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October 27, 2011

Board Secretary

Ontario Energy Board

P.O. Box 2319

27th Floor

2300 Yonge Street

Toronto ON M4P 1E4

Re: EB-2011-0217 - Submission on Cost Award Claims

Dear Board Secretary:

Attached hereto is the submission of my client South Kent Wind LP on cost award claims with respect to the EB-2011-0217 proceeding.

In addition to this filing with the Board via email, two hard copies bearing original signatures will be forwarded to you. The filing will also be filed with RESS once the Board provides a UserID and Password, as requested by the undersigned on October 26, 2011.

Yours truly,

(original signed)

Paul Vlahos

cc: Dave Machacek, Consultant to cost award claimant Machacek-English (via *email only*)

Frank Davis, South Kent Wind LP (via *email only*)

ONTARIO ENERGY BOARD

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 South Kent Wind LP for an Order or Orders pursuant to section 92 of the *Ontario Energy Board Act, 1998* (as amended) granting leave to construct transmission facilities in the Municipality of Chatham-Kent.

SUBMISSIONS ON COST AWARD CLAIMS

Background

South Kent Wind LP (“**SKW**”) filed an application with the Ontario Energy Board (the “**Board**”) dated June 14, 2011 under section 92 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B, for an order of the Board granting leave to construct certain transmission and associated facilities in the Municipality of Chatham-Kent.

The Board assigned File No. EB-2011-0217 to the application. The Board issued a Notice of Application and Hearing (“**Notice**”) on June 28, 2011. SKW served and published the Notice as directed by the Board.

Following the publication of the Board’s Notice, the Board received requests for intervenor status from the Kent Federation of Agriculture (“**KFA**”), the Independent Electricity System Operator (“**IESO**”), and a joint intervention from landowners, William and Mary Ann Machacek and William Alan and Anne English (“**Machacek-English**”).

The Board granted intervenor status to all parties that requested such status. The Board determined that KFA and Machacek-English are eligible to apply for an award of costs under the Board’s *Practice Direction on Cost Awards*. With respect

to Machacek-English, the Board issued specific warnings regarding eligibility for cost recovery, as will be noted below.

In its decision issued October 11, 2011, the Board approved SKW's leave to construct application. In that decision, the Board set out the dates for the cost award process. Cost claims were to be filed by October 21, 2011 and SKW's objections, if any, to be filed by October 28, 2011. Cost claimants must file any responses by November 4, 2011.

SKW is in receipt of a cost claim from William and Mary Ann Machacek. SKW understands that no cost claim would be filed by William Allan and Anne English. No cost claim was received from KFA, which did not participate actively in the proceeding.

SKW objects to the Machacek cost claim, the particulars of which are set out below.

SKW's Objection to the Machacek's Cost Claim

For the reasons hereinafter stated, SKW hereby objects to the payment of any costs as claimed by Machacek-English on the basis that such costs were incurred in relation to matters outside the Board's scope of jurisdiction.

The Notice

The Notice that SKW published at the direction of the Board stated as follows:

"For a leave to construct application that is filed under section 92 of the *Act*, such as this application, section 96(2) of the *Act* provides that when determining if a proposed work is in the public interest, the Board's jurisdiction is *limited* to consideration of:

- the interests of consumers with respect to price and the reliability and quality of electricity service, and

- where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

Therefore, the Board has no power to review what might broadly be described as “environmental” issues. The generation facility itself (i.e. the wind farm) also is not part of the leave to construct applications and does not fall within the scope of this proceeding.

Any environmental issues related to this project are to be considered through the Renewable Energy Approval (“REA”) process ...”

SKW Written Response

In response to the interest expressed by the Machacek-English in requesting intervenor status and cost award eligibility (“Letter”), on August 3, 2011 SKW wrote to the Board stating its concern as follows:

“It is apparent from the Letter that the issues of concern may broadly be described as "environmental" and are directed at the owner of the land on which the Applicant has planned to locate the Corridor Line. We question whether the concerns raised in the Letter fall within the scope of the proceeding. Further, according to the Letter costs will be sought for expert advice. The Applicant is concerned that this group may incur significant expenses that may not be recoverable.

For these reasons, we respectfully request that the Board determine whether the basis for this group's intervention falls within the scope of the proceeding before granting intervenor status.”

Board Procedural Order No. 1

In response, in its Procedural Order No. 1 dated August 3, 2011 the Board stressed that cost eligibility shall be restricted to matters directly within the scope of this proceeding. Specifically, the Board stated:

“The Board has decided that it will grant intervenor status to the IESO, the KFA and Machacek-English. A list of approved intervenors is attached as Appendix A to this Order. The Board has also decided that it will grant the KFA and Machacek-English eligibility to apply for an award of costs under the Board’s *Practice Directions on Cost Awards*. The Board however notes that cost eligibility shall be restricted to matters directly within the scope of this proceeding.

With respect to the scope of the proceeding and as noted in the Notice, the Board’s jurisdiction in this proceeding is limited to the consideration of the price of electricity, the reliability of the electricity system and quality of electricity supply, as well as the promotion of the use of renewable energy sources consistent with the policies of the government of Ontario. The Board therefore has no authority under the law to review, consider or adjudicate upon what might broadly be described as “environmental” or “land use” issues. Such issues may be more suited to the Ministry of the Environment’s Renewable Energy Approval Process.

The Board notes that many of the issues raised by Machacek-English in its letter of intervention dated July 14, 2011 and in subsequent letters, such as issues related to the liability for upkeep, drainage, pest and noxious weed control of affected lands, the appropriate use of agricultural land and the impact of possible future projects, are beyond the scope of this proceeding. **Any activities undertaken by intervenors with respect to issues outside the scope of the Board’s jurisdiction will not be eligible for any cost recovery** (*emphasis in the original*).

It is not the Board’s practice to award costs to individual intervenors. The Board reminds Machacek-English that as an individual intervenor, the following information should be used as guidance for what costs may or may not be recoverable in a cost award. Machacek-English:

- may be eligible to recover out-of-pocket costs for photocopying or for travel to attend Ontario Energy Board related events if required;

- are not eligible to receive any costs (out-of-pocket travel costs or otherwise) for events organized by persons other than the Ontario Energy Board;
- may not be eligible to receive any costs associated with their time (e.g., the time spent preparing interrogatories, submissions, etc.); and
- may not recover any costs in advance.”

Board Decision

In their filed interrogatories and submissions in this proceeding, Machacek-English raised three primary issues, all relating to land matters. In its October 11, 2011 decision on SKW’s application, the Board rejected all three issues raised by Machacek-English on the grounds that they were outside the jurisdiction of the Board and not within the scope of the proceeding. Specifically, the Board found as follows (*footnotes not reproduced*):

“Machacek-English raised three issues in relation to land matters. First, Machacek-English expressed concern over the state of the corridor and submitted that the neglect of these lands was negatively affecting the agricultural productivity of surrounding lands. Machacek-English submitted that matters related to the upkeep of the corridor should be addressed prior to the sale of the corridor. Second, Machacek-English submitted that the corridor lands should be used for agriculture and for the production of biodiesel or ethanol. Third, Machacek-English argued that the proposed hydro corridor would negatively impact the property values of adjacent lands.

SKW submitted that the issues raised by Machacek-English are “environmental” and were therefore beyond the scope of a section 92 leave to construct application. SKW further submitted that the matters related to the upkeep of the corridor lands was an issue for the owner of the corridor and not SKW, the lessee. With respect to the appropriate use

for the corridor lands, SKW submitted that the Board did not have jurisdiction to rule on such matters. Lastly, with respect to the issue of negative impact on property values, SKW submitted that the claim was unsubstantiated and referred to the Board's Decision in EB-2005-0230 where the Board had stated: "It is clear, when section 96 is read, that the value of land or the potential devaluation of land of an abutting property owner does not fall within the scope of the Board's jurisdiction".

As noted in the Board's Notice and elsewhere in this Decision, the Board's jurisdiction in a section 92 leave to construct application is strictly limited (*emphasis in the original*) to the consideration of price, reliability and quality of electricity service and consistency with the Government of Ontario's policy to promote the use of renewable energy sources. In the Board's view the issues related to the state of the corridor and its impact on agricultural production of surrounding lands, the appropriate use for affected lands and the impact on land values, do not directly relate to the price, reliability or quality of electricity service or the promotion of the government policy and accordingly, are beyond the scope of the Board's jurisdiction, as prescribed in section 96(2) of the Act. Therefore, the Board does not have the authority to consider the issues raised by Machacek-English."

Practice Direction on Cost Awards

In Section 5 of *Practice Direction on Cost Awards*, the Board sets out the principles which the Board may consider in determining a cost award to a party. SKW submits that three such principles are of particular relevance to the costs presently under consideration by the Board:

- Under subsection 5.01 (h) the Board states that it may consider whether a party addressed issues in its questions or in its argument which were not relevant to the issues determined by the Board;
- Under subsection 5.01 (f) the Board states that it may consider whether a party contributed to a better understanding by the Board of one or more of the issues; and

- Under subsection 5.01 (a) the Board states that it may consider whether a party participated responsibly in the process.

SKW respectfully submits that, as confirmed in the Board's decision cited above, the issues raised by Machacek-English have no relevance to the issues which were under the jurisdiction of the Board for consideration. Further, SKW submits that because the Machacek-English submissions focused exclusively on matters outside the scope of the Board's jurisdictions, such submissions could not have contributed to the Board's understanding of the issues properly before it for consideration. Further, SKW submits that the willful incurrence of costs in pursuit of matters clearly beyond the scope of the jurisdiction of the Board was an irresponsible decision for which SKW should not bear undue financial responsibility.

SKW submits that Machacek-English had the benefit of adequate notice in advance of the Board's policies and procedures with respect to awarding costs in the present matter through the Notice, the Board's Procedural Order No. 1 and the *Practice Direction on Cost Awards*. Machacek-English's claim for costs is, respectfully, contrary to the clear directions and principles stated by the Board in this regard.

Consultant

SKW further submits a specific objection with respect to the costs claimed in connection with the use of a consultant, Mr. Dave Machacek (the "**Consultant**"), by Machacek-English. In this instance, the vast majority of the cost claim is associated with the time and disbursements of the Consultant. SKW makes two specific submissions in this regard:

- The Consultant does not contain relevant experience as set forth in the Board's Tariff under the *Practice Direction on Cost Awards* to qualify for any award of costs. The Consultant's CV appended to the cost claim filing discloses that the Consultant has no credentials in regulatory matters before this Board or other similar tribunal; and

- SKW submits that the apparent family relation of the Consultant to the Machacek family may be adequate evidence for the Board to conclude that the Consultant is not a bona fide third-party expert or consultant engaged by Machacek-English as contemplated by the *Practice Direction on Cost Awards*. SKW invites Machacek-English to identify any family relationship with the Consultant.

Should there be any inclination by the Board to award out of pocket expenses, SKW has no particular submissions to make as the reasonableness of these other expenses claimed are, in practice, reviewed for conformity with the *Practice Direction on Cost Awards* by the Board itself.

All of which is respectfully submitted.

October 27, 2011

(original signed)

South Kent Wind LP

By its Consultant: Paul Vlahos