EB-2011-0394

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 McLean's Mountain Wind LP for an Order granting leave to construct a new transmission line and associated facilities.

MCLEAN'S MOUNTAIN WIND LIMITED PARTNERSHIP

SUBMISSION ON THE NEED FOR AN ORAL HEARING

DELIVERED APRIL 20, 2012

INTRODUCTION:

1. In November of 2011, McLean's Mountain Wind Limited Partnership ("McLean") filed an application (referred to here as the "Application") with the Ontario Energy Board (the "Board") dated November 22, 2011 under section 92 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the "OEB Act"). The Application was prepared and filed in accordance with the Board's *Filing Requirements for Electricity Transmission Projects under Section 92 of the OEB Act*, being Chapter 4 of the Board's *Filing Requirements for Transmission and Distribution Applications*.

2. In the Application, McLean seeks an order of the Board granting leave to construct a transmission line and associated facilities (the "Project") to connect the McLean's Mountain Wind Farm ("MMWF") to the IESO-controlled Grid. McLean also seeks an order approving the form of easement agreement provided in the Application.

3. The Board initially received requests for intervenor status from the following groups and individuals:

   - Lake Superior Action-Research-Conservation ("LSARC");
   - Manitoulin Coalition for Safe Energy Alternatives ("McSEA");

- BayNiche Conservancy ("BayNiche");
- Wind Concerns Ontario ("WCO"); and
- Rosemary Wakegijig, for Wikwemikong Elders, Community And Youth

4. Several of those groups and individuals made requests for an oral hearing in conjunction with their requests for intervenor status.

5. In its correspondence of January 25, 2012 responding to (and opposing) the requests for intervenor status, McLean, through its counsel, described the nature of the requests and expressed its concerns that the matters that were being raised in the requests were not within the scope of this proceeding. McLean will not repeat those descriptions here – a copy of the letter accompanies this submission as Attachment 1, for the Board's assistance. However, that letter also addressed the requests for an oral hearing, as follows:

Requests for an Oral Hearing:

Several of the prospective intervenors have requested an oral hearing in respect of this Application. McLean's offers the following comments in this regard.

As can be seen in the Application, McLean's has conducted extensive public consultations through public information sessions held on Manitoulin Island. The material provided to the public included the proposed route of the Transmission Line that is the subject of this Application.

Based on the correspondence received from the prospective intervenors, and the very few references to the transmission facilities contained in that correspondence, it appears that the oral hearing is being sought as a forum for complaints about the Wind Farm, environmental matters and Provincial renewable generation policy, none of which is before the Board. The Board's Notice states that:

> **"Written Hearing**
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> The Board intends to proceed with this matter by way of a written hearing unless a party satisfies the Board that there is a good reason for not holding a written hearing. If you object to the Board holding a written hearing in this matter, you must provide written reasons why an oral hearing is necessary. Any submissions objecting to a written hearing must be received by the Board and copied to the applicant within 10 days of the publication or service date of this notice."

McLean's respectfully submits that no party has provided a "good reason for not holding a written hearing", and that the matters to be addressed in this Leave to Construct Application are well-suited to a written hearing. Accordingly, McLean's requests that the Board confirm that this matter will proceed by way of a written hearing.

6. In Procedural Order No. 1 in this matter, issued on January 27, 2012, the Board made the following comments (at page 5) with respect to the requests for an oral hearing:

> **Request for an Oral hearing on Manitoulin Island**
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> Wikwemikong, MCSEA, WCO, and BayNiche Conservancy and numerous letters of comment have requested that the Board hold an oral hearing, and that the hearing be held on Manitoulin Island. At this point in the proceeding, it is not clear to the Board that many of the issues identified in the letters of intervention and letters of comment actually fall within the scope of this proceeding. The Board is therefore not prepared at this point to establish a process for an oral hearing. However, the Board may reconsider this issue after the interrogatory phase of the proceeding is completed.

7. The Board also made the following comments (at pages 4-5) with respect to the scope of its jurisdiction in a Leave to Construct Application under Section 92 of the *Ontario Energy Board Act, 1998*, as amended:

> **"Scope of the Board's Jurisdiction in a Section 92 Leave to Construct Application**
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> The Board's jurisdiction to consider issues in a section 92 leave to construct case is limited by subsection 96(2) of the OEB Act which states:
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> (2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
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> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
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> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. 2009, c. 12, Sched. D, s. 16.
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> The Board does not have the power to consider any issues other than those identified in subsection 96(2). Parties requesting intervenor status have indicated a broad range of interests in this proceeding. The Board notes that as a general matter, the following issues are not within the scope of a section 92 leave to construct application: environmental issues, any issues relating to the wind farm itself, the Ontario Power Authority's feed in tariff program, and social policy issues. And while the Government's policies in respect of renewable energy form part of the criteria in section 96(2), the Board does not have the power to enquire into the appropriateness of that policy. The Board has further held in previous proceedings that it is not empowered to consider issues relating to the Crown's duty to consult with Aboriginal peoples in a section 92 leave to construct application.[1] Parties are reminded that any interrogatories and submissions to the Board must relate to the issues identified in subsection 96(2). Furthermore, the Board will not award costs in this proceeding for time spent on matters which are outside the scope of this proceeding.

> The Board does not have the jurisdiction to determine issues related to environmental and social concerns outside of the scope of section 96(2), and it is important to note that the Project is subject to a separate Renewable Energy Approval ("REA") process. Generally speaking, environmental issues are considered in that process, and parties with an interest in these issues are encouraged to participate in the REA process if they have any concerns. Although the Board has no role in the REA process, any approval of the leave to construct application would ordinarily be conditional on all necessary permits and authorizations being acquired, including a completed REA.
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> 1 Yellow Falls Power Limited Partnership, *Decision on Questions of Jurisdiction and Procedural Order 4*, EB-2009-0210, November 18, 2009. See also, Northgate Minerals, *Procedural Order 2*, EB-2010-0150, July 29, 2010."

8. On February 14, 2012, the Board issued Procedural Order No. 2, in which it granted intervenor status to the Manitoulin Nature Club, the North American Platform Against Wind Power ("NA-PAW") and Canadian Pacific Railway Company ("CP Rail"). The Board again cautioned parties about the scope of the proceeding and parties' involvement in it in Procedural Order No. 2. In correspondence dated February 17, 2012, McLean expressed its concern about the Nature Club and NA-PAW requests for intervenor status, as the matters raised in the requests were beyond the scope of this proceeding.

9. In short, having considered the oral hearing requests made at the outset of the proceeding, the Board rejected them, although it did allow for the possibility that a request for an oral hearing could be considered at a later date. The Board had also expressed its concerns that matters being raised by intervenors were beyond the scope of the proceeding, and discussed that scope on at least three occasions – in the Notice of Application and Hearing; at length in Procedural Order No. 1; and a third time in Procedural Order No. 2.

THE INTERROGATORY PROCESS:

10. McLean received interrogatories from Board Staff, CP Rail, MCSEA (also on behalf of LSARC, Bayniche Conservancy, Wikwemikong Elders, Community and Youth, and the Manitoulin Nature Club), and NA-PAW. McLean initially received approximately 85 questions from MCSEA in the first round of MCSEA interrogatories, many of which were irrelevant to this proceeding and/or beyond

its scope. Similarly, essentially all of the NA-PAW interrogatories were beyond the scope of the proceeding.

11. On March 30, 2012, McLean provided its responses to the Board Staff and Intervenor interrogatories. On Tuesday, April 3, 2012, MCSEA sent an email message to the Board, McLean and other parties expressing concerns about certain interrogatory responses and seeking to raise those concerns with the Applicant. In that message, MCSEA proposed the completion of the interrogatory record by April 6, 2012. On April 3, 2012, following receipt of the MCSEA message, McLean wrote to the Board suggesting that it would assist the Board and McLean if MCSEA were to set out its concerns, with reference to specific interrogatory responses, in order that McLean could determine an appropriate response to the MCSEA request. It was not until late in the afternoon of Monday, April 9, 2012 that MCSEA sent its "questions of clarification" in respect of McLean's responses to its initial interrogatories. A corrected version was sent in the morning of April 10, 2012, followed by copies of the newspaper articles referred to in various questions.

12. The MCSEA "questions of clarification" amounted to approximately 108 questions, some of them not requesting clarification but instead, seeking completely new information. The Board (in Procedural Order No. 5) determined that these will be considered to be a second round of interrogatories, and noted that McLean advised the Board that it was prepared to provide responses to clarifications that are relevant and within the scope of the proceeding. McLean has provided those responses.

13. The interrogatory process has now included almost 250 questions, with close to 200 of those having come from MCSEA. Of just over 200 MCSEA and NA-PAW questions, over 40 were beyond the scope of this proceeding, as they dealt with the wind farm itself, environmental matters, aboriginal consultations, other approvals, and other matters not relevant to the proceeding. There are two

implications of this. The first is that notwithstanding at least three clear explanations from the Board as to the scope of this proceeding, certain intervenors continue to pursue matters that are beyond that scope, and it is reasonable to expect that an oral hearing would be used as a platform to pursue those matters rather than those within the Board's limited jurisdiction in section 92 applications. The second is that the discovery process in this proceeding – a proceeding with a limited scope – has been extensive.

14. Contrary to the MCSEA suggestion in its April 3, 2012 email message, there was no previous "direction" from the Board with respect to requests for an oral hearing. The requests were already made and rejected by the Board. In Procedural Order #5, the Board wrote: "The Board had indicated in Procedural Order No. 1 that it may reconsider whether an oral hearing needed to be held. There have now been essentially two rounds of interrogatories and clarifications, and the Board now requests submissions on the need for an oral hearing."

15. McLean offers the following comments in this regard. McLean notes that it may request an opportunity to reply to any Board Staff and Intervenor submissions on this issue.

THERE IS NO NEED FOR AN ORAL HEARING IN THIS CASE

16. There is no requirement that the Board conduct an oral hearing in this proceeding. Rule 34.01 of the Board's *Rules of Practice and Procedure* provides:

> "34.01 In any proceeding, the Board may hold an oral, electronic or written hearing, subject to the *Statutory Powers Procedure Act* and the statute under which the proceeding arises."

17. Subsection 5.1(2) of the *Statutory Powers Procedure Act* provides that "The tribunal shall not hold a written hearing if a party satisfies the tribunal that there is good reason for not doing so."

18. As noted above, in its Notice of Application, the Board wrote: "The Board intends to proceed with this matter by way of a written hearing unless a party satisfies the Board that there is a good reason for not holding a written hearing." McLean agrees with the Board that the reasons for an oral hearing given by intervenors in their requests for intervenor status did not establish a good reason for an oral hearing. Similarly, no party has shown a good reason for an oral hearing since that time. The evidence on the record of this proceeding, which includes a complete Application prepared in accordance with the Board's Filing Requirements and complete responses to hundreds of interrogatories raised in two rounds of questions, is extensive.

19. Principles of fundamental justice are set out in the Board's guidelines. Pursuant to the OEB Resource Guide,[1] applicants and stakeholders are entitled to:

    1. the right to be heard:
        - the OEB must deal with all applications that are within its mandate; and
        - the OEB must allow all parties with legitimate direct interests to participate.
    2. the right to know the case:
        - all parties must receive adequate notice; and
        - all parties must receive all information on which the decision is to be based.
    3. the right to have the decision made by persons who have heard the evidence:
        - nobody except panel members may make the decision.

20. These principles are codified under the OEB Act, whereby the Board has the power to make orders, rules, codes and policy directions. With regard to leave to construct applications, an order from the Board is necessary for the construction, expansion or reinforcement of an electricity transmission line, electricity

[1] OEB Resource Guide, Understanding the Adjudication Process, online: http://www.ontarioenergyboard.ca/OEB/Industry/Media+Room/Publications/OEB+Resource+Guide/Understanding+the+Adjudication+Process.

distribution line or to make an interconnection.[2] Orders are made by panels on the basis of an evidentiary record.[3]

21. The Board's common practice is to deal with applications of this kind by way of written hearings. In fact, McLean suggests that the vast majority of Board proceedings that require adjudicative hearings are dealt with through written hearings. The issue with respect to oral hearings was considered when the Board released its *Report with Respect to Decision-Making Processes at the OEB*[4] (the "Report") in the fall of 2006. The Report was prepared to ensure that the Board's decision-making processes are transparent and open, while at the same time being "more focused on relevant issues, timely and results oriented." In the report, the Board noted that oral hearings are only one of a number of ways that the Board makes decisions and pursues its regulatory mandates. For example, in the 2004-2005 year, the Board issued approximately 700 decisions, of which less than five per cent resulted from oral hearings.[5] The remainder resulted from written proceedings or proceeded without a hearing. Accordingly, an oral hearing is only one of many instruments that the Board has available to implement its mandate.

22. In the present case, as the Board has made clear on several occasions, the Board's mandate is very limited by statute. Parties with legitimate direct interests have been allowed to participate to the extent that that participation is within the scope of the proceeding. The extensive discovery process has ensured that the evidentiary record is complete. A written hearing will allow the parties to be heard on relevant matters and to comment on that evidentiary record. McLean submits that there is no matter within the limited statutory scope of this

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[2] 1998, SO 1998, c. 15, Sch B, s. 92 (1).
[3] 1998, SO 1998, c 15, Sch B, s. 4.3.
[4] Ontario Energy Board, *Report with Respect to Decision-Making Processes at the OEB*, online: http://www.ontarioenergyboard.ca/documents/abouttheoeb/corpinfo_reports/decision_making_processes_report_270906.pdf.
[5] Ontario Energy Board, 2004-2005 Annual Report, p. 29.

proceeding that requires the use of an oral hearing. In its Report (at p.14), the Board suggested that "Adjudicative hearings should be largely restricted to circumstances where fact-finding is required to support an order." The discovery process in this proceeding has allowed for that fact-finding to take place.

23. On rare occasions, the Board has allowed for an oral hearing in order to expedite its process in this type of application. For example, in an application by Erie Shores Wind Farm Limited Partnership for an Order granting leave to construct transmission facilities to connect a wind farm to the transmission facilities of Hydro One Network Inc. (EB-2005-0230), the Board stated in Procedural Order No. 1 (at the outset of the proceeding) that it was not convinced that a written hearing would be inadequate in the context of this matter, but that allowing for an oral hearing would expedite completion of the proceeding.

24. In the present case, particularly after two rounds of interrogatories, the next step in the process would typically be the filing of written submissions. Accordingly, inserting an oral hearing into this process, which would likely involve the pursuit of matters outside the scope of this proceeding, and which would still have to be followed by written submissions, cannot help but prolong the completion of the proceeding rather than expedite it.

25. McLean would refer the Board to its recent Decision in an application by White River Hydro LP and Pic Mobert First Nation (EB-2011-0420) for an order of the Board granting leave to construct an electricity transmission line. As noted in Procedural Order No. 1,[6] the intervenor in this application raised concerns with respect to adequacy of aboriginal consultation in relation to the proposed new route for the transmission line. Accordingly, the intervenor sought eligibility to apply for an award of costs and stated that the Board should convene an oral hearing in keeping with Ojibway culture. The Board however determined that,

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[6] Ontario Energy Board, online: http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/326763/view/WhiteRiver_PO1_20120223.PDF.

given the circumstances of the case, including the scope of its jurisdiction pursuant to section 92 of the OEB Act, it would be most appropriate to hear the matter by way of a written proceeding.

26. McLean respectfully submits that the Board should take a similar approach in the current proceeding.

CONCLUSION:

27. For the reasons set out above, McLean respectfully submits that no good reason for an oral hearing has been established in this proceeding. The oral hearing would not enhance the Board's ability to adjudicate this matter, but instead would lengthen this proceeding unnecessarily; create a platform for matters that are beyond the scope of this proceeding; and add significantly to the costs of this proceeding.

28. McLean requests that the Board confirm that it will deal with this Application by way of a written hearing, and that it establish a timeline for the filing of final written submissions.

All of which is respectfully submitted this 20th day of April, 2012.

Borden Ladner Gervais LLP
Per:

Original Signed by James C. Sidlofsky
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