



EB-2009-0242

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 York
Energy Centre LP for an electricity generation licence.

By delegation, before: Theodore Antonopoulos

DECISION AND ORDER

THE APPLICATION

York Energy Centre LP (“York Energy”, “YEC” or the “Applicant”) filed an application dated June 29, 2009 with the Ontario Energy Board (the “Board”) under section 60 of the *Ontario Energy Board Act, 1998* for an electricity generation licence. York Energy requested the licence for the purpose of owning and operating a 435 MW natural gas fired generator (the “Project”) that is planned for King City, Ontario. York Energy obtained a Peaking Generation Contract with the Ontario Power Authority (“OPA”) for the subject generator on December 19, 2008 in response to an RFP aimed at addressing increasing load growth in northern York Region.

The Board’s Notice of Application and Written Hearing for an electricity generation licence was posted on July 30, 2009. Four parties responded to the Notice: Harten Consulting, Township of King (the “Township”), Richard Johnson, and the Concerned Citizens of King Township Inc. (“CCKT”). In their response to the Notice, Harten Consulting and CCKT requested the Board convene an oral hearing to examine the merits of the application. On September 10, 2009, the Board issued a Decision with Reasons and Procedural Order No.1 denying the oral hearing request and extending the time for interested parties to file written submissions on the merits of the application.

THE BOARD'S TREATMENT OF CONFIDENTIAL INFORMATION IN THIS PROCEEDING

This proceeding involved the filing of certain information in confidence. The Board's general policy is that all records should be open for inspection by any person, reflecting the Board's view that its proceedings should be open, transparent and accessible. However, the Board recognizes that some of the information placed on the record in its processes may be of a confidential nature and should be protected as such. For example, it has been the Board's practice to retain in confidence all financial information provided by applicants in support of licence applications. Accordingly, the financial information provided by the Applicant in this proceeding was filed in confidence and no other party except for Board staff had access to the confidential information filed by the Applicant.

In providing reasons for the Board's findings in this Decision, the Board sought to strike the appropriate balance between the rights of the Applicant to confidentiality for information which, if disclosed publicly, may result in harm to the Applicant and, on the other hand, the rights of the public and intervenors to have sufficient information to understand the reasons for the Board's Decision.

In this proceeding, Board staff posed confidential interrogatories with respect to the Applicant's financial matters and the status of other regulatory approvals. The Applicant filed all its responses in confidence. Board staff filed its entire written submission in confidence, including its final recommendations.

Other parties filed interrogatories, on the public record, related to the publicly available portion of the application and the Applicant filed responses on the public record. All written submissions filed by other parties were filed on the public record. The Applicant's initial and final reply submissions were filed on the public record.

To the extent necessary, the Board has redacted certain portions of this Decision that would otherwise disclose specific details of the financial or other confidential information provided by the Applicant, either in the original application or in response to interrogatories. The Board has not redacted references to financial or other information submitted in this proceeding that is available in the public domain, for example, the financial statements for the Applicant's parent company Pristine Power Inc. ("Pristine") are publicly available in Pristine's Annual Report. The Board has also disclosed in this Decision Board staff's final recommendations provided in its written submission as the recommendations themselves do not disclose specific details of the information provided by the Applicant in confidence.

PHASE 1

The following parties filed written submissions in response to Procedural Order No. 1: The Township, Ontario Nature, CCKT, Richard Johnson, and Clayton de Vries. York Energy filed its reply submission on September 30, 2009.

Submissions

The Township of King submitted that it is an unwilling host to the generation facility. The Township argued that the Applicant has not yet obtained all the necessary approvals for the project, noting the absence of a connection point to the facility and Municipal Site Plan approval. The Township stated that the application is premature until the status of the approvals and other significant questions surrounding the generation project are resolved.

Ontario Nature submitted that an agreement with the Applicant would have to be in place to connect to Hydro One using a right-of-way through the Cawthra Mulock Nature Reserve. Ontario Nature noted that it owns the reserve and that to date, no such agreement is in place. Ontario Nature further submitted that there is a long list of outstanding issues that remain unaddressed, and on this basis, requested that the application be denied.

CCKT also argued that the application is premature based on the fact that many of the necessary approvals have not been obtained. Some of the outstanding approvals noted by CCKT were the following:

- Clearance letter from the Ontario Ministry of Culture regarding an archaeological assessment;
- Lack of secured access to the transmission grid;
- Lack of an Environmental Assessment for the proposed gas pipeline, and;
- Lack of secured financing.

CCKT submitted that given the incomplete status of most of the required approvals, the application is premature because each of the approvals could change the size, location and operation of the proposed facility. CCKT requested that the Board deny the application.

Mr. Johnson also noted the lack of approvals in place for the project. Mr. Johnson specifically addressed the concerns of the Lake Simcoe Region Conservation Authority ("LSRCA") which reviewed the Site Plan Development Application to the Township. The

LSRCA noted that the proposed site alterations associated with the project are contrary to Section 3.1.2 (d) of the Provincial Policy Statement and on this basis, the LSRCA recommended that the Site Plan Application be denied.

Clayton de Vries submitted that the location of the proposed generation facility is flawed to the extent that it cannot properly fulfill the objectives of the OPA and as a result will not be able to provide a secure power supply for northern York Region. Mr. de Vries indicated that the generator property is located in a flood plain and will be inaccessible during serious rainstorms. In addition, Mr. de Vries indicated that the “islanding” condition that the OPA identified as a benefit to consumers during an emergency, may not materialize due to the long distance between the generator and the Armitage Transformer Station. Mr. de Vries also noted that the Applicant had yet to secure access to the grid. Mr. de Vries supported the request of Ontario Nature for the Board to deny the licence application.

York Energy responded to all submissions stating that the concerns of the interested parties were outside the scope of this proceeding and that the Board does not have the mandate to second guess other regulatory bodies’ decisions. The Applicant stated that the proper test to review a generation licence application is the Applicant’s ability to operate a generation facility in the Ontario market. No party submitted evidence questioning the ability of York Energy to operate a generation facility in the Ontario market.

The Applicant also stated that it is committed to working with the Township and other regulatory decision-makers and is confident it will ultimately obtain both the Site Plan Development permit and all other required approvals. York Energy submitted that there is no need for the Board to predicate consideration of a generation licence on prior receipt of approvals outside of the Board’s mandate.

PHASE 2

On October 21, 2009, York Energy provided an update to its application. The Applicant noted that it had obtained one further approval (an Archeological Clearance Letter from The Ministry of Culture) and that as a result of discussions with the OPA, the interconnection point for the generator will be located in a new location resulting in the removal of the requirement for a 600 m transmission line along existing rights-of-way. This information was copied to all parties.

On November 6, 2009, CCKT filed a response to the Applicant’s Archaeological Assessment. CCKT stated that it does not have any evidence that the Applicant has

obtained a licence permitting it to alter the archaeological site. As a result, CCKT requested time to prepare further written submissions and further peer review of the Archaeological Assessment for submission to the Board. On November 12, 2009, the Applicant filed a response providing a letter of clearance from the Ministry of Culture. The Applicant submitted there is no basis to include additional time for CCKT to make further written submissions.

As a result of the additional evidence submitted by the Applicant and the submissions of the parties with respect thereto, the Board re-opened the record of the application with Procedural Order No. 2 to include all information submitted after September 30, 2009 and to place it on the public record of the application. The re-opening of the record also provided the Applicant, Board staff and interested parties a final opportunity to clarify these and any other perceived deficiencies by way of written interrogatories followed by final written submissions.

In accordance with Procedural Order No. 2, the Board directed parties to limit their interrogatories to elicit information relevant to the Board's consideration of the Applicant's ability to own and operate a generation facility and to participate reliably in the energy market.

Along with Board staff the following interested parties submitted interrogatories in Phase 2 of this proceeding: Harten Consulting, CCKT, and the Township of King.

On December 16, 2009, the Chippewas of Georgina Island filed a letter requesting a halt to the proceeding to allow them time to ascertain the effect the York Energy Centre project would have on the Pukwis project and their planned additional 100 MW renewable energy project. The Board responded on January 15, 2010 denying the request to halt the proceeding on the basis that the request by the Chippewas of Georgina Island was outside the scope of this proceeding. The Board did however allow time for the Chippewas of Georgina Island to file a written submission on the merits of the application.

On January 4, 2010, York Energy responded to the interrogatories from Board staff and the interested parties. On January 18, 2010, along with Board staff, Harten Consulting and CCKT submitted final written submissions. The record of this proceeding closed on January 28, 2010 with York Energy's reply to all final written submissions.

The full non-confidential portion of the record is available at the Board's offices. The Board has chosen to summarize the record to the extent necessary to provide context

to its findings.

Final Written Submissions

Harten Consulting stated in its final written submission that the implementation of an interim control by-law by Town Council of the Township of King could result in a one to two year delay in the project. As well, Harten Consulting cited the LSRCA's concerns with respect to the project in addition to other regulatory approvals and environmental issues that still need to be addressed.

CCKT's final written submission outlined certain uncertainties with respect to the Ontario Municipal Board ("OMB") hearings that will deal with Site Plan approval of the Project. CCKT noted that significant delays as a result of a protracted hearing process could result in the Applicant's scheduling being affected. CCKT once again noted its view that the application is premature in conjunction with obtaining other regulatory approvals and the approval of the proposed pipeline to the facility. CCKT questioned the Applicant's technical and financial capability with regards to building and operating a facility double the size of any project the parent company has ever undertaken. CCKT referred to the parent company's financial losses in 2009, the underlying debt and current financial position as challenges to financing and constructing the Project. CCKT questioned the ability of the Applicant and its parent company to obtain the needed capital to finance the Project given worsening economic conditions. CCKT also requested verification from the Applicant on a number of issues relating to the possibility of construction delays, equipment and development costs, financial closing and financial penalties with the OPA in the event of delays.

In its submission, Board staff was silent as to the ability of the Applicant to operate a generation facility and its past conduct. Staff limited its submission to an analysis of the financial information provided by the Applicant.

Staff noted that in response to Board staff interrogatories York Energy filed a term sheet and debt financing proposal with bank lenders, as well as an updated regulatory approval and financing schedule. In addition, staff noted that York Energy filed examples of the OPA's financial requirements for a peaking generation contract, including financial statements for Pristine and the affiliates of Harbert York Canada Company. The Board notes that references to this information were also provided in response to CCKT interrogatories. Staff noted that pro forma financial statements for York Energy, or a parental guarantor letter that would link the parent company financial statements to the Applicant were not provided.

In response to Board Staff Interrogatory No. 2 the Applicant stated that [REDACTED]
[REDACTED] Staff noted that currently, there is a concern with respect to Site Plan approval as the Township has gone on record in this proceeding as being an unwilling host to the generation facility.

In light of the fact the Applicant has an OPA peaking generation contract and a debt financing proposal with bank lenders, Board staff supported licensing the Applicant. Board staff submitted that in order to be able to issue an electricity generator licence the Board must be confident that York Energy will be able to fulfill its financial obligations and secure financing to construct, own and operate its generation facility. Imposing reporting conditions on the licence would alert the Board to the risk of failure and address concerns of how possible long term delays would affect financing of the Project.

Board staff submitted it would be appropriate for York Energy to receive a 20 year term licence contingent on obtaining Site Plan approval and closing of financing for the generation facility within five years of the licence being issued. Failure to provide these documents with the Board within five years should result in the licence becoming null and void.

The Applicant replied to all submissions in one submission outlining the prior approvals obtained such as the OPA peaking generation contract and the environmental assessment. York Energy acknowledged the authorizations needed to commission the Project and noted the OMB's hearing on Site Plan approval as the proper forum for such issues. The Applicant submitted that outstanding approvals should not preclude the Board from issuing a licence and the proper focus of this proceeding is whether the Applicant has met the Board's test of its ability to own and operate the Project and participate reliably in Ontario's electricity market.

York Energy submitted that it has met the Board's tests with evidence of the partnership between its parent company Pristine and Harbert York Canada Company. In addition to co-owning and operating the East Windsor Cogeneration Centre, both parent companies share leadership experience on average of 22 years in the electricity industry. The Applicant stated it has a successful track record of financing and constructing generation facilities.

The Applicant submitted it has demonstrated the financial wherewithal to obtain financing for construction and ongoing operation of the Project. The Applicant has satisfied the financial requirements of the OPA in its RFP process and the parent

entities of York Energy will together provide equity contribution of \$73 million as well as executing a term sheet with bank lenders for 80% of the approximately \$365 million total cost of the generation project. Pristine indicated it has already invested its share of the necessary equity for the Project.

The Applicant stated that it expects to obtain all required regulatory authorizations and has provided updates on the status of these approvals in its responses to interrogatories. The Applicant submitted there is no basis to suggest York Energy will not be able to own or operate the Project or reliably participate in the Ontario energy market. The Applicant reiterated that scrutiny by the Board in matters relating to the OMB, Ministry of the Environment, OPA, or other regulators would be duplicative and outside the proper scope of the Board's evaluation of electricity generation licence applications.

BOARD FINDINGS

Certain parties have argued for denial of the Applicant's licence application on the basis that the Applicant has not acquired all the necessary approvals with respect to the generation project. The Board notes that other agencies have the mandate to oversee the environmental and regulatory approvals related to generation facilities, and to the extent that these approvals are not obtained the project will not be able to proceed. Pursuant to Attachment A of the licence application and updated through correspondence and interrogatories, York Energy submitted that four out of eight major approvals are still outstanding (aside from the generation licence). In response to Board staff interrogatories, York Energy stated [REDACTED] [REDACTED] The Board will deal with the matter of the outstanding approvals below.

The Board's statutory objectives with respect to electricity include protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.¹

In the exercise of its licensing function, the Board's practice is to review a licence application based on the Applicant's ability to own and/or operate a generation facility and to participate reliably in Ontario's energy market.

The Board uses three main criteria to assess an electricity generator licence applicant:

- The applicant's ability to be a financially viable entity with respect to owning and

¹ *Ontario Energy Board Act, 1998 S.O. 1998, c.15, section 1*

operating a generation facility in Ontario's energy market;

- The applicant's technical capability to reliably and safely operate a generator; and
- The applicant and its key individuals' past business history and conduct such that they afford reasonable grounds for belief that the applicant will carry on business in accordance with law, integrity and honesty.

After considering the application, the Board finds it to be in the public interest to issue the electricity generation licence under Part V of the Act with conditions as outlined below.

The Board has no concerns with the Applicant's information with respect to its technical ability and past conduct.

Financial Viability of the Applicant

York Energy is the holder of an OPA Peaking Generation Contract for the subject facility. While an OPA contract provides some level of financial support, additional information demonstrating the financial position of the company overall (including information on financing and operational costs) would allow the Board to make an assessment of the Applicant's finances and whether the Applicant will be able to reliably participate in Ontario's energy market by maintaining a healthy financial position going forward.

The Board notes that York Energy is a new entity, created solely to build, own and operate the Project. In the absence of audited financial statements, it has been the Board's practice to accept either the financial statements of the parent company (accompanied by a parental guarantee) or pro forma financial statements of the Applicant, demonstrating the forecasted financial position of the applicant at least two years from the start of operations.

While the Applicant filed the financial statements of its partners, the Applicant did not file either a parental guarantee or its own financial statements. The Applicant stated that given York Energy's limited partnership structure, no parent company relationship exists, so no parental guarantee has been provided. [REDACTED]

[REDACTED]
[REDACTED] As noted above, York Energy did not file its own pro forma financial statements.

The Board notes that the purpose of the parental guarantee is to provide some evidence that an applicant is likely to carry out its financial obligations for the term of its

licence. The licensed entity in this case is York Energy, not Pristine or Harbert York Canada Company. Financial information that relates to the parent company is normally not useful if it is not accompanied by a guarantee. While the Board acknowledges that in a limited partnership structure there is no parent company relationship, the fact that the Applicant and its partners chose to structure their relationship in such a manner should not absolve the Applicant of the responsibility to file the required information. While it may be true that no parent company relationship exists, there is clearly an association among the parties. As such, a guarantee from one of the partners might have sufficed.

The Board notes that in its Phase 2 reply submission, the Applicant stated that “there is no basis to suggest York Energy will not be able to own or operate the YEC or reliably participate in the Ontario energy market.” The Board notes that the burden of proof is on the Applicant, not on other parties, and that the basis on which to evaluate York Energy’s reliable participation in the energy market is by way of analyzing York Energy’s financial position, not just York Energy’s ability to construct the Project.

The Board reviewed other information provided by the Applicant in support of its financial position. In response to Board staff interrogatories, the Applicant provided, in confidence, a term sheet and debt financing proposal in place of a guarantee or the Applicant’s pro forma financial statements. The Applicant also provided information on the financial capacity of the partners and the financial plan underpinning the continued development, construction and operation of the facility.

The Board accepts that the debt financing proposal provided by the Applicant demonstrates a healthy initial financial position of the Applicant by way of its relationship with its partner companies. The Board accepts that the Applicant’s current financial plan is aimed at funding the continued development, construction and operations of the facility.

In all of the circumstances, the Board finds that the additional information provided by the Applicant through interrogatories, coupled with the OPA contract, is sufficient financial information on which to base the issuance of a licence.

While there are additional concerns from certain parties with the location of the generator, as noted above, this is the purview of other regulatory bodies.

The Board notes CCKT’s concerns with respect to York Energy’s ability to participate reliably in the electricity market for the longer term. [REDACTED]

[REDACTED]
[REDACTED] As

noted above, in the absence of York Energy’s financials, the Board assessed the alternative supporting information provided by the Applicant and is satisfied that this information is sufficient for purposes of licensing the Applicant at this time. However, the Board will require the Applicant to provide actual financial statements to the Board reflecting York Energy’s first two full years of operations, as soon as they become available. The updated financial information will be used by the Board to monitor the financial position of the Applicant.

The Relevance of the Remaining Approvals

In terms of the remaining approvals, it is unclear whether the Applicant may encounter delays in receiving the remaining regulatory approvals and what effect such delays would have on the in-service date and financial health of the generator.

While the issues that will be considered as part of other regulatory approvals are out of scope for this proceeding, the timing of the receipt of those approvals may impact the financial success of the generation project. The Board’s licence application form does require an applicant to provide a list of approvals and the status of these approvals. This requirement is not designed to allow the Board to delve into the issues involved in those approvals, nor is there any requirement to ensure that all major approvals are in place before a generator licence can be issued. However, the Board may be assisted in understanding whether the proposed generator is likely to be constructed in a timely manner.

The CCKT posed interrogatories in this regard, and the Applicant responded that they have negotiated with key suppliers and contractors terms and conditions that will reduce the risk of cost overruns or financial penalties resulting from delays. However, the Board notes that reducing the risk of cost overruns or financial penalties does not confirm that there will be no adverse impacts on the financial health of the generator should serious delays arise. The Board notes that in response to Board staff interrogatory No. 1, York Energy submitted that, [REDACTED]

[REDACTED]
[REDACTED]

[REDACTED] In addition, as noted in response to Board staff interrogatory No. 2, [REDACTED]

[REDACTED]

The Board notes that failure to acquire Site Plan approval in accordance with the timelines identified will mean the Project is at risk of not proceeding. Likewise, the information provided by the Applicant in supporting its financial performance may no longer be valid if the proposed Project financing is not obtained. The Board directs York Energy to file with the Board proof of both Site Plan approval and close of debt financing within three years of issuance of this Decision. If the required information is not filed within three years of issuance of this Decision, this licence shall be deemed null and void.

In light of the December 2011 in-service date, the Board's expectation is that three years is sufficient time for the Applicant to acquire all the remaining approvals and confirm financing arrangements.

The Board agrees with the CCKT and the general position of other intervenors that each of the remaining approvals could change the size, location and/or operation of the proposed facility. However, it is the Board's view that the financial information provided in this proceeding by the Applicant can be relied upon for purposes of licensing the Applicant at this time, given the conditions placed on this licence. In addition, the licence will include the standard requirement found in all generator licences to report to the Board any material change in circumstances that adversely affects or is likely to adversely affect York Energy's business.

The Board notes that this application was filed in June 2009. The Board wishes to thank all parties that participated in this unusually long proceeding for their contributions. The Board made considerable efforts to ensure that all parties were heard and that the arguments were focused and relevant to this proceeding. While much of the information filed early in this proceeding was out of scope, the information that was relied upon was thoughtful and articulate, and assisted the Board in its adjudication of this matter.

IT IS THEREFORE ORDERED THAT:

1. The application for an electricity generation licence is granted, on such conditions as are contained in this Decision and Order and the attached licence.
2. The Applicant shall file with the Board documents proving that Site Plan approval has been obtained within three years of issuance of this Decision.

3. The Applicant shall file with the Board proof that debt financing has been obtained to proceed with the York Energy Centre project within three years of issuance of this Decision.
4. In the event that the Applicant does not satisfy the conditions identified in Order numbers 2 and 3 above, the licence attached to this Decision and Order shall be deemed null and void.
5. The Applicant shall submit to the Board actual audited financial statements reflecting the first two full years of operation by York Energy as soon as they become available. The financial statements may be filed in confidence.

DATED at Toronto, March 23, 2010.

ONTARIO ENERGY BOARD

Original signed by

Theodore Antonopoulos
Manager, Electricity Rate Applications