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July 26, 2012

Delivered by Email and Courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
26th Floor, Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

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

Introduction:

We are counsel to McLean's Mountain Wind Limited Partnership (referred to here as "McLean" or the "Applicant"), the Applicant in the above-captioned application for leave to construct transmission facilities to connect the McLean's Mountain Wind Farm (the "Wind Farm"), to be located south of Little Current on Manitoulin Island, to the IESO-controlled grid on Goat Island, together with the other relief set out in the Application.

On June 28, 2012, the Board issued its Decision and Order approving the Application, subject to the conditions appended to the Decision. The Board allowed the Manitoulin Coalition for Safe Energy Alternatives ("McSEA") until Thursday, July 19, 2012 to deliver its cost claim. MCSEA did not make a cost claim – MCSEA had no counsel or consultant. Instead, on July 19th, McLean received from Mr. Beaudry of MCSEA a request for an honorarium associated with its participation in this proceeding. Mr. Beaudry did not specify a proposed amount for the honorarium, but he does indicate that based on a calculation he provides in his request, that is in turn based on his view of an honorarium awarded in another leave to construct proceeding (EB-2007-0050, the Hydro One Bruce to Milton leave to construct proceeding – a proceeding that is not comparable to the present one except to the extent that they both involve applications for leave to construct transmission lines and related facilities under section 92 of the *Ontario Energy Board Act, 1998*), an equivalent honorarium would be over $16,000.

McLean's response to the MCSEA request is set out in the following pages. In short, though, for the reasons discussed below, McLean respectfully submits that no honorarium is warranted in this case. If the Board were to determine that this is an appropriate case for an honorarium, McLean submits that it should be in an amount significantly less than the $2,000 awarded in the Bruce-Milton proceeding.

Background:

As the Board noted in Procedural Order No.1 (referred to below as "PO#1"), "MCSEA requested costs for the proceeding and in an e-mail amendment of January 5, 2012 MCSEA also specifically requested 'an honorarium recognizing individual efforts in preparing and presenting an intervention or submission'."

In our letter of January 26, 2012, McLean addressed several of the requests for intervenor status, including that of MCSEA. McLean referred to the following statement made by the Board in the Notice of Application:

> "The Wind Farm itself is not part of this application, and does not fall within the scope of this proceeding. Environmental issues with respect to this project are considered through the separate Renewable Energy Approval ("REA") process, which is not a part of this Board proceeding."

McLean made the following submissions in respect of the MCSEA request for intervenor status:

> "McSEA's request is set out in an email message dated December 29, 2011 from Raymond Beaudry of McSEA. Mr. Beaudry's letter expresses concerns about both the Wind Farm and the proposed transmission line. However, McLean's is concerned that the opposition to the transmission facilities is being used as a means of attempting to stop the Wind Farm, and that is beyond the scope of this proceeding. This concern arises out of comments such as the following, from the McSEA request:
>
> > "Should transmission approval be given then the environmental, cultural, economic, visual, health, property rights impacts would be realized for this Industrial Wind Turbine project.
> >
> > …
> >
> > Transmission line approval would also allow this project to proceed in and environmentally sensitive key habitat and wetlands where our local township has the Perch Lake in the project area protected as environmentally sensitive and has building restrictions in the vicinity.
> >
> > The 100 meter tall industrial wind turbines and 100 meter plus blade sweep would be an environmental disaster to this area and known flyway, stopover and nesting location.
> >
> > Manitoulin Island is known for its biodiverse habitat and has many unique flora and fauna species at risk which would be impacted for an unreliable source of generation provincial auditor general agrees with. This generation is for off Manitoulin use and the impacts outweigh the community benefit.
> >
> > …
> >
> > With the OPA only allowing wind generation as 10% reliability then it and as above it does not seem practical or economically viable to allow this approval to proceed."
>
> As the Board clearly indicated in the Notice, both the Wind Farm and environmental issues with respect to the project are not within the scope of this proceeding. McLean's respectfully submits that the concerns expressed by McSEA relate to matters that are not within the scope of this proceeding; McSEA has therefore not established grounds for its intervention request; and the request should be denied."

With respect to the MCSEA request for a cost award, McLean made the following submission:

> "McLean's is aware of only one request for a cost award in this matter. Mr. Beaudry's letter of January 5, 2012 includes a request on behalf of McSEA for a cost award, and the reasons for that request. As noted above, the McSEA request for intervenor status relates to the Wind Farm, environmental matters and Provincial policy, all of which are beyond the scope of this proceeding. Accordingly, McLean's respectfully submits that the request for a cost award should be denied. If the Board determines that McSEA will be eligible for an award of costs, it is in the interest of all parties that the scope of this proceeding be clear from

> the outset, and that the Board confirm that costs will not be recoverable for expenditures related to matters that are beyond that scope."

In PO#1, issued January 27, 2012, the Board made the following findings with respect to the requests for intervenor status and MCSEA's request for a cost award:

> "As described in further detail below, the Board has some concerns regarding some of the issues that the proposed intervenors highlight in their letters of intervention. However, the Board is not prepared to deny these parties intervenor status. The Board will therefore grant Wikwemikong, MCSEA, WCO, LSARC and BayNiche intervenor status, subject to the restrictions on the scope of the Board's jurisdiction, as described below.
>
> …
>
> **Requests for Cost Eligibility**
>
> …
>
> The Board grants cost eligibility to MCSEA but the extent of the cost eligibility will be restricted to matters directly within the scope of this proceeding, as discussed further below. Further information on activities that are eligible for an award of costs is outlined in the Board's *Practice Direction on Cost Awards* on the Board's website. Please note that, unless the Board specifies otherwise, cost claims are to be filed at the end of this proceeding. Cost claims will be subject to the Applicant's right of objection. An honorarium may also be considered by the Board at the end of the proceeding."

In addition to its comment on the scope of this proceeding in the Notice of this Application, published in the January 11, 2012 edition of the Manitoulin Expositor, the Board also discussed the scope of this proceeding in greater detail in PO #1, in the section titled "Scope of the Board's Jurisdiction in a Section 92 Leave to Construct Application". McLean will not repeat that explanation here – PO#1 is available on the Board's web site. The Board has made the scope of this proceeding abundantly clear on several occasions, including others discussed below.

The MCSEA Request for an Honorarium:

As noted above, MCSEA has no cost claim. It has no counsel or consultants whose accounts which would typically form the basis for a cost claim. McLean notes that the need to retain a consultant was initially held out by MCSEA as a ground for its request for confirmation for cost eligibility, however, on Monday, February 13, 2012, shortly after the issuance of PO#1 in which the Board granted limited cost eligibility to MCSEA, Mr. Beaudry advised that Mr. Adams no longer represented MCSEA and that MCSEA was no longer requesting a cost award for professional services. MCSEA has provided no support for any other costs, and MCSEA has waived any claim to disbursements.

Mr. Beaudry's request is for an honorarium, notwithstanding his description of MCSEA's role as that of a "case manager" and his review of the Board's criteria when determining the amount of a cost award. Rule 3.08 of the Board's *Practice Direction on Cost Awards* provides for honoraria as follows:

> 3.08 The Board may, in appropriate circumstances, award an honorarium in such amount as the Board determines appropriate recognizing individual efforts in preparing and presenting an intervention, submission or written comments.

McLean respectfully submits that an honorarium is not warranted in this case, for the following reasons:

1. The Board restricted MCSEA's cost eligibility "to matters directly within the scope of this proceeding". Throughout this proceeding, and despite repeated explanations from the Board as to the scope of this proceeding and section 92 proceedings generally, MCSEA's focus has been on matters that are beyond that scope. For example:

   (a) Despite the Board's explanation of the scope of the proceeding in the Notice of Application, MCSEA's request for intervenor status, discussed above, dealt primarily with the Wind Farm and environmental matters, both of which are beyond the scope of a section 92 proceeding.

   (b) Despite the Board's more detailed explanation in PO#1 and its caution to parties with respect to the scope of the proceeding in Procedural Order #2, issued on February 14, 2012, Mr. Beaudry submitted almost 200 interrogatories (approximately 85 in the first round of interrogatories, followed by approximately 108 "questions of clarification" treated by the Board as a second round of interrogatories). Of those, dozens were beyond the scope of this proceeding. As McLean noted in its April 20, 2012 submission on the need for an oral hearing, "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." Mr. Beaudry asserts in his request that NA-PAW was among the groups whose interventions MCSEA coordinated, although the NA-PAW interrogatories were filed separately.

   (c) As McLean further noted in its April 20th submission, "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". This activity continued on the part of MCSEA and Mr. Beaudry when the Board provided for the filing of intervenor evidence. In Procedural Order No.7, issued May 11, 2012, the Board determined that it would not admit into evidence the material put forward by MCSEA as it was irrelevant and beyond the scope of the proceeding.

   (d) Finally, notwithstanding the Board's rejection of the material put forward as its evidence, MCSEA pursued similar issues in its final submission, rather than matters within the scope of the proceeding. The Board addressed the issues raised by MCSEA at page 9 of its June 28, 2012 Decision and Order as follows:

   > "**Issues Raised by MCSEA**
   >
   > MCSEA in its submission reiterated many of the concerns it has expressed at various points within the process. These concerns relate to the accuracy and adequacy of the Notice, the completeness and accuracy of the application, and the legitimacy of one of the partners, Mnidoo Mnising Power LP. The Board has already considered these matters and made its determinations. MCSEA's submissions seek to re-argue these issues and as such the Board will not address them further in this decision.

> MCSEA concluded that if the Board were to approve the application, it should only do so if a final design is submitted, and that if the project does proceed, advises that the transformer station must be properly grounded."

2. Mr. Beaudry refers to the Board's criteria for determining the amount of a cost award and concludes that all of the criteria to support an award have been met. With respect, that is not the case. For example:

   (a) It may be that MCSEA may have met certain of the Board's deadlines. However, when what is being filed by those deadlines is material that is not within the scope of the proceeding (a significant portion of the MCSEA interrogatories; the intended MCSEA evidence; and the MCSEA final submission), the mere meeting of a deadline does not represent responsible participation.

   (b) Similarly, item (h) in the Board's section 5.01 criteria ("addressed issues in its interrogatories, its written or oral evidence, or in its questions on cross-examination, or in its argument or otherwise in its intervention which were not relevant to the issues determined by the Board in the process") is clearly applicable to MCSEA. Throughout this proceeding, as discussed above, the Board has found that Mr. Beaudry and MCSEA were raising matters and filing material that were not relevant.

   (c) Mr. Beaudry asserts that the MCSEA support for a group intervention assisted the Board in defining the scope of the proceeding. With respect, the scope of the proceeding was clear from the outset. It was Mr. Beaudry and MCSEA that regularly moved beyond that scope notwithstanding the Board's numerous explanations, cautions and determinations. McLean cannot agree that Mr. Beaudry provided any assistance to the Board in this regard. If anything, MCSEA's actions, including the filing of over 100 "questions of clarification", unduly prolonged this proceeding.

3. Finally, Mr. Beaudry writes: "The Board is facing many similar applications. By providing recognition by way of an honorarium for a responsible intervention, future processes might be enhanced by adequate public participation." McLean submits that the Board's Practice Direction has long provided for honoraria, and as Mr. Beaudry notes, an honorarium has been granted in at least one other leave to construct proceeding. It is not necessary to grant an honorarium in the current proceeding to encourage public participation. McLean submits that the granting of an honorarium should not be granted as a matter of course – to do so would not encourage responsible participation in the Board's process.

In light of the foregoing, McLean respectfully requests that the Board reject the request for an honorarium.

The Quantum of an Honorarium in the Event that the Board determines to Make an Award:

McLean submits that an honorarium is not appropriate in the circumstances of this case. However, McLean offers the following comments in the event that the Board determines that an honorarium is warranted.

As noted above, Mr. Beaudry did not specify an amount for his requested honorarium. He does, however, mention two figures in his submission: $16,537.50, and $149,940. He appears to be suggesting that the honorarium should be $16,537.50. That figure is based on Mr. Beaudry's assertion that every day from the time the proceeding commenced in late 2011 through to the June 28th Decision and Order was spent on this case. Mr. Beaudry then multiplies his calculation of the number of weekdays in that period by $150. The $150 is derived from an honorarium awarded to an individual intervenor in Hydro One Networks Inc.'s Bruce to Milton leave to construct application (EB-2007-0050, referred to below as the "Bruce to Milton Proceeding"). Mr. Beaudry apparently took what was a lump sum honorarium, together with an allowance for expenses, and divided it by the number of hearing days and other procedural dates (issues, motions and technical conference days) in that proceeding to arrive at a *per diem* of $150.

The latter figure of $149,940 is used by Mr. Beaudry to illustrate what he suggests a cost claim could total based on 110.25 eight-hour weekdays through the December-June period at the lowest hourly rate on the Board's tariff for cost awards. The implication seems to be that by comparison, the $16,537.50 value is a modest request.

McLean respectfully submits that there is no basis for either of those figures. McLean makes the following submissions in this regard:

1. As noted previously, both the current proceeding and the Bruce to Milton Proceeding involved applications for leave to construct transmission lines, but there is little similarity between them. The scope of the Bruce to Milton Proceeding was vastly greater than that of the current proceeding. As described by the Board in its June 28th Decision, the current proceeding involved a 115 kV "single circuit overhead transmission line, a 1 km section of submarine cable, a switching station, a transformer station, and associated facilities. The Transmission Facilities will connect a wind farm on Manitoulin Island to the IESO-controlled grid on Goat Island, a distance of approximately 10 km." Much of the McLean's transmission line is located along a municipal right of way. The Bruce to Milton Proceeding was described at page 4 of the Board's September 15, 2008 Decision and Order granting leave subject to conditions is as follows:

   > "Hydro One is seeking an Order of the Board for leave to construct approximately 180 kilometres of double-circuit 500 Kilovolt ("kV") electricity transmission line adjacent to the existing transmission corridor (500 kV and/or 230 kV) extending from the Bruce NGS in Kincardine Township to Hydro One's Milton Switching Station in the town of Milton. Hydro One also proposes to make modifications at the Milton, Bruce A and Bruce B transmission stations to accommodate the new transmission lines.
   >
   > The original application was filed on March 29, 2007; an amended application was filed on November 30, 2007. The Application was given Board file No. EB-2007-0050. A map filed by Hydro One on November 30, 2007 as part of their amended application showing the location of the project is shown in Figure 1.
   >
   > Hydro One submitted that the project is required to meet the increased need for transmission capacity associated with the development of wind power in the Bruce area and the return to service of nuclear units at

the Bruce NGS. Hydro One proposed an in-service date of Fall 2011 for the new 500 kV transmission line and related facilities. The estimated cost of the transmission project is $635 million."

2. The Bruce to Milton proceeding began in March of 2007, and that application was modified by Hydro One in September of that year. The Decision was issued in September 2008, approximately 1½ years after the original application was filed. That proceeding involved almost 20 days of issues and motions days before the Board, a transcribed technical conference and the oral hearing itself. Aside from the extensive oral process, the proceeding involved thousands of pages of evidence (both in the original and revised applications) and a multitude of interrogatories. The current proceeding was far narrower in scope and was disposed of by way of a written hearing.

3. When MCSEA had the opportunity to file evidence and make submissions, the bulk of the material filed was beyond the scope of the proceeding. By contrast, Mr. Pappas, the intervenor in the Bruce to Milton proceeding referred to by Mr. Beaudry, took the following position in that proceeding (from page 31 of the September 15, 2008 Decision and Order in EB-2007-0050):

"Mr. Chris Aristides Pappas, an individual intervenor, submitted that Hydro One had not met the Filing Requirements because it had not examined in sufficient detail new conductor technologies, Flexible Alternating Current Transmission Systems, commonly called "FACTS" technologies, series compensation, etc. He further submitted that the proposed project presents significant risk to the system due to, among other things, the continued use of the BSPS."

4. Mr. Pappas filed extensive evidence and interrogatories with the Board, responded to interrogatories and participated in the oral hearing, including in cross-examination of Hydro One witnesses. In its September 28, 2008 Decision and Order on Cost Awards, the Board made the following finding:

"The Board will award Mr. Pappas an honorarium of $2,000. Mr. Pappas worked diligently in proceeding to present evidence and test applicant evidence. He raised issues which were then explored further by expert witnesses of other intervenors. Mr. Pappas is also awarded his disbursements which were appropriately filed in accordance with the Practice Direction on Cost Awards."

5. In other words, in recognition of his contribution to that entire lengthy and complex proceeding, that individual intervenor was awarded a lump sum honorarium of $2,000 plus $1,838 in Stage One disbursements and a further $342.61 for Stage Two disbursements (as noted above, Mr. Beaudry has made no claim for recovery of disbursements). Mr. Beaudry does not acknowledge that the entire honorarium in the Bruce to Milton proceeding was $2,000. Instead, he attempts to recast that $2,000 lump sum honorarium as a $150 *per diem* and expand it to include the entire duration of the McLean proceeding. There is no basis for this, and it misrepresents the Board's award in the Bruce to Milton Proceeding.

6. Similarly, there is no basis for the suggestion that a cost award to MCSEA could total $149,940. There is no justification or support for the number of hours allegedly spent on this matter. Moreover, MCSEA did not retain counsel or a qualified consultant in this matter, notwithstanding the Board's determination that MCSEA would be eligible for a cost award. As the Board has previously noted in disposing of a cost claim by individuals (see page 3 of the Board's December 27, 2006 Supplemental Cost Award Decision and Cost Order in EB-2005-0234 – an application by Greater Sudbury Hydro Inc. seeking

leave to acquire all outstanding shares in West Nipissing Energy Services Ltd.[1]), "the tariff included in Appendix A to the Practice Direction and Form 1 of Appendix B to the Practice Direction are meant to be used to recover costs for legal counsel and consultants hired by parties to the Board's proceedings or processes. The tariff and form are not meant to be used for individuals or members of a group. This is evidenced by the wording of the tariff (i.e., it sets out rates for legal fees and for analyst/consultant fees) and Form 1 (i.e., it asks for the name, year of call, and law firm name for the legal counsel or the name, number of years of relevant experience, and the consultant firm name for the consultant)." In that case, the Board rejected a claim of $7500 for 150 hours of preparation time and instead awarded an honorarium of $500. As noted above, it appears that the figure of $149,940 is being used by Mr. Beaudry more to for the purpose of implying that the $16,537.50 value represents a reasonable honorarium than as a proposed honorarium in itself.

7. If the Board determines that an honorarium is warranted, and if, as Mr. Beaudry appears to suggest, the Board's award in the Bruce to Milton proceeding should be used as a guide, then McLean submits that the honorarium payable to MCSEA should be significantly less than that paid in the Bruce to Milton proceeding. As discussed at length above, much of the MCSEA material was out of scope and not relevant to this proceeding. A minimal honorarium will allow MCSEA to recover some incidental costs while not creating an incentive for participation of this kind in other proceedings. McLean suggests that the Board award no more than $300 to MCSEA.

We thank you for your consideration in this matter. Should you have any questions or require further information in respect of the matters addressed in this letter, please do not hesitate to contact me.

Yours very truly,

BORDEN LADNER GERVAIS LLP
Per:

Original signed by James C. Sidlofsky

James C. Sidlofsky

copy to:

Gordon Potts, McLean's Mountain Wind Limited Partnership
Art Jacko, Mnidoo Mnising Power Limited Partnership
Manitoulin Coalition for Safe Energy Alternatives
BayNiche Conservancy
Lake Superior Action-Research-Conservation
Wind Concerns Ontario
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[1] Available at: http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/270362/view/dec_order%20cost%20awards_Greater%20Sudbury.PDF