

ARBITRATION

between

WINDLECTRIC INC.

Claimant

-and-

THE CORPORATION OF LOYALIST TOWNSHIP

Respondent

DONALD L. MARSTON

Arbitrator

FINAL RULING AWARD

October 30, 2017

Claimant's Counsel:

Robert W. Staley, Jonathan G. Bell and Ian W. Thompson, of Bennett Jones LLP

Respondent's Counsel:

Tony Fleming, of Cunningham, Swan, Carty, Little and Bonham LLP

Arbitrator:

Donald L. Marston

Hearing Date

The hearing of this arbitration took place at the Ramada Kingston Hotel and Conference Centre in Kingston, Ontario on October 4, 2017. At the request of The Corporation of Loyalist Township (“Loyalist Township”), and with the agreement of Windlectric Inc. (“Windlectric”), this arbitration hearing was open for observation by the public.

In addition to counsel for Windlectric and counsel for Loyalist Township, the following representatives of Loyalist Township were also present:

- Robert Maddocks, Chief Administrative Officer;
- David Thompson, Director of Infrastructure Services; and
- David MacPherson, Manager of Public Works

Contractual Basis for this Arbitration

The contractual basis for this Arbitration arises from, and is evidenced by:

- the Road Use Agreement between Windlectric and Loyalist Township dated January 26, 2016 (the “RUA”), the dispute resolution provisions thereof comprising Part X– Dispute Resolution, at Sections 58 to 63 of the RUA;
- the Term Sheet Agreement between Windlectric and Loyalist Township entered into on August 23, 2017, which is attached as Schedule B to the Arbitration Notice and is also attached as Schedule B to the Submissions in this Arbitration of the Respondent Loyalist Township (the “Term Sheet Agreement”); and
- the Arbitrator Terms of Appointment Agreement between Windlectric, Loyalist Township and Donald L Marston.

Background to the Issues in this Arbitration

The RUA was entered into in connection with a renewable energy wind turbine project on Amherst Island within Loyalist Township (the “Project”). The RUA provides, amongst other things, for Windlectric’s rights and obligations to undertake modifications to certain road allowances and other infrastructure in connection with Windlectric’s construction of the Project.

As pointed out in Windlectric’s Notice to Arbitrate, dated September 13, 2017 (the “Arbitration Notice”), the RUA required Windlectric to prepare an Operations Plan (the “OP”) for approval by the Council of Loyalist Township that demonstrates how prudent and reasonable practices will be used during construction of the Project to minimize the level of disruption, disturbance and inconvenience to the residents of

Loyalist Township. The Arbitration Notice also stated that the 9th revision of the OP was approved on August 8, 2017 by a 5-1 vote by the Council of Loyalist Township.

The Arbitration Notice also noted that the RUA required Windlectric to engage an independent professional engineer to prepare a Pre-Construction Study (the “PCS”) prior to the commencement of construction. The PCS was to be prepared for approval by Loyalist Township.

As further noted in the Arbitration Notice the OP provides a written description of how construction of the Project will be performed (including with respect to municipal infrastructure) and explains that the PCS implements this written strategy into technical documents, noting in particular that pursuant to the terms of the RUA, the PCS must, amongst other things:

- identify municipal infrastructure that will or may be damaged, destroyed or otherwise adversely affected by the construction of the Project;
- evaluate the existing condition and service capacity of the municipal infrastructure so identified;
- Include plans and drawings related to the Project’s construction activities; and
- be developed through an iterative process whereby Windlectric is to submit one or more drafts of the PCS to Loyalist Township for its review and approval, or identification in writing of any deficiencies.

This iterative draft PCS submission process is addressed in the RUA, paragraph 18 thereof providing, in part, as follows:

“.... Such process shall continue until such deficiencies are satisfied. For greater certainty the parties will work together to resolve such deficiencies in a timely manner and once all deficiencies are resolved, will constitute the Municipality’s approval of the Pre-Construction Study....”

The Arbitration Notice notes that the first draft of the PCS was submitted to Loyalist Township on March 9, 2017, and, as contemplated by Section 18 of the RUA, Windlectric thereafter submitted iterative versions of the PCS to Loyalist Township and continued its efforts to finalize the PCS to the satisfaction of Loyalist Township subsequent to the final approval of the OP by Council on August 8, 2017.

A chronology of PCS submissions by Windlectric and responses by Loyalist Township (aggregating approximately 23 documents) is attached as Schedule A to the Arbitration Notice.

Schedule B to the Arbitration Notice is the Term Sheet Agreement entered into to resolve disputes about the timeliness of a notice to arbitrate issued by Windlectric in relation to the PCS; the Term Sheet Agreement setting out a series of steps to be taken leading to consideration by Loyalist Township of the PCS on September 11, 2017, including, amongst other things:

- Loyalist Township was to hold a public meeting on Amherst Island in relation to the PCS on September 6, 2017;
- as a precondition to holding the public meeting, Loyalist Township was to receive the complete PCS submission no later than August 29, 2017, such complete PCS submission to include:
 - “all necessary drawings, as amended to respond to comments provided by the Township up to and including August 24, 2017. In the event that Windlectric cannot complete the drawing revisions by the August 29 deadline, it shall be sufficient if Windlectric agrees to make such changes as are necessary to resolve the deficiency identified, with an undertaking to make best efforts to have such revisions completed before the September 6 public meeting, including without limitation such additional comments as may be submitted by the Township after August 24 2017, both parties acting reasonably.”
- in the event the PCS is not approved by Council at its September 11, 2017 meeting Windlectric may commence an arbitration under the RUA in connection with Council’s decision; and
- the designation of Donald Marston as sole arbitrator should such an arbitration be commenced by Windlectric.

The iterative process of PCS submissions and responses resulted in the issuance of a Loyalist Township Staff Report Review of the Windlectric Pre-Construction Study dated September 19, 2017 and approved by staff September 20, 2017 prepared for the 16th Session of Regular Council September 25, 2017, authored by Dave Thompson, Director of Infrastructure Services (the “Township Staff PCS Approval Recommendation”).

The Township Staff PCS Approval Recommendation includes an Executive Summary introduction that notes that after a previous September 11th Council meeting it was felt that three main topics were still required to be further addressed by Windlectric before Loyalist Township would consider approval of the PCS, including:

1. Advancing engineering drawings to a point that they were acceptable to both Jewell Engineering (an independent engineering consultant to the Township) and Loyalist Township staff;
2. That Loyalist Township Council be satisfied with the level of communication between Windlectric and Tri-Board Transportation; and
3. That the questions raised through the public meeting on September 6, including questions received prior to the September 6 public meeting, were suitably responded to by Windlectric to the satisfaction of Council.

The Township Staff PCS Approval Recommendation then includes the following express recommendation:

“Recommendation: That the report from the Director of Infrastructure Services, September 21, 2017 re: Review of Windlectric Pre-Construction Study, be received and the following be adopted:

1. That Council approve the Pre-construction Study prepared by Windlectric and as per the September 20th submission, as amended September 21, 2017, subject to the condition noted in Recommendation 2; and
2. That upon Loyalist Township Council’s approval of the Pre-construction Study, Windlectric may not commence work or haul any heavy loads on any Township road where the Survey Protocol, as outlined in the Operations Plan, has not been completed.”

Technical Engineering Issues

The Township Staff PCS Approval Recommendation also confirmed, by way of Background, that at the previous 15th Session of Council, Council had received a Report authored by the Director of Planning and Development Services that provides that the required scope of the PCS is limited as per the RUA to:

- plan views of the Island municipal roads that will be impacted by the Project. These drawings show the locations of the surveyed property lines, the location of the collector cables, culverts, fencing and guardrails, and entrances, as well as a limited number of details;
- overall Windlectric Project schedule which shows road and turbine construction commencing in September 2017 and being completed in February 2018;
- detailed schedules for road improvements and collector system construction on a road by road basis;
- a statement that an appropriate consultant (Windlectric has named Stantec) has been appointed the Environmental Monitor of the project;
- geotechnical report that evaluates existing road conditions and proposes requirements for upgrades to support Windlectric’s activities; and

- detailed drawings of proposed intersections of Windlectric’s private roads system with Township public roads and the location and construction details related to the electrical collector system.

The Township Staff PCS Approval Recommendation also provides the following (this portion is also reproduced here in its entirety because of the importance and scope of the Township Staff PCS Approval Recommendation):

“During the past several days Windlectric has forwarded to the Township, correspondence regarding their ongoing communications with Tri-Board Transportation.

Windlectric has also prepared a response matrix of all of the questions presented by the public and the responses from Windlectric.

Through the coordination of Jewell Engineering, their specialty sub - consultants (geotechnical and electrical engineering) have also had an opportunity to review the recent technical updates proposed by Windlectric. There has been steady dialogue between Township staff/consultants and Windlectric’s consultants with respect to the PCS, with a view to finalizing the PCS submission.

At approximately noon on Wednesday, September 20, Loyalist Township received a full submission of drawings and documentation for the Pre-construction study, entitled “Consolidated Pre-construction Study– September 20, 2017”. It is the understanding of staff that all of the most recent amendments requested by the Township have been included in this submission.

The Township’s Consultant was asked to immediately review the amendments to Windlectric’s September 20 submissions, and responded on September 21 with technical comments.

Windlectric responded later on the September 21 and addressed the latest comments from Jewell Engineering. **There are no further technical matters outstanding** (emphasis added). One of the comments provided to Windlectric was to include a new section to the PCS that includes the various responses to the concerns raised by Jewell Engineering. All ‘Response Tables’ prepared by Windlectric and submitted to Loyalist Township since the first submission of the Pre-construction Study, were added to the Pre-construction Study as Section J, and included in the September 21 2017 submission.”

Recommendation 2. of the Township Staff PCS Approval Recommendation is an express condition that Windlectric is not to commence work or haul any heavy loads

on any Township road where the Survey Protocol, as outlined in the Operations Plan, has not been completed.

Further reference to the survey protocol is made in the Township Staff PCS Approval Recommendation as follows:

“The approved Operations Plan includes the survey protocol. The main elements of the protocol was that properties owned by non-participating owners whose land(s) abut Township Roads to be utilized by Windlectric for their project construction, would be peer reviewed by the Township’s appointed land surveyor. This very detailed work is not finalized, but over 50% of the road segments have been completed. Windlectric has provided an updated schedule on the progress of the legal surveys and the peer reviews completed by the Townships appointed surveyor. The results of the peer review, with one exception, have been consistent with the surveyor’s opinions presented by Windlectric. It is expected that this work will be completed in the near future.”

Tri-Board Transportation

With respect to the level of communication between Windlectric and Tri-Board Transportation, the Township Staff PCS Approval Recommendation references its attached series of communications from Windlectric outlining correspondence with Tri-Board Transportation, submitted in response to Council’s recent inquiry on this topic, and provides that Council will need to satisfy themselves that the responses supplied meets their requirements.

The Arbitration Notice points out that the “Tri-Board School Transportation issue is unrelated to the PCS and, under the RUA, is not an appropriate precondition to the approval of the PCS. It appears to be an issue seized upon by vocal Project opponents in an effort to defeat the Project”.

In Its Arbitration Notice Windlectric stated that, prior to the Council meeting on September 11, 2017, Windlectric had reasonably addressed in writing all outstanding technical issues in relation to the PCS.

Public Questions

The Township Staff PCS Approval Recommendation also references questions that had been received from the public, some of which are identified in the Recommendation as relating to the PCS, and some of which do not, as follows:

“Also attached is a detailed listing of the questions received by the Township, both prior to and at the public information session held on September 6 with

respect to the PCS. **Some of these questions relate directly to the PCS documents, and Windlectric has provided answers to all of these questions** (emphasis added). The balance of the questions are not related to the PCS. Windlectric has answered these questions also. Identifying addresses have been redacted from this document by Township staff. Council will need to satisfy themselves that the responses to the public inquiries supplied by Windlectric meet their requirements.”

The Township Staff PCS Approval Recommendation is very much a key document in this Arbitration, which is why much of it and its background has been reproduced or referenced as part of this Final Ruling Award.

The Issues

There are two issues in this arbitration. The first issue is whether, given the wording of the Township Staff PCS Approval Recommendation and the positions and submissions of the parties in this matter, the PCS should be approved by the arbitrator.

The second issue is a timing issue relating to when and by whom the PCS is finally approved given the iterative process of PCS submissions by Windlectric and responses by Loyalist Township and the issuance of the Township Staff PCS Approval Recommendation to Council. Does it happen at the point in time when the Township Staff PCS Approval Recommendation was issued as the Claimant argues, or is Council approval of such Recommendation required under the Municipal Act as the Respondent maintains?

The Public Hearing in this Arbitration

Arbitration hearings are normally held privately. Individuals present typically include legal counsel, party representatives and the arbitrator(s). However, as Mr. Fleming has confirmed, given the significant public interest in this matter Loyalist Township requested and the parties agreed that this arbitration hearing would be open to the public.

At the outset of the hearing, I drew to counsels’ attention that I had been approached shortly before the hearing commenced by Ms. Le Lay on behalf of the Association to Protect Amherst Island (the “APAI”). Ms. Le Lay requested an opportunity to speak on behalf of the APAI during the course of the arbitration hearing. Ms. Le Lay asked if I would inquire if counsel for the parties would object to her speaking on behalf of the APAI during the arbitration hearing. I indicated to Ms. Le Lay that I had already discussed this with counsel and they had both indicated that they would be objecting, but I agreed to again raise her request with counsel, in fairness to Ms. Le Lay.

By way of background, on October 3, 2017 I had received, from counsel for Loyalist

Township a copy of a letter from the APAI dated September 24, 2017 addressed to the Mayor and Members of Council of Loyalist Township recommending, in effect, that Council defer consideration of the PCS or that the Township Solicitor be requested to comment on conditions suggested in the APAI letter in the in-camera session prior to open Council and that any approval of the PCS be subject to the conditions as identified in the APAI's letter.

In forwarding the APAI's letter to me, counsel for Loyalist Township made it clear that nothing in the APAI letter altered his view that the public has no legal right to participate in this arbitration process.

As a preliminary matter, and with the agreement of both parties, Mr. Jonathan Bell, counsel for Windlectric, addressed the issue of who is entitled to appear and make submissions or offer evidence at this arbitration hearing. Mr. Bell introduced his remarks by pointing out, in effect, that an arbitrator in a bilateral arbitration has no discretion to hear from anyone who is not a party; that even if the arbitrator did have such discretion, it ought not to be exercised in a case such as this where the issue is a narrow, discrete question of contractual interpretation between the parties and no one other than the parties has information that would help in the determination of contractual interpretation; and that the members of the public who wanted to speak, being largely the APAI, have had a number of appropriate forums in which to address their concerns throughout the process of this Project and continue to do so, emphasizing that this arbitration hearing is not an appropriate forum for the APAI's participation.

Mr. Bell commented on the relevant contractual documents in this matter, namely the arbitration provision in the RUA, the Arbitration Act 1991 and the Term Sheet Agreement. Mr. Bell also pointed out that there is nothing in the RUA or the Arbitration Act or the Term Sheet Agreement that provides for anyone other than the parties to participate in the arbitration or to make submissions. Accordingly, Mr. Bell argued, the arbitrator in this matter has no discretion to hear anyone else because the arbitrator's authority derives from the agreement of the parties and their intent was never to allow anyone else to make submissions or be heard.

Mr. Bell also referenced case law confirming that arbitration is subject to a private agreement between the parties and only the parties have a right to be heard in the arbitration pursuant to their agreement. Mr. Bell stated that he is "not trying to say that anyone here has ill intent, the whole purpose of this is not to allow parties foreign to the arbitration to hijack the process and that's not what was agreed to here and that's what separates arbitration from the court system".

Mr. Bell pointed out that the only issue before me is whether or not the PCS submitted on August 29, 2017, as amended, should be approved pursuant to the RUA. Emphasizing how *ad idem* the parties are, he also pointed out that the Respondent is not tendering evidence in these proceedings; and that the Loyalist Township PCS Staff Approval Recommendation confirms that technical deficiencies

identified in the PCS have been adequately addressed and all that remains comes down to a narrow question of contractual interpretation that counsel for both parties will be addressing that turns on the intention of the parties.

Mr. Bell's final point of argument related to the APAI and any other interested members of the public. Before going on to say that they've had their day to raise their objections, Mr. Bell acknowledged that normally an arbitration hearing is private. But here the parties agreed to make it open to the public, given the interest in this arbitration. This was, in his submission, a generous acknowledgment from the parties to allow the public to attend and hear what was going on but it certainly was never the intent that that gives them participation rights.

Mr. Bell also provided background information with respect to the number of opportunities APAI has had to make their submissions. He pointed out that before arriving at this arbitration process there was a party permitting process; a public process over two years that resulted in an appeal by the APAI that went to an environmental review tribunal (the "ERT") hearing review. After 25 days of hearings that were open to the public over a six month process, the ERT approved the project and the APAI appealed to the Divisional Court. The Divisional Court heard the appeal and rendered its decision Mr. Bell pointed out that, while this arbitration hearing is taking place, the APAI is undergoing a ministerial review appeal process in front of the Ministry of Environment. Mr. Bell acknowledged that those proceedings and appeals are all proper forums upon which the APAI had standing in bringing its concerns, but that this private arbitration is not such a proper forum.

By way of further background, as Mr. Bautista's affidavit in this matter confirms, there have been in the order of 12 opportunities at various Council meetings and public consultation processes for the public to show up and give comments on the RUA when it was approved by bylaw. And subsequently the OPS plan was approved by Council, and the final step in the process prior to construction is the PCS and the PCS approval plan, which has given rise to this arbitration. Mr. Bell again emphasized that the APAI have had, and continue to have, their opportunities to participate, but this arbitration hearing does not constitute one of those opportunities.

Mr. Staley, also counsel for Windlectric, added that Windlectric had agreed to a hearing open to the public in order to address a concern expressed by Loyalist Township that there be daylight into this because of the public interest in this process.

Counsel for Loyalist Township, Mr. Tony Fleming confirmed that the request to have the public attend and to make this open to the public was at the request of Loyalist Township; and that this was done precisely for the reason that there is a significant public interest in this matter. Mr. Fleming agreed with counsel for Windlectric that it was never the intent for this process to be one in which the public has the opportunity to participate because, as Mr. Bell had indicated, that is not the purpose

of an arbitration. Mr. Fleming agreed with Mr. Bell's submission on the law; that the law is very clear that an arbitration is a dispute resolution mechanism between two private parties and there is no legal right for a third party to participate in that process; that this arbitration is an expedited process to try and resolve the very narrow issues of dispute between the parties in this case. Accordingly, as Mr. Fleming confirmed, there is simply no jurisdiction conferred upon the arbitrator to allow the public to participate in this matter.

I agreed with both counsel on their submissions on the private contractual nature of this arbitration and accordingly, confirmed at the hearing that participation at this arbitration hearing would be restricted to the parties; the public were welcome to stay and observe but not to participate.

Windlectric's Hearing Submissions

Counsel for the Claimant, Mr. Robert Staley, presented the Claimant's case.

At the outset of his presentation, Mr. Staley confirmed, as had been previously discussed, that Windlectric's evidence in the hearing would consist of two witness statements from Ariel Bautista, dated September 28 and October 3, 2017 that would stand as his examination in chief, copies of which were provided to the Respondent's counsel and to the arbitrator. Mr. Staley noted that he did not propose to ask Mr. Bautista, who was present at the hearing, any additional questions. He also again confirmed that Mr. Bautista's witness statements constituted Windlectric's evidence for the purpose of the arbitration. Counsel for Loyalist Township, Mr. Fleming, confirmed that the Respondent did not intend to file any responding evidence or to cross-examine Mr. Bautista.

Mr. Staley identified the PCS as the subject matter of the hearing. He noted that it was prepared pursuant to the RUA; the most recent version of the PCS being dated September 21, 2017 following a number of months of iterations of the PCS having been submitted by Windlectric for Loyalist Township's review and comment. He pointed out that in addition to the technical issues raised by the PCS Windlectric had also attempted to address other concerns that, in Windlectric's submission, fell outside of the four corners of the PCS, all in an effort to remove obstacles to the approval, first of the OP and subsequently of the PCS.

Notwithstanding that the PCS had been recommended for approval by Loyalist Township staff, as articulated in the Loyalist Staff PCS Approval Recommendation, Mr. Staley pointed out that Township Council had twice, once as council of the whole and subsequently as committee of the whole, deferred consideration of the PCS. He also asserted Windlectric's submission that Council approval of the PCS is not actually required as such PCS approval arises by virtue of the completion of the iterative process; and he added that Windlectric had hoped that Council would have approved the PCS.

In arguing Claimant's submission that successful completion of the iterative process rather than Council approval is all that is required, Mr. Staley pointed out that the RUA, the central agreement to the OP and the PCS, was authorized by Council in December 2015 pursuant to a Council bylaw; and he argued, in response to Mr. Fleming's submission, that any delegation of authority represented by the RUA was approved by Council when the bylaw authorizing the RUA was adopted.

Mr. Staley reviewed important case law; the *Bhasin* case, a 2014 decision of the Supreme Court of Canada relating to the duty of honesty and good faith in the performance of contracts, and *Greenberg v. Meffert*, a 1985 decision of the Ontario Court of Appeal relating to contracts where a party's performance under the contract is subject to the exercise of discretion by the other party. Mr. Staley pointed out, in referencing these cases, that the discretion to be exercised by Loyalist Township under the RUA must be exercised subject to the good faith standard and also subject to an objective standard of reasonableness.

Mr. Staley pointed out that the OP provides for an express process of public comments including a public hearing and a public meeting followed by an iterative process leading up to the OP being submitted to Council and Council having the right to ultimately expressly vote and decide on the OP.

By comparison, as Mr. Staley noted, Part V of the RUA deals with the duty to prepare the PCS, to be prepared by the Project engineer. Accordingly the OP becomes the framework document that describes how Windlectric is to undertake the Project in such a way as to minimize disruption to municipal services and inconvenience to residents. By comparison the PCS is the technical means by which measures that are relevant to the use of roads are implemented through technical means, including technical drawings, a matter uniquely suited to technical experts and outside the natural expertise of elected politicians; as Mr. Staley noted, in effect, the PCS exercise is a much more technical exercise than is represented by the exercise leading to the OP.

Further, as Mr. Staley pointed out, in effect, Section 18 of the RUA references the iterative process of submissions and responses leading to the Municipality's approval of the PCS, by comparison to Council's approval rights relating to the OP; such technical responses being written by staff and informed by the staff's or by the Township's outside technical experts; and that once the last of the comments has been provided to the satisfaction of the Township staff then, as Mr. Staley submits, the PCS had been approved and there is no further requirement that the PCS has to go to Council as the RUA does not require Council approval of the RUA; once staff, after dealing with the PCS submissions in an objectively reasonable manner, had acknowledged in their September 22nd report that there were no further technical matters outstanding, Mr. Staley argued, the PCS was then approved.

Loyalist Township's Hearing Submissions

Counsel for Loyalist Township, Mr. Tony Fleming, noted, before going into his submissions that he agreed with Mr. Staley that the reasons for not having the decision from Council on the PCS are not relevant to the decision to be made by the arbitrator in this matter; and that he agreed with Mr. Staley's request for a decision from me at my earliest opportunity in order not to unduly delay the Project, with written reasons to follow.

Mr. Fleming confirmed that Loyalist Township is not tendering evidence in this hearing contrary to that provided by Mr. Bautista with respect to the issues of technical deficiencies and the resolution of those technical deficiencies related to the PCS; agreeing that the evidence before me includes the Township Staff PCS Approval Recommendation confirming that the technical deficiencies have been addressed to staff's satisfaction. Mr. Fleming further confirmed that the only significant issue for me to deal with as arbitrator, other than the actual approval itself, is the issue of timeliness upon which Mr. Staley dealt with at length. Accordingly Mr. Fleming confirmed that he would deal, as he had in his written submissions, with the interpretation of the agreement in terms of whether or not Council is the appropriate entity to approve the PCS.

Introducing first the contractual interpretation issue, Mr. Fleming acknowledged the distinction between the OP versus the PCS in terms of process and he indicated that his primary submission in that regard would relate to the Term Sheet Agreement. Mr. Fleming stated that his second submission would relate to the law set out in the Municipal Act and how that statute governs approvals of a municipality.

Mr. Fleming's presentation included, in effect and without limitation, the following:

- Mr. Fleming agreed that the PCS is a technical document but he pointed out the importance of appreciating that the impact of that technical document goes beyond merely engineering as the municipal government is responsible for protecting the public interest and the PCS describes the reconstruction of more than 20 km of road on Amherst Island, a road not only to provide for the construction of the Project but also a road that will be maintained by the Township for the foreseeable future. Accordingly, he emphasized that this is an important issue that transcends merely the technical.
- Referencing section 18 of the RUA, Mr. Fleming pointed out that the issue before me with respect to timing is who determines when deficiencies have been resolved. Section 18 of the RUA provides, in part, that the parties will work together to resolve such deficiencies "in a timely manner and once all deficiencies are resolved, will constitute the Municipality's approval of the Pre-Construction Study". Mr. Fleming pointed out that Mr. Staley focused on "Municipality" and "approval" and Mr. Fleming's focus is on "once

deficiencies are resolved”; so the timing issue before me is who determines when the deficiencies are resolved, Mr. Staley having suggested that Township staff make that determination. Mr. Fleming, on the other hand, referred to 5.1 of the Municipal Act that provides “The Powers of the municipality shall be exercised by its council. Mr. Fleming took issue with Mr. Staley’s submission that the passage of the 2015 bylaw approving the RUA therefore approved the process by which the Municipality would approve the PCS, Mr. Fleming emphasizing that Loyalist Township is a municipal government that takes its authority from the Municipal Act and that it can take no action that is not authorized by the Municipal Act. Referring to the Municipal Act Mr. Fleming pointed out that a delegation under the Municipal Act must be “to a person or body” and no such person or body is identified in the RUA to which Council’s approval authority has been delegated.

- Mr. Fleming acknowledged that the language is different as between processing the OP and processing the PCS; but, he disagreed with Mr. Staley’s argument that Section 18 of the RUA, as a matter of contract interpretation, means that staff have been delegated that approval authority. Mr. Fleming emphasized that there is no basis for a finding in law that Section 18 of the RUA has lawfully delegated the authority to make the decision from Council to staff; in the absence of specific wording delegating authority, Mr. Fleming submitted that Council had retained that approval function.
- Mr. Fleming also pointed out that Council makes decisions on a variety of technical matters; that municipal councils routinely approve tenders for all kinds of construction projects; they provide planning approvals dealing with engineering, storm water management, environmental issues, architecture and any number of technical matters; and that Council is a level of government charged with making decisions in the public interest and when those decisions relate to technical matters Council relies on its staff’s recommendations and on external experts where necessary and appropriate. Accordingly, Mr. Fleming, in effect, stated that the Township Staff PCS Approval Recommendation constitutes but another such staff recommendation for submission to Council as the municipality’s decision-making body.
- Mr. Fleming’s closing argument related to Term Sheet Agreement, paragraph 6 of which reads “Council will consider the PCS at its September 11th meeting” and paragraph 7, provides, in effect, for the possibility of this arbitration “In the event that council does not approve the PCS...” Notwithstanding Mr. Staley’s submission that his client agreed to the Term Sheet Agreement as a matter of expediency, Mr. Fleming argued that when Windlectric did so they clearly agreed that Council is the approval authority

and, he argues that is absolutely consistent with the RUA and also with the Municipal Act obligations upon which the Municipality must act.

In response to my questioning if Council had questioned the Township Staff PCS Approval Recommendation in order to satisfy itself that the Township Staff PCS Approval Recommendation was an appropriate submission, Mr. Fleming confirmed that Council was provided with the entire PCS at meetings to ask questions of staff and that Council also had the benefit of the public session on September 6 where members of the public asked various questions, the answers to which are also part of the staff report; accordingly Council was given all the information that staff had in order to allow Council to understand the PCS matters, and if necessary to ask questions.

When I asked Mr. Fleming to comment, if he could, on why Council had not made the approval decision that I am being asked to make in this arbitration, Mr. Fleming declined to do so, explaining that any knowledge he has on those matters is subject to solicitor/client privilege.

Mr. Fleming did confirm, when I asked, that he did not take issue with the Township Staff PCS Approval Recommendation; and that Council has seen the Township Staff PCS Approval Recommendation and that no objection has been taken with respect to it.

Rebuttal by Mr. Staley

In his rebuttal to Mr. Fleming, Mr. Staley referenced section 23.1 of the Municipal Act, pointing out that it provides for broad delegation of authority to a “person or body” and that, in effect, on a plain reading of the RUA, the delegation of authority to staff, whether called a person or a body, is caught by that delegation of authority section. Mr. Staley emphasized, in effect, that the methods of approval for the PCS and the OP are different; and there is no requirement that the PCS goes to Council; Mr. Staley emphasizing that this is a matter for the application of normal principles of contract interpretation; that the approval provision in the RUA provides for a deemed approval; and that it follows that no meeting is required to approve it as the resolution of issues as confirmed by staff constitutes approval.

Mr. Staley pointed out that, 13 days after the PCS was completed, and 12 days after staff had confirmed there were no technical issues Council had not identified a single issue, and that that would suggest that all deficiencies have not been resolved but the Municipality has offered no evidence of that; no deficiencies have been identified and accordingly Council has said nothing to contradict that the PCS has, in effect, been deemed to be approved; nothing problematic has been identified subsequent to September 22, 2017.

Mr. Staley also responded with respect to the interpretation of the Term Sheet Agreement, pointing out that it provided a pathway for Council to consider the matter but that there is nothing in the Term Sheet Agreement that modifies or varies Section 18 of the RUA; and there is no reason why the PCS is not approved, cannot be approved and has not been approved as all requirements for its approval have been met.

Mr. Staley also pointed out that I am not being asked to decide today whether the PCS is approved as of today or as of some other date; the important thing for Windlectric is that it's approved today on any basis, whether it's as of today or as of September 22 or whenever.

Mr. Fleming confirmed his agreement with Mr. Staley's concern about the timing of my approval of the PCS as it is of importance to Windlectric in terms of moving the Project forward; and he confirmed he was prepared to wait for my written reasons with respect to the more detail submissions made by counsel with respect to the Timing Issue.

With respect to Mr. Staley's comments relating to the Municipal Act Section 23.1 reference to "a person or body", Mr. Fleming agreed that it is very broad language providing authority to delegate to a broad range of either individuals or groups but it does still require that the delegation be specific; that if Council delegates it must do so clearly in order that everyone knows to whom the power has been delegated to avoid a situation where municipal authority could be exercised by two different people, both of them giving contrary decisions; accordingly Council must identify to whom authority is being delegated. Mr. Fleming again emphasized that unless the authority is clearly and expressly delegated, matters must come to Council for approval.

Arbitrator's Decision

The first issue to be decided by me in this arbitration is whether the PCS as submitted September 20, 2017 and as amended September 21, 2017, should be approved. In the Township Staff PCS Approval Recommendation Loyalist Township Council received an express recommendation from its Director of Infrastructure Services that Council approve the PCS. The PCS is a technical engineering study relating to the design and construction of the Project; and the Township Staff PCS Approval recommendation that expressly recommended Council approval clearly confirmed that there are no further technical matters outstanding relating to the PCS.

Notwithstanding the clear wording of the Township Staff PCS Approval Recommendation recommending approval of the PCS, Council has twice deferred its decision on whether the PCS should be approved; and this arbitration arises pursuant to paragraph 7 of the Term Sheet Agreement that provides that if Council

does not approve the PCS at its September 11, 2017 meeting Windlectric may commence this arbitration.

Not only has Council deferred its consideration of the PCS but in addition:

- Loyalist Township has tendered no evidence in these arbitration proceedings;
- Loyalist Township takes no issue with the factual chronology set out in the affidavit of Ariel Bautista sworn September 28 2017 as it relates to the comments and responses submitted by the parties to resolve technical deficiencies with the PCS;
- Loyalist Township has agreed jointly with Windlectric that I should make no finding, ruling or decision related to bad faith in this arbitration proceeding;
- Loyalist Township identifies the sole issue in this arbitration as whether the PCS submitted by Windlectric to the Township on August 29, 2017, as subsequently revised, should be approved; and
- Loyalist Township also disputes the submissions of Windlectric that the issuance of the Township Staff PCS Approval Recommendation constitutes an approval of the PCS by Loyalist Township, pointing out that that would be an impermissibly narrow interpretation of the RUA, as Township Council, and not staff, is the approval authority for the PCS.

Mr. Fleming has also confirmed that Loyalist Township has submitted no evidence contrary to Mr. Bautista's affidavit that the technical deficiencies have been addressed. Mr. Fleming also confirmed to me that he has received no direction to take issue with the Township Staff PCS Approval Recommendation.

Loyalist Township does however disagree with the assertion that a decision to approve the PCS pursuant to section 18 of the RUA could be made (or was in fact made) by Township staff.

I will be addressing this second issue relating to the timing of any approval of the PCS subsequently in this decision.

Returning to the issue of whether the PCS should be approved, and before confirming my written decision in that regard, there are a number of developments and considerations that I want to note have arisen in the course of this arbitration:

- When I was first approached by counsel on this matter it was explained to me that the parties were working through the iterative process involved in

finalizing the PCS and that, if an arbitration became necessary, the issue would likely be one of a technical engineering nature.

- As it turned out however, and as the parties have acknowledged and agreed, all the technical issues in the PCS have been adequately addressed; there are no further technical matters outstanding; and since Council has declined to do so, I am being asked to decide whether the PCS should be approved and also to rule on when and how the PCS is to be determined to be approved, as a matter of contract interpretation of the RUA and as a matter of law.
- In the course of preparing for this arbitration, I became more aware of the controversy, particularly from local residents, with respect to the Project. On October 3, 2017, I received from counsel for Loyalist Township, a copy of a six page letter from the president of APAI dated September 24, 2017 and addressed to the Mayor and Members of Council of Loyalist Township (the “APAI letter”) recommending deferral by Council of its consideration of the PCS to the next council meeting and recommending, among other things, that outstanding issues as set out in the APAI letter be resolved or if Council was not prepared to consider deferral, that the Township Solicitor be requested to comment on each of a number of conditions at the in-camera session prior to open Council and that the PCS be approved subject to certain conditions as out in detail in the APAI letter.

As I ruled earlier, I concur with counsel that the APAI lacks standing in this arbitration and hence is not entitled to participate in this arbitration. However, given my late receipt of the APAI letter, and as this Project has been years in the making, I reviewed the Project history as revealed during the course of this arbitration. The history listed below has already been noted by me, or by counsel, or included in Mr. Bautista’s affidavit. The arbitration documents reviewed record and evidence that:

- The Project is the product of many years of consultations and planning with local residents, all levels of government and environmental experts. Consultations began in or around 2008;
- in February 2011, the Ontario Power Authority awarded a contract to Windlectric to supply electricity generated from the renewable Energy generating wind power facility to be constructed on Amherst Island;
- On April 18, 2013, Windlectric submitted a 3,400 page Renewable Energy Approval (“REA”) application to the Ontario Ministry of the Environment and Climate Change (“MOECC”) to develop, construct and operate the Project;

- The REA was granted by the MOECC on or about August 24, 2015 and allows Windlectric to construct and operate the Project;
- At its December 14, 2015 meeting Council of Loyalist Township passed a bylaw authorizing the RUA;
- Following a significant iterative process pursuant to the RUA ,on August 8, 2017 Council finally approved the OP, prepared to demonstrate how prudent and reasonable practices are to be used during the construction of the Project to minimize the level of disruption, disturbance and inconvenience to the Township’s residents;
- A first draft of the PCS was submitted by Windlectric on March 9, 2017, commencing the iterative process of submitting, meeting and receiving feedback on 5 additional iterative versions of the PCS; and leading finally to this private arbitration proceeding pursuant to the Term Sheet Agreement.

As indicated, my Project history review arose as a result of my receipt of the APAI letter; and, my resultant interest in determining what opportunities APAI may have had to make submissions. These include the permitting process; a public process over two years; an appeal by the APAI to the ERT; and a further appeal by the APAI to the Divisional Court; and in addition, counsel has pointed out the APAI is now further appealing the project to the Ministry of the Environment. Further, as Mr. Bautista has pointed out there have been some twelve additional opportunities for the public to show up and provide comments on the RUA at various council meetings and public consultations, and as well during the OP and PCS processes. Mr. Bell also pointed out that all the appeals he identified were proper forums for the APAI to make its submissions, unlike this arbitration which is a private arbitration between the two contracting parties, Windlectric and Loyalist Township.

Accordingly, the evidence demonstrates that the APAI has indeed had opportunities to make its submissions on the Project and continues to do so before the Ministry of the Environment. My review of the Project history is included in my decision as it has been important to my understanding of the Project and of the processes involved in this Project.

I turn now to my decision on the two main issues. Should the PCS be approved? (the “Approval Issue”) And if so, how should the effective date of the PCS approval be determined? (the “Timing Issue”). My decisions herein are taken after my careful consideration of the issues, the submissions of the parties, the documentary evidence in this matter, the submissions, case law and statute references and the able and impressive arguments of counsel for both parties.

On the Approval Issue, as I determined and stated at the conclusion of the hearing on October 4, 2017, given the acknowledgment in the Township Staff PCS Approval

Recommendation that there are no further technical matters outstanding; given that the Township Staff PCS Approval Recommendation has in fact been seen by Council and no objection has been taken with respect to it; and given that no evidence has been submitted by Loyalist Township in this hearing contrary to that provided by Windlectric, I confirm my decision that, as recommended in the Township Staff PCS Approval Recommendation, the PCS should be and is approved by me. Accordingly, consistent with the Recommendation set out in the Township Staff PCS Approval Recommendation, the Pre-construction Study prepared by Windlectric as per the September 20th submission, as amended September 21, 2017 is approved subject to the condition that Windlectric may not commence work or haul any heavy loads on any Township road where the Survey Protocol, as outlined in the OP, has not been completed.

With respect to the Timing Issue, the Submissions and impressive arguments of counsel for each party have been summarized herein. Windlectric argues that as the RUA expressly provides for Council's approval of the OP, but the RUA does not expressly provide for the approval of the PCS but rather for the approval of the Municipality; that the issuance of the Township Staff PCS Approval Recommendation by municipal staff constituted the approval of the PCS and that, as a matter of contract interpretation, the approval of the PCS occurred when the Township Staff PCS Approval Recommendation was finalized. Loyalist Township argues, in effect, that a municipality is governed by the Municipal Act; and in the absence of any express delegation of authority pursuant to the Municipal Act only Council is authorized to approve the Township Staff PCS Approval Recommendation.

After careful consideration of the submissions by counsel on the Timing Issue, I conclude and have decided that Mr. Fleming's argument on behalf of Loyalist Township prevails, and the Municipal Act governs with respect to municipal approvals in the absence of express delegation of authority under the Municipal Act. Accordingly I now confirm that the effective date of my approval of the PCS was the arbitration hearing date, October 4, 2017, and that my approval decision was based on and is subject to the Township Staff PCS Approval Recommendation and, as already noted, its express condition that Windlectric may not commence work or haul any heavy loads on any Township road where the Survey Protocol, as outlined in the OP, has not been completed.

Date and Signature

This Final Ruling Award is issued at Toronto, Ontario on the 30th day of October, 2017 as duly signed by the Arbitrator below.



Donald L. Marston
Arbitrator