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May 4, 2011

Ontario Energy Board  
2300 Yonge Street  
P.O. Box 2319  
Suite 2700  
Toronto ON M4P 1E4

**Attention: Ms Kirsten Walli  
Board Secretary**

Dear Ms. Walli:

**Re: Haldimand County Hydro Inc.  
Application for Leave to Construct Transmission Facilities  
for Summerhaven Wind LP  
Board File: EB-2011-0027**

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### **Introduction and Summary**

This letter is written on behalf of Summerhaven Wind LP ("Summerhaven"), the Applicant in the above noted proceeding, in response to the Notice of Motion delivered to the Board by Haldimand County Hydro Inc. ("HCHI") dated April 28, 2011.

The Motion requests an order that the Board commence a generic proceeding and to defer making a final decision in the current application pending the completion of that proceeding. The request, which is brought on the eve of final argument, seeks nothing less than an indefinite adjournment of a proceeding which is close to completion.

HCHI has no legal entitlement to bring a motion requesting that the Board commence a hearing and this panel does not have the ability to order the commencement of a hearing. Summerhaven therefore respectfully requests that the Board dismiss the Motion without a hearing.

Further, without going into the merits of the Motion, a high level review of the topics requested to be addressed in the generic hearing are outside of the Board's jurisdiction and those that are within the Board's general statutory jurisdiction are not within the matters that the Board may consider in a Leave to Construct Application pursuant to ss. 96(2) of the *Ontario Energy Board Act, 1998* (the "Act"). For those matters that are within the Board's authority under ss. 96(2), HCHI and other interested parties may make legal submissions in this proceeding. HCHI has had considerable time to consider these issues and it is inappropriate for it to seek to delay at this time.

### **HCHI has no Authority to Bring this Motion**

The Board's authority to commence a hearing and order the preparation of evidence is in sections 19(4) and 21(2) of the *Act*. These sections provide as follows:

"19(4) The Board *of its own motion* may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. [emphasis added]

21(1) The Board may at any time *on its own motion* and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act." [emphasis added]

As both of these provisions make clear, the Board may commence proceedings on its own motion. There is no entitlement for any person to bring a motion to commence a proceeding. While a party may always make such a request, such a request does not carry with it any legal entitlements. The Board confirmed this position as recently as May 3, 2011, where it stated the following with respect to the identical issue:<sup>1</sup>

"the Board confirms that it is not up to a party to make a motion to the Board to hold a hearing. As noted by Union in its reply submission, there is no right for a person to bring a motion for an order commencing a proceeding."

As a result, HCHI does not have the right to bring this Motion and it should be dismissed without a hearing for that reason alone.

### **The Panel has no Mandate to Order a Generic Hearing**

In addition to the fact that HCHI does not have the right to bring this Motion, this panel has no mandate to commence a generic hearing. The authority to commence a hearing is exercised by the Board, not a panel in a specific application. A panel in an application may suggest to the Board that a generic hearing be held, but it has no authority to grant the order requested here, which is to commence a hearing. The reason for this limitation is that the Board's determination of whether to commence a generic hearing is a policy matter that considers a wide range of interests and a range of other policy issues that are also before the Board. It is not a response to an issue in a specific hearing.

An example of the Board's approach is provided in its consideration of cost allocation for suite metering. In a proceeding to set distribution rates for PowerStream Inc., some intervenors requested that the Board should direct a generic hearing to resolve the issue. In responding to that request, the Board stated:<sup>2</sup>

"The shaping of Board policy will of course need to consider this issue in the context of a number of other policy issues before the Board. In that regard, the Board will now have two decisions from rate proceedings as it considers this matter. In the Majority Panel's view, it would be advisable for the Board to take a generic approach in addressing this matter."

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<sup>1</sup> Decision on Motion, Jacobs Pool Proceeding, May 3, 2011, at p. 5 (EB-2011-0013, EB-2011-0014, EB-2011-0015).

<sup>2</sup> Decision setting 2008 Distribution Rates for PowerStream Inc., July 27, 2009, at p. 7 (EB-2008-0244).

Thus, the panel was prepared to say that it was “advisable” that the Board hold a generic proceeding. It could not go as far as to order one.

### **Impact of Granting the Motion**

In addition to the fact that the Motion is fundamentally flawed for the reasons set out above, the Board should be very cautious about motions aimed at delaying proceedings through raising broad policy issues. As the Board stated in a previous proceeding:<sup>3</sup> “A generic decision is often the preferred solution but it cannot be an excuse for delay.”

In this case, the Motion seeks the Board to hold a generic proceeding to address the following issues:

- a) Can the OEB order the transmission line to be located underground? And if so, under what circumstances would the OEB make such an order?
- b) Are transmitters and distributors permitted to locate poles on both sides of municipal ROWs?
- c) If the answer to (b) is “no”, are transmitters and distributors required to enter into joint use pole agreements? If so, what space requirements are to be provided for future users and what form of agreements or rights are to be included in such an arrangement?
- d) In EB-2011-0063, a form of easement agreement for the municipality is provided. The access to municipal ROWs through the use of an easement agreement may impact the existing rights of electricity distributors and potentially other utilities. Other utilities have rights of access to municipal ROWs but do not have easements. What is the appropriate form and content of land rights that should be granted by a municipality to transmitters in these situations?
- e) If the proposed transmission line has the potential to impact the distributor in respect of operating and maintenance costs, how does the distributor properly recover such costs?
- f) If the proposed transmission line requires or has the potential to require the distributor to purchase additional capital assets, such as a vehicle, is such an expenditure to be recovered from the generator/transmitter?
- g) What quality of service and reliability impacts may result from overhead transmission lines, such as induction and stray voltage;
- h) How does the Board’s exclusive authority granted by section 19(6) of the OEB Act, see below, reconcile with the Ministry of the Environment’s authority to issue a Renewable Energy Approval pursuant to section 47.3 of the Environmental Protection Act (“EPA”)? 19(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

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<sup>3</sup> Decision setting 2008 Distribution Rates for PowerStream Inc., July 27, 2009, at p. 14 (EB-2008-0244).

The Notice of Motion adds that “HCHI has provided the preliminary list of issues but is not suggesting these are the only issues and that a proper issues list should be developed during the generic proceeding.”

If the Board were to hold a hearing to address HCHI’s “preliminary list of issues”, it would occupy much of the Board’s already busy agenda for the foreseeable future and postpone a decision on the Leave to Construct Application almost indefinitely. For HCHI to raise this questions at this point in the proceeding raises significant concerns. This is especially the case since HCHI has been aware of the Applicant’s intentions since at least September, 2010, and has made no previous attempt to raise this issue with the Board. To attempt to delay a project that has already undergone substantial processes and is near completion would be substantially prejudicial to the Applicant, and is simply improper.

Further, without delving into the merits of these issues, it is clear that the vast majority of them are outside of the Board’s jurisdiction and those that are within the Board’s general statutory jurisdiction are not within the matters that the Board may consider in a Leave to Construct Application pursuant to ss. 96(2) of the *Act*. For those matters that are within the Board’s authority under ss. 96(2), if HCHI is serious about seeking a resolution of these issues, then HCHI and other interested parties may make legal submissions on those issues in this proceeding.

## **Conclusion**

In summary, HCHI has no legal entitlement to bring a motion requesting that the Board commence a hearing and this panel does not have the ability to order the commencement of a hearing. HCHI’s motion raises no valid points for consideration in this process, and attempting to delay this process is improper. Summerhaven therefore respectfully requests that the Board dismiss the Motion without a hearing.

Sincerely,



George Vagh

c: K. Annis - McCarthy Tétrault LLP  
Ben Greenhouse – Summerhaven Wind, LP  
Don Boyle – Corporation of Haldimand County  
Woodward McKaig – Sullivan, Mahoney LP  
Lloyd Payne – Haldimand County Hydro Inc.  
Fred Reicheld – Glenfred GasWells Ltd. (by courier)