EB-2010-0253

IN THE MATTER OF the Electricity Act, 1998 as amended (the "Electricity Act");

AND IN THE MATTER OF THE an application by Plateau Wind Inc. for an order or orders pursuant to section 41(9) of the Electricity Act establishing the location of Plateau Wind's distribution facilities within certain road allowances owned by the Municipality of Grey Highlands.

AND IN THE MATTER OF the Board's Decision dated January 12, 2011 (File Number EB-2010-0253)

# NOTICE OF MOTION

The Corporation of the Municipality of Grey Highlands (the "Municipality") will make a Motion to the Ontario Energy Board (the "Board" on a date and at a time to be determined by the Board.

PROPOSED METHOD OF HEARING: The Municipality proposes that the Motion be made orally or in writing as pleases the Board.

THE MOTION IS FOR an Order of the Board:

1. To review and overturn the Decision of January 12, 2011 wherein the Board determined that the Applicant was a "distributor" for the purposes of section 41 of the *Electricity Act*.

2. As a result of the foregoing, an Order declaring that Ontario Energy Board has no jurisdiction to determine the location of Plateau's facilities within the road allowances owned by the Municipality.

3. An Order staying the original decision until such time as a determination on the motion has been issued.

THE GROUNDS FOR THE MOTION ARE:

4. The Municipality respectfully submits that the findings of Board raise a question of the correctness of the decision on the following grounds:

    a. The Board erred in its interpretation and application of Section 4.0.1of Ontario Regulation 161/99, which was an error of law;

b. The Board erred in the determination of its jurisdiction, which was an error of law;

c. The Board erred in the interpretation of the definitions of "renewable energy generation facility", "distribution systems" and "distribute" in the *Electricity Act* which was an error of law;

d. The Board erred in determining the location of the structures under section 41(9) of the Act based on an erroneous conclusion (at paragraph 44 of the Decision) that "the two parties [the Municipality and the Applicant] had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances". The foregoing constitutes a mixed error of fact and law.

Details concerning the foregoing grounds are provided below.

5. The Municipality may provide such further and other grounds as counsel for the Municipality may submit and the Board allow.

**Detailed Explanation of the Grounds**

***The Board erred in its interpretation and application of Section 4.0.1of Ontario Regulation 161/99, which was an error of law;***

6. The Board incorrectly attributed a position to the Municipality that it had not taken. Specifically the Board , at paragraph 48 of the Decision, stated that "[c]ontrary to the assertion of Grey Highlands, the fact that Plateau does not require a license does not imply that they are not a distributor".

7. The Municipality's submission at paragraphs 23 and 24 were particularly clear:

*23. If the distribution lines associated with a "renewable energy generation facility" constituted a "distribution system" as defined in the Electricity Act, Plateau would be required to be licensed as a distributor under section 57 of the Ontario Energy Board Act.*

*24. Contrary to the assertions of the Applicant's solicitor concerning Ont. Reg. 161/99 (at Tab 2, Page 5, Lines 7-11 and footnote 5), the reason Plateau does not require a distributor's license is due solely to the fact that its distribution lines are defined to be a component of a "renewable energy generation facility" and are not a "distribution system".*

8. The Municipality re-iterates its primary submission that the specific reason the Applicant does not require a distributor's license is that the distribution lines

and/or facilities connecting the Applicant's proposed turbines to the local distribution system of Hydro One Networks are part of a "renewable energy generation facility" as defined in the *Electricity Act* and are not a "distribution system" as defined in the Act.

9. In summary, the Applicant does not need to take the benefit of the "licensing exemption" found in section 4.0.1 of Regulation 161/09 because it has no "distribution system" for which a specific distribution license is required.

10. Instead, once the Applicant receives a license to operate its "renewable energy generation facility" the "associated or ancillary equipment, systems...as may be prescribed by regulation" would also be "licensed".

11. Furthermore, the fact that the Applicant's distribution lines are a component of a defined "renewable energy generation facility" and are not a separate, licensable "distribution system" is further highlighted by the fact that other obligations imposed upon entities that are "distributors" do no apply to the Applicant.

12. If the Board's original decision were to be upheld the Applicant would be required among other things produce a "Conditions of Service" document and to comply with all aspects of the Distribution Code.

13. Even if the Applicant were subject to a licensing exemption under section 4.0.1 of Ont. Reg. 161/09 (which the Municipality does not accept) there is no exemption from complying with other obligations, duties and responsibilities of a "distributor". Accordingly if the Board's decision is found to be correct, the Applicant as distributor would have to comply with all other obligations of distributor effected under the legislation, regulations, codes and policies.

14. In the Municipality's respectful submission, the Board in relying upon section 4.0.1 of Regulation 161/09 failed to consider the totality of the statutory and regulatory regime that applies to a "distributor" and failed to properly consider all aspects of the Municipality's submissions.

15. The Board, in the Municipality's respectful submission, gave no consideration to the Municipality's original submissions on the totality of the statutory and regulatory regime found at Part F of its original submissions, in reliance upon an erroneous interpretation and application of section 4.0.1 of Regulation 161/09.

16. The proper, strict construction of section 41 of the *Electricity Act* is that in the absence of the defined term "generator", the section has no application to any distribution lines that are a component of a "renewable energy generation facility".

17. Pursuant to section 1(4) and 1(5) of Ont. Reg 160/09 "distribution lines of less than 50 kilometers in length that are...used to distribute electricity within the facility or from the facility to the distribution system of the distributor in whose distribution service area the renewable energy generation facility is located" are

a component of a “renewable energy generation facility”.

18. The Municipality respectfully submits that the Province in enacting the *Green Energy Act* and its consequential amendments to other legislation clearly turned its mind to the specific consequence of the definitions in the *Electricity Act*. Specifically the Province chose to include such distribution lines, that would otherwise constitute a “distribution system” under that Act, within the definition of a “renewable energy generation facility”. It also chose not to amend section 41 of the *Electricity Act* to include “generators”.

19. The Municipality repeats and relies upon its original submissions concerning the strict interpretation of statutes that convey special provisions found at paragraph 5 through 11 of its original submissions which are repeated below.

20. The Municipality respectfully submits that the rights bestowed under section 41 of the *Electricity Act* represent a significant and substantial incursion upon the exclusive jurisdiction vested in municipal corporations concerning the use, occupation and alteration of municipal roads.

21. The rights bestowed under section 41 represent a special privilege granted to transmitters and distributors.

22. Where special privileges are granted under statutory authority, the legislation granting such special privilege must be strictly construed.

    *Re Stronach* (1928), 61 O.L.R. 636 (C.A.) (**Caselaw, Tab 2**)
    *Re Carter and Sudbury et. al.* (1949) O.R. 455 (**Caselaw, Tab 2**)

23. It is well established law in Ontario, that statutes or by-laws that restrict, control or interfere with rights of enjoyment normally vested in the owner of property must be strictly construed.

    *City of Thunder Bay v. Potts* (1982), 39 O.R. (2d) 725 (H.C.J.) (**Caselaw, Tab 2**)
    *Coleman v. McCallum* (1913), 4 O.W.N. 1127 (H.C.J.) (**Caselaw, Tab 2**)

24. The rights bestowed under section 41 of the *Electricity Act* constitute special privileges which clearly impose restrictions and control upon and/or interfere with the rights of ownership vested in the Municipality pursuant to sections 24 through 68 of the *Municipal Act, 2001* concerning roads under its jurisdiction.

25. But for the statutory provisions of section 41 of the *Electricity Act*, no person is may alter, erect any structures or buildings upon , or occupy a municipal road (including unopened road allowances) without the written consent of the municipality.

26. Accordingly, section 41 of the *Electricity Act* must be strictly construed in its application to the Applicant and its Project.

27. The Municipality respectfully submits that the Board failed to give any regard to the rules of statutory interpretation established by the Ontario courts and specifically that if failed to strictly construed the special privileges bestowed under section 41 of the *Electricity Act*.

28. In the alternative, if the Board rejects the foregoing analysis of the definitions in the Electricity Act and the principle of strict construction and concludes that section 4.0.1 of Ont. Reg. 161/99, as it relates to the distribution lines and/or facilities that will connect the Applicant's turbines to the local distribution system of Hydro One Networks is determinative of or is a factor in determining whether such lines and/or facilities are a "distribution system" as defined in the *Electricity Act*, the Municipality respectfully submits that the Board erred in interpreting that section.

29. Specifically the Board failed to consider the introductory paragraph which applies to all of the subsections set out therein, including subsection (d).

30. The Board specifically stated that the exemption in section 4.0.1 "applies to a distributor when it distributes electricity solely for the purpose of conveying it into the IESO-controlled grid". That analysis or view of the exemption represents a patent error.

31. The condition precedent to the application of the exemption in any of the situations outlined in subsection (a), (b), (c), or (d) is that the distributor must "distribute electricity for a price no greater than that required to recover all reasonable costs".

32. The Board failed to consider that condition precedent in its decision. Furthermore, it received no evidence from the Applicant to confirm that the Applicant's project met all conditions for the exemption.

33. In addition to the foregoing, subsection (1.1) of section 4.0.1 clearly reveals that the section itself has no applicability to the Applicant activities. Subsection (1.1) states:

> "For the purposes of subsection (1), the reasonable costs that may be recovered from a consumer must be calculated in a manner that ensures the consumer receives the full benefit of their proportionate share of any financial assistance to which the distributor is entitled under the Ontario Clean Energy Benefit Act, 2010. O. Reg. 496/10, s. 2 (3)."

34. Subsection (1.1) makes specific reference to "consumers" as it relates to the condition precedent of determining that the distributor "distributes electricity for a price no greater than that required to recover all reasonable costs".

35. The term "consumer" is defined in the *Electricity Act* to mean "a person who uses, for the person's own consumption electricity that it did not generate". As noted at paragraph 4 of the Decision, the Applicant proposes to deliver electricity

"to the existing local distribution system of Hydro One Networks".

36. As the Applicant will not deliver the electricity to a consumer as defined in the Act, it would be patently incorrect to conclude that section 4.0.1 applies to Applicant's Project including the associated distribution lines and facilities.

37. The Municipality respectfully submits that the Board's misconstruction of the Municipality's argument as noted at paragraph 8 above and its error in interpreting and applying section 4.0.1 was the basis of an erroneous interpretation of the definitions in the *Electricity Act*, including the definition of a distribution system.

***The Board erred in the determination of its jurisdiction and the interpretation of the definitions of "renewable energy generation facility", "distribution systems" and "distribute" in the Electricity Act which represent errors of law;***

38. At paragraph 9, the Board stated that "it is not within the Board's jurisdiction in this proceeding to consider any aspect of Plateau's proposed wind generation facilities".

39. The Municipality respectfully submits that the Board erred in its assessment of its jurisdiction and failed to properly exercise its jurisdiction.

40. Simply stated the Board cannot consider section 41 of the *Electricity Act* without giving due consideration to the existence of a supply of electricity.

41. In the *Electricity Act*, the definition of "distribute" means to "convey electricity" while the definition of a "distribution system" is a "system for distributing electricity".

42. The Municipality respectfully submits that in the absence of any electricity or any source from which the Applicant proposes to "distribute" electricity there can be no "distribution system" and accordingly there can be no matter for resolution pursuant to section 41 of the *Electricity Act*.

43. The Board failed to identify whether the Applicant's Project was licensed under section 57 of the *Ontario Energy Board Act*.

44. As of February 14, 2011, the Applicant, to the best of the knowledge of the Municipality, does not hold a license issued pursuant to section 57 of the Ontario Energy Board Act.
***Affidavit of Dan Best***

45. Pursuant to section 57 of the *Ontario Energy Board Act*, until such time as the Applicant has received its license to operate the "renewable energy generation facility" the applicant has no electricity to convey and/or no source from which it can distribute electricity.

46. In the absence of any electricity to distribute, by definition, the Applicant is incapable of owning or operating a distribution system, cannot be a distributor and as such is afforded no rights or protections under section 41 of the *Electricity Act*.

47. Notwithstanding its own statement that it could not "consider any aspect of Plateau's proposed wind generation facilities", the Board in paragraph 10 of the Decision made specific reference to some of the processes undertaken by the Applicant concerning its Project (which the Board identified to include the turbines at paragraph 3 of its decision).

48. The foregoing represents a fundamental flaw in the adjudication process and analysis undertaken by the Board for two reasons. Firstly, the Board ignored its own preliminary (but erroneous) determination as to jurisdiction; secondly, when the Board pursued the analysis of Plateau's proposed wind generation facilities it failed to consider the most salient aspect of the Project being the fact that it is not yet licensed.

49. The Board's incorrect assessment of its jurisdiction and subsequent failure to abide by that assessment demonstrate the existence of profound procedural irregularities which provide a further basis to doubt the correctness of its decision.

***The Board erred in determining the location of the structures under section 41(9) of the Act based on an erroneous statement of fact (at paragraph 44 of the Decision) that "the two parties [the Municipality and the Applicant] had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances"***.

50. The only reference in the Board's decision to any specific evidence that is germane to the issue to be determined under section 41(9) of the Electricity Act is contained at paragraph 44 wherein the Board stated that "*the two parties [the Municipality and the Applicant] had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances*"

51. Further, at paragraph 46 of the Decision the Board noted that "the Board has considered the only evidence provided in this proceeding... and that evidence has been provided by Plateau".

52. The Municipality respectfully submits that it is reasonable to consider that the specific evidence mentioned by the Board in its decision (at paragraph 44) represents the substantial, significant or salient evidence upon which the Board based its conclusions and decision.

53. The Municipality respectfully submits that the Board's conclusion that "the two parties had reached a mutually acceptable agreement with respect to location...". was erroneous at law.

54. Only the Council of a Municipal Corporation can authorize an agreement unless such authority has been delegated to an individual staff member. Such authorization must be by by-law.

***Municipal Act, 2001***, **section 5**.
***Affidavit of Dan Best***

55. Council of the Corporation of the Municipality of Grey Highlands, as noted in the Board's Decision at paragraph 44, did not endorse the agreement or pass a by-law to authorize any agreement with Plateau.

***Affidavit of Dan Best***

56. Council had not delegated any authority to the CAO to enter into agreement.

***Affidavit of Dan Best***

57. Based on the foregoing, the only substantive evidence relied upon by the Board in rendering its decision under section 41(9) was premised on an erroneous conclusion that the Municipality of Grey Highlands and the Applicant had reached an agreement.

58. Accordingly it is reasonable to conclude that the Board had no significant or substantial evidence upon which to determine the location of the proposed facilities.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used in support of the hearing of the motion:

59. The Affidavit of Dan Best, Chief Administrative Officer of the Municipality of Grey Highlands.

60. The original Submissions of the Municipality dated the 25th of November, 2010.

61. Such further evidence as counsel for the Municipality may submit and the Board allow.

All of which is respectfully submitted this 14th Day of February, 2011.