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February 24, 2012

Delivered by E-mail and Courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: Application for Leave to Construct – EB-2011-0394
McLean’s Mountain Wind Limited Partnership**

We are counsel to McLean’s Mountain Wind Limited Partnership (the “Applicant”) in this matter.

Please find accompanying this letter the reply submission of McLean’s on confidentiality delivered pursuant to Procedural Order No. 2.

Should you have any questions or require further information, please do not hesitate to contact me.

**Yours very truly,
BORDEN LADNER GERVAIS LLP**

Original signed by James C. Sidlofsky

James C. Sidlofsky
JCS/ac
Encl.

copy to: Gordon Potts, McLean’s Mountain Wind Limited Partnership
Art Jacko, Mnidoo Mnising Power Limited Partnership
Michael Millar, Board Counsel
Edik Zwarenstein, Board Staff
Raymond Beaudry, MCSEA
Catherine Bayne, BayNiche Conservancy
George Brown, LSARC
Jane Wilson, Wind Concerns Ontario
Rosemary Wakegijig, Wikwemikong Elders, Community Members and Youth
Neil Smiley, counsel to CP
Lynda Lee, Manitoulin Nature Club
Sherri Lange, NA-PAW
Tom Adams

TOR01: 4859038: v1

IN THE MATTER OF the *Ontario Energy Board Act, 1998* S.O. 1998 c.15, Schedule B (the “Act”);

AND IN THE MATTER OF an application by McLean’s Mountain Wind Limited Partnership to the Ontario Energy Board (the “Board”) dated November 22, 2011 under section 92 of the Act for an order of the Board granting leave to construct transmission facilities.

**MCLEAN’S MOUNTAIN WIND LIMITED PARTNERSHIP
REPLY SUBMISSION ON REQUEST FOR CONFIDENTIALITY**

DELIVERED FEBRUARY 24, 2012

INTRODUCTION:

1. McLean’s filed its Application and pre-filed evidence in this proceeding on November 22, 2012.
2. Among the pre-filed evidence were the following five items that McLean’s requested be maintained in confidence, pursuant to the Board’s *Practice Direction on Confidential Filings* (the “Practice Direction”):
 - (a) Exhibit E, Tab 1, Schedule 2 - Single Line Drawing of Proposed Electrical Connection
 - (b) Exhibit E, Tab 1, Schedule 3 - Electrical Drawings of Transmission Facilities
 - (c) Exhibit E, Tab 1, Schedule 4 - Design Specifications and Operational Data: Submarine Cable
 - (d) Exhibit E, Tab 1, Schedule 5 - Overhead Transmission Line Design and Stringing Charts
 - (e) Exhibit G, Tab 1, Schedule 2 - Table of Lands Required for Transmission Facilities
3. Items (a) through (d) above consist of electrical drawings, design specifications and operational data in relation to transmission facilities the Applicant is proposing to construct.

4. Item (e) contains personal information relating to third party individuals and contractual arrangements made between the Applicant and those individuals with respect to the acquisition of rights related to the route of the transmission line that is the subject of this Application.
5. Procedural Order No.1, issued on January 27, 2012, set out certain deadlines for Board Staff and intervenor submissions, if any, on the confidentiality request (February 3, 2012) and for McLean's reply thereto (February 10, 2012). McLean's received submissions from Board Staff, and from Tom Adams, who at that time was acting as a representative for a number of intervenors.
6. By letter from its counsel dated February 9, 2012, McLean's advised that it had had further discussions with its consultants with respect to items (a) through (d) above, and that it would produce those drawings and specifications on the public record (they have since been made publicly available), leaving only item (e) as the subject of the confidentiality request. While those submissions with respect to item (e) will be discussed in more detail below, in short, Board Staff support McLean's request for confidential treatment, while Mr. Adams opposes it.
7. In Procedural Order No.2 ("PO#2"), issued February 14, 2012, the Board added Canadian Pacific Railway Company ("CP") as an intervenor and provided for submissions by CP on the confidentiality request (which the Board confirmed is now limited to item (e) – McLean's notes that subsequent references to the confidentiality request in this submission refer to the request for confidentiality in respect of item (e) above) by February 17, 2012 and for a comprehensive response from McLean's on all Board Staff and intervenor submissions on the confidentiality request, by February 24, 2012.
8. By a letter from its counsel dated February 17, 2012, CP confirmed that it had no objection to McLean's confidentiality request.
9. McLean's offers the following submissions in respect of the confidentiality request.

THE BOARD STAFF AND INTERVENOR SUBMISSIONS:

10. The Board Staff comments on item (e) are limited. The Board Staff submission begins as follows:

“The Board’s mandate with respect to Leave to Construct applications is described in the *Ontario Energy Board Act, 1998*:

‘The Board’s role is to ensure that these transmission investments are in the public interest. Subsection 96(2) in part specifies that, for section 92 purposes, “the Board shall only consider the interests of consumers with respect to prices and the reliability and quality of electricity service.’

Board staff concurs that it is appropriate that information provided in set e) above (Exh G, Tab 1, Schedule 2: Table of Lands Required for transmission Facilities) is suitably maintained in a confidential manner.”

11. As noted above, CP does not object to the confidentiality request.
12. The MCSEA/Bayniche/LSARC/WCO/Wikwemikong Elders, Community Members and Youth submission (referred to here as the “MCSEA Submission”), as it relates to item (e), is also limited, and is as follows:

“McLean is asking that the Board treat in confidence the ‘Table of Lands Required for Transmission Facilities’. Board Staff concurs with McLean’s request. My clients suggest that the document be produced on the public record although redacted to remove any personal information related to affected land owners. Except for the personal details, all of the information contained in the ‘Table of Lands Required for the Transmission Facilities’ will be publicly available if construction is ever completed. For example, any severances or easements will have to be recorded and can be found in the MPAC and municipal records.

In the event that the ‘Table of Lands Required for Transmission Facilities’ refers to any lands acquired by, or planned to be acquired by, expropriation under the Electricity Act or any other legislation, we believe that full details should be provided on the public record.”

THE McLEAN'S REPLY:

13. This submission will focus on the following three areas:
- (a) The confidential nature of the material and the treatment of the material in the Practice Direction;
 - (b) The Board's treatment of similar material in other proceedings; and
 - (c) The relevance of the MCSEA submission to this proceeding.
- (a) **The confidential nature of the material and the treatment of the material in the Practice Direction;**
14. As noted above, the subject material contains personal information relating to third party individuals and contractual arrangements made between the Applicant and those individuals with respect to the acquisition of rights related to the route of the transmission line that is the subject of this Application.
15. More particularly, it contains the names of property owners along the route of the proposed transmission line with whom McLean's has entered into contractual arrangements; corresponding property identifiers; the nature of the arrangements entered into; and the types of facilities to be located on those individuals' properties. The forms of the agreements are public – they can be found in the pre-filed evidence, at Exhibit G, Tab 1, Schedule 3. The forms of agreements have been filed publicly pursuant to the Board's *Filing Requirements for Transmission and Distribution Applications*.
16. The route of the proposed transmission line is shown on numerous maps included in the pre-filed evidence, as are the lots and concessions in the vicinity of the transmission line. One example of this can be found at Exhibit D, Tab 2, Schedule 2 (This Schedule is titled "Project Location – Transmission Facilities Map", and the drawing itself is titled "Figure A-2: Project Components Site Plan").
17. McLean's has confirmed that it has entered into contractual arrangements with all owners of land along the route of the proposed transmission line, with the exception of CP (see

the discussion of Land Matters, at Exhibit G, Tab 1, Schedule 1). While the forms of agreements have been provided on the public record, McLean's has not publicly disclosed the names of the property owners or the specific contractual arrangements applicable to each of the owners.

18. Appendix A to the Practice Direction sets out several of the Board's "Considerations in Determining Requests for Confidentiality". The Appendix begins as follows:

"The final determination of whether or not information will be kept confidential rests with the Board. The Board will strive to find a balance between the general public interest in transparency and openness and the need to protect confidential information."

19. The Appendix then lists various "factors that the Board may consider in addressing confidentiality of filings made with the Board". These include:

"(a) the potential harm that could result from the disclosure of the information, including:

- i. prejudice to any person's competitive position;
- ii. whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations;
- iii. whether the information could interfere significantly with negotiations being carried out by a party; and
- iv. whether the disclosure would be likely to produce a significant loss or gain to any person;

...

(d) whether the information is personal information;

...

(g) any other matters relating to FIPPA and FIPPA exemptions;

(h) whether the type of information in question was previously held confidential by the Board;

...."

20. McLean's noted in the cover letter to the Application that disclosure of this information would conflict with Section 17(1) of the *Freedom of Information and Protection of Privacy Act* (Ontario), referred to here as "FIPPA", since it would prejudice the competitive position of the Applicant and could potentially interfere with the contractual

arrangements or other negotiations between the Applicant and other third party landowners.

21. In addition to the foregoing, the addresses of these individuals constitute “personal information” as that term is defined in section 2 of FIPPA, as are the individuals’ names where they appear with other personal information. Subsection 21(1) of FIPPA provides, in part, that “A head shall refuse to disclose personal information to any person other than the individual to whom the information relates”, except in certain circumstances:

- “(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
- (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
- (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
- (e) for a research purpose if,
 - (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
 - (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
 - (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

22. With respect to clause (f), subsection 21(2) of FIPPA goes on to list the following factors that are to be considered (together with all other relevant circumstances) in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy:

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
 - (f) the personal information is highly sensitive;
 - (g) the personal information is unlikely to be accurate or reliable;
 - (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
 - (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
23. A number of these factors would suggest that in certain circumstances, the release of personal information may be justified. McLean's submits, however, that none of these circumstances exists in the current case.
24. Moreover, subsection 21(3) of FIPPA sets out circumstances in which a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy. Under clause 21(3)(c), the disclosure is presumed to constitute an unjustified invasion of personal privacy where the personal information "describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness". McLean's submits that the real property of the individuals named in the subject table is among the assets of those individuals, and that this brings the information within the scope of clause 21(3)(c) of FIPPA.
25. McLean's submits that the disclosure of the information in respect of which confidentiality is claimed is not appropriate, and that it would be contrary to both the Practice Direction and the relevant provisions of FIPPA.
- (b) The Board's treatment of similar material in other proceedings:**
26. As noted above, among the factors that the Board may consider in addressing confidentiality of filings made with the Board is whether the type of information in question was previously held confidential by the Board. This is consistent with the opening paragraph of the Practice Direction, in which the Board states:

"The purpose of this Practice Direction on Confidential Filings is to establish uniform procedures for the filing of confidential materials in relation to all proceedings that come before the Ontario Energy Board.

This Practice Direction is also intended to assist participants in the Board's proceedings in understanding how the Board will deal with such filings."

27. McLean's submits that information of the kind at issue in this proceeding has been maintained in confidence in other leave to construct proceedings conducted by the Board. For example, in an application by Grand Renewable Wind, LP (Board File No. EB-2011-0063), the applicant indicated (at Exhibit B, Tab 3, Schedule 1, page 2, paragraph 43), in describing the land acquisition process for private landowners, that the names of property owners had been removed for the sake of their privacy.
28. Similarly, in an application by South Kent Wind, LP (Board File No. EB-2011-0217), the applicant filed a map showing the landowners along the proposed route. At Exhibit B, Tab 4, Schedule 3, page 1 of its application, the applicant stated that "A map that shows the landowners along the Tie Line will be filed pursuant to the Board's Practice Direction on Confidential Filings in order to keep the names of the private landowners off the public record as requested by Board staff." At Exhibit B, Tab 4, Schedule 5, page 1 of that application, under the heading "List of Affect Landowners", the applicant referred to "9 private landowners whose names will be filed pursuant to the Board's Practice Direction on Confidential Filings, as requested by Board staff".
29. McLean's submits that it is appropriate that the material at issue in the current proceeding be maintained in confidence, consistent with the treatment of similar material in other similar proceedings.

(c) The relevance of the MCSEA submission to this proceeding:

30. As noted above, the route of the proposed transmission line and the location of related transmission facilities are clearly indicated throughout the application.
31. The scope of the Board's jurisdiction and of this proceeding have been clearly articulated by the Board in its Notice of Application and Hearing; in PO#1 and PO#2; and in the Board Staff submission on confidentiality.

32. McLean's respectfully submits that MCSEA has failed to provide any indication as to why it is necessary for the purposes of this proceeding to publicly name the individuals with whom McLean's has entered into agreements. McLean's submits that apart from the inappropriateness of doing so, discussed above, the names of the individuals are irrelevant to this proceeding, and there is simply no need for their release.
33. While it is not entirely clear that the following item relates solely to the table that is the subject of the confidentiality request, MCSEA has also requested that "full details" be provided on the public record of "any lands acquired by, or planned to be acquired by, expropriation under the Electricity Act or any other legislation". In fact, the contractual arrangements referred to in the table that is the subject of the confidentiality request were not arrived at through expropriation. However, McLean's submits that the manner in which the land rights are acquired is not relevant to the current proceeding, nor is that a focus of the Filing Requirements, notwithstanding that the forms of agreements are before the Board for approval. McLean's will need land rights in order to construct the proposed transmission line, and the OEB Act addresses circumstances in which necessary land rights cannot be arranged through negotiation. Any such negotiations with land owners are highly commercially sensitive and are not within the scope of this proceeding.

CONCLUSION:

34. For all of the foregoing reasons, McLean's respectfully requests that the Board reject the MCSEA submission and confirm that Exhibit G, Tab 1, Schedule 2 of the Application – Table of Lands Required for Transmission Facilities – shall remain confidential.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24TH DAY OF FEBRUARY, 2012.

Original Signed by James C. Sidlofsky
James C. Sidlofsky
Counsel to McLean's Mountain Wind Limited Partnership