence about the risks posed by the project in question. The Tribunal ruled that wind turbines CAN cause harm to humans if situated too close to human receptors (see sidebar "It's a matter of degree").

On November 29, 2010, Katie Brenda Erickson and Chatham-Kent Wind Action Inc. filed a Notice of Appeal of the REA issued by the Ministry of the Environment to Kent Breeze Corp. and MacLeod Windmill Project Inc. for the construction and operation of eight wind turbine generators in the Township of Camden. Following 17 days of hearings conducted in February, March and May of this year, the ERT's detailed, 223-page decision was released July 18, 2011.

The streamlined REA process serves as a 'single-window' approval, replacing separate environmental assessments, air and noise approvals, waste approvals, sewage works approvals, water permits and Planning Act approvals for designated renewable energy projects in Ontario. However, section 142.1 of the *Environmental Protection Act* (*EPA*) allows members of the public, including corporations, to appeal REAs. Appeals are heard before the ERT. The right to appeal is automatic, and no leave is required from the Tribunal. The appellant must establish that the REA should not have been granted on one of two grounds: the project will cause serious harm to human health; or the project will cause serious and irreversible harm to plant life, animal life or the natural environment.

The appellants argued that the REA for the project should be revoked because of a variety of direct and indirect health problems that could affect nearby residents. These fell into three general categories: (1) direct hearing loss; (2) physical injury or death from tower collapse, turbine failure or other accident; and (3) a range of "indirect" and chronic health effects, such as sleep disturbance, headache, tinnitus, dizziness, vertigo, nausea, tachycardia, irritability, memory problems and panic episodes. Although the precise mechanism for such indirect effects is as yet unknown, the appellants claimed that in its entirety, the evidence is "compelling."

After hearing what it called "cutting edge scientific evidence" presented by "an impressive array of leading experts from around the world," the Tribunal ruled that the Kent Breeze Project, if operated in accordance with current Ontario standards, would not cause serious harm to human health. The appeal failed the statutory test set out in s.145.2.1(2)(a) of the *EPA,* and the Director's original REA was confirmed. The ERT did conclude that

It's a matter of degree

"While there are certainly legitimate concerns and uncertainties about the effects of wind turbines on human health, the Tribunal cannot conclude that engaging in the Kent Breeze Project as approved will cause serious harm to human health according to the evidence tendered in this Hearing. The Tribunal notes that the research in this area is at quite an early stage and that our collective understanding of the impacts of wind turbines on human health will likely progress as further research and analysis is undertaken."

"While the Appellants were not successful in their appeals, the Tribunal notes that their involvement and that of the Respondents, has served to advance the state of the debate about wind turbines and human health. This case has successfully shown that the debate should not be simplified to one about whether wind turbines can cause harm to humans. The evidence presented to the Tribunal demonstrates that they can, if facilities are placed too close to residents. The debate has now evolved to one of degree."

– *Erickson v. Director, Ministry of the Environment*, ERT Case Nos. 10-121/10-122, pg. 207

> [T]he evidence shows that there are some risks and uncertainties associated with wind turbines that merit further research. In that regard, the Tribunal hopes that future debate focuses on the most appropriate standards rather than "yes or no" arguments about whether turbines can cause harm.

The ERT says further research is needed to determine whether the permissible noise levels and setback distance are appropriate to protect human health. Just because the appellants had failed to prove the current Ontario standards wrong in the context of the Kent Breeze project, the ERT concluded "that is no excuse to close the book on further research."

The first of many appeals to come

As Erickson demonstrates, parties appealing REAs face an uphill battle. The grounds are difficult to satisfy, and the burden of proof lies upon the party alleging the harm. Parties bringing an appeal have a high evidentiary threshold to meet because they must prove that the approved project WILL (as opposed to MAY) cause the harm prescribed. As more appeals are brought before the ERT, it will be interesting to observe how appellants deal with these challenges.

Disconnect between the DSC and microFIT keeps green power off grid

Why bother installing solar panels or erecting wind turbines if you can't sell the power generated to the Ontario Power Authority (OPA)? Despite a number of incentives, both financial and administrative, to promote the development of renewable energy, microFIT proponents continue to be frustrated by a lack of access to the electrical distribution system. In an effort to avoid individuals installing projects and then finding out their project cannot be connected to the grid, all microFIT applications submitted after December 8, 2010, must now obtain an "Offer to Connect" from their local distribution company (LDC) before the OPA will issue a microFIT Conditional Offer. This will likely not address delays in receiving an Offer to Connect or actually connecting the project to the grid once installed.

The cause of the problem is the apparent "disconnect" between the Distributor System Code (DSC), which sets

Municipalities attempt to regain planning power over renewables

In the two-and-a-half years since the *Green Energy and Green Economy Act* (*GEGEA*) came into force, some Ontario municipalities have continued to bemoan their loss of planning controls over renewable energy projects. Their inability to reject or restrict the siting of rural wind farms or ground-mounted solar displays has aroused considerable consternation. In an effort to reverse this loss of control, a growing number of municipalities – 77 at last count – have introduced by-laws to regulate the development of renewable energy projects.

Arran-Elderslie was the first municipality to attempt to reassert some measure of control, passing By-law 14-10, Health Provisions Respecting Locating and Erecting Wind Generation Facilities, on May 10, 2010. This by-law requires wind farm developers to provide the municipality's chief building official with certificates supported by health studies from a number of provincial ministries and from Health Canada, stating that the type of wind facility will benefit, or not harm, the health, safety and well-being of residents.

Some municipalities have followed Arran-Elderslie's example. Other municipalities have enacted by-laws requiring consultation with the municipality, or restricting the chief building official from granting a building permit unless certain conditions are met.

Some municipalities have taken a different approach, and have decided to work with renewable energy generators to control the location of projects and obtain the significant financial benefits that accompany them. Other municipalities are stepping into the renewable energy field as generators, either on their own or in partnership with established generating companies.

It is likely that as *GEGEA* regulations and guidelines further clarify the need for proponents to consult with municipalities and the public, some of these by-laws will become redundant and more municipalities will see the benefits to working with renewable energy proponents.

However, there are undoubtedly some municipalities that simply do not want renewable energy projects within their borders. To install projects in these locations may require a legal challenge to the by-law.

out the minimum conditions that a distributor must meet to maintain a licence in Ontario, and the microFIT program. The DSC was never amended following the introduction of the microFIT program to require the connection of renewable micro generation to the grid; nor is there any provision in the DSC to require a distributor to invest in the necessary upgrades needed to the system to enable the connection of additional microFIT projects. This disconnect is compounded by a 'lack of levers' at the Ontario Energy Board to address the refusals or to require Hydro One Networks Inc. (HONI) to plan the necessary expansions and connect these projects to the grid.

Since microFIT is lumped in with micro-embedded facilities more generally, the DSC specifically contemplates the ability of distributors to refuse to connect a proposed micro -embedded generation facility (s. 6.2.6). In addition, the DSC (s. 6.2.25) allows a distributor to make decisions on the basis of ensuring the "safety, reliability and efficiency of the distribution system." This allows a distributor to refuse a microFIT project where the distributor believes that the addition of the microFIT project to the gird will compromise safety and reliability.

In an attempt to address at least some of the backlog, the Ministry of Energy directed the OPA on August 19, 2011, to allow the relocation of a capacity-constrained microFIT-approved project to another property, upon written notice to the OPA, where it might be connected to the grid. The OPA was also directed to allow any constrained applicant the option of combining and relocating up to 50 projects (with combined capacity of up to 500 kW), or to assign any or all of their Conditional Offer(s) to another constrained applicant.

Hydro One and Toronto Hydro fail to gain OEB approval for CDM programs

In two significant proceedings heard earlier this year, both Hydro One and Toronto Hydro failed to have their Conservation and Demand Management (CDM) Programs approved by the Ontario Energy Board (OEB). The Board ruled that Hydro One had not filed its full Evaluation Plans with its application, while Toronto Hydro's CDM Program duplicated that of the Ontario Power Authority (OPA). Both of these local distribution companies (LDCs) eventually abandoned their CDM Programs.

CDM Programs must complement the suite of OPA Programs to meet certain provincially mandated conservation and demand management targets. LDCs like Hydro One and Toronto Hydro can do this by implementing the OPA Programs and, where necessary, adopting their own complementary CDM Programs.

In each case, two threshold issues were considered by the OEB. According to the Minister of Energy's Directive to the OEB (dated March 31, 2010), the Board may not approve an applicant's CDM Programs: (1) prior to the "establishment" of the OPA Programs, or (2) where the applicant's CDM Programs "duplicate" the OPA Programs.

Hydro One withdraws CDM program

In late 2010, Hydro One Networks Inc. and Hydro One Brampton Networks Inc. each applied for orders granting approval of funding for six CDM Programs. During the proceedings, a number of questions were raised by intervenors about

- the jurisdiction of the OEB to hear the applications since neither applicant had filed Evaluation Plans as required in the CDM Code
- the criteria to be applied
- their prematurity given the status of "establishment" of the OPA Programs.

After considering all of these matters, the Board adjourned the applications because Hydro One and Hydro One Brampton had not filed their full Evaluation Plans with their applications. Shortly thereafter, in the spring of 2011, Hydro One and Hydro One Brampton withdrew their applications for CDM Programs.

Toronto Hydro duplicates OPA programs

In early 2011, Toronto Hydro-Electric System Limited Inc. filed its application for the approval of funding for nine (later reduced to eight) CDM Programs. Four of the eight CDM Programs proposed by Toronto Hydro were education initiatives, designed to promote CDM awareness to the public.

Although the OEB found that Toronto Hydro's application for CDM Programs was premature, given that Toronto Hydro filed its application before the OPA Programs were established, they did not consider this a fatal flaw. The Board decided to consider the application as though the

OPA Programs had been established prior to the Toronto Hydro filing. The Board held that it will decide the date of establishment of the OPA Programs on a case-by-case basis in future applications.

The OEB did find, however, that Toronto Hydro's proposed CDM Programs duplicated the OPA Programs. The OEB found that the basis for this prohibition is rooted in a "concern that CDM activities, as important as they are to the overall policy direction of the Province, need to be implemented and administered efficiently, with due regard to the interests of consumers in maintaining affordable rates."

The OEB found that the education initiatives were duplicative of the OPA Programs. Further, the OEB decided that the four education initiatives, as proposed by Toronto Hydro, were payable through the existing $1.4 billion program administration budget provided under the OPA Programs.

In the end, the OEB only approved two of the eight CDM Programs proposed by Toronto Hydro, with limited terms and reduced budgets. Toronto Hydro assessed the two approved programs as narrowed by the OEB and decided not to implement them.

What's next?

The OEB is taking its oversight role seriously. LDCs must ensure that their proposed CDM programs do not duplicate the programs of the OPA and that their applications for CDM programs are complete and comply with the spirit and letter of the Conservation and Demand Management Code.

Willms & Shier partner recognized for her expertise in energy regulatory law

Willms & Shier Environmental Lawyers LLP is proud to announce that Juli Abouchar is listed in *Best Lawyers* in the field of energy regulatory law. Results are based on evaluations from 373,000 lawyers across Canada.

Our Energy Team

Juli Abouchar
Certified Environmental Law Specialist
Phone: 416-862-4836
jabouchar@willmsshier.com

Matt Gardner
Phone: 416-862-4825
mgardner@willmsshier.com

Cherie Brant
Phone: 416-862-4829
cbrant@willmsshier.com

Joanna Vince
Phone: 416-862-4830
jvince@willmsshier.com

Jacquelyn Stevens
Phone: 416-862-4828
jstevens@willmsshier.com

Katherine Koostachin
Phone: 416-862-4823
kkoostachin@willmsshier.com

Our energy law practitioners represent and advise proponents in planning, structuring and implementing renewable energy and transmission projects. Our involvement with Ontario's energy demand, supply and conservation planning processes, combined with development expertise in these areas, makes our team unique in its ability to meet client needs.

Willms & Shier Environmental Lawyers LLP
4 King Street West, Suite 900, Toronto, Ontario, M5H 1B6
Tel: 416 863 0711 / Fax: 416 863 1938 / Website: www.willmsshier.com

If you would like to receive Willms & Shier's Environmental Law Report, email your name, title and organization to *jhardacre@willmsshier.com*