

April 1, 2013

VIA E-MAIL & COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, Box 2319
Toronto, ON
M4P 1E4

Dear Ms. Walli:

**Re: K2 Wind Ontario Limited Partnership;
Notice of Motion;
Board File Number EB-2012-0458**

We are writing on behalf of K2 Wind Ontario Limited Partnership ("**K2 Wind**") to file the enclosed Notice of Motion with the Ontario Energy Board (the "**Board**") pursuant to Rule 8 of the Board's Rules of Practice and Procedure.

For the reasons provided in the Notice of Motion, K2 Wind seeks an Order from the Board striking out the three affidavits filed on behalf of the intervenor, the Residents Group, on March 24, 2013.

Two hard copies of the Notice of Motion will be delivered to the Board and served on the intervenors as soon as possible.

Please note that as of March 28th, 2013 "**FMC**" has changed its name to "**Dentons Canada LLP**". Our address and phone numbers have not changed.

Yours truly,
Dentons Canada LLP

(signed) Helen T. Newland

Helen T. Newland
HTN/ko
Encls.

cc: Maureen Helt
Leila Azaiez
Ontario Energy Board

Boris de Jonge
Capital Power Corporation

Paula Lukan
IESO

Paul F. Wendelgass
K2 Wind Ontario Inc.

Anita & Paul Frayne
ACW Residents Group

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, Sch. B, as amended (the “**OEB Act**”).

AND IN THE MATTER OF an Application (the
“**Application**”) by K2 Wind Ontario Limited Partnership for
an order under section 92 and subsection 96(1) of the
Ontario Energy Board Act, 1998, granting leave to construct
an electricity transmission line and related transmission
facilities (the “**Proposed Facilities**”).

AND IN THE MATTER OF a motion by K2 Wind Ontario
Limited Partnership to strike out the evidence of the
intervenor, the Residents Group, filed on March 24, 2013.

NOTICE OF MOTION

K2 Wind Ontario Limited Partnership (“**K2 Wind**”) will make a motion to the Ontario
Energy Board (the “**Board**”), at its offices at 2300 Yonge Street, to be heard in a
manner and at a time to be determined by the Board.

THIS MOTION IS FOR:

1. An order striking out three affidavits filed on behalf of the intervenor, the
Residents Group, on March 24, 2013, as follows:
 - (a) the affidavit of Michael Leitch that deals with whether the Proposed
Facilities meet specific requirements in the applicable electrical safety and
construction standards (the “**Leitch Affidavit**”);
 - (b) the affidavit of Ross and Darlene Brindley that raises the issue of alleged
potential stray voltage from a 27 kV distribution line of Hydro One
Networks Inc. (“**Hydro One**”) and that has nothing to do with the
Proposed Facilities (the “**Brindley Affidavit**”); and
 - (c) the affidavit of Marianne and Paul Bollinger that discusses a letter sent by
K2 Wind to various Ashfield-Colborne-Wawanosh Township (“**ACW
Township**”) residents (the “**Bollinger Affidavit**”) (collectively, the
“**Affidavits**”).

THE GROUNDS OF THIS MOTION ARE AS FOLLOWS:

Overview

2. The Board should strike out the Affidavits for the following reasons:
- (a) the issues of electrical safety and construction practices that are raised in the Leitch Affidavit, would require the Board to engage in matters within the exclusive jurisdiction of the Electrical Safety Authority (the “**ESA**”), pursuant to Part VIII of the *Electricity Act, 1998* (the “**Electricity Act**”);
 - (b) the construction activities and health issues that are raised in the Leitch Affidavit and the Brindley Affidavit, are outside the scope of this proceeding, as delineated in Procedural Order No. 1;
 - (c) the stray voltage issues that are raised in the Brindley Affidavit relate to an entirely different project and have nothing to do with the Proposed Facilities;
 - (d) the Bollinger Affidavit raises issues that are not relevant to this proceeding, namely, allegations as to what transpired at a particular ACW Township Council meeting; and
 - (e) to the extent that the Leitch Affidavit and the Brindley Affidavit purport to offer expert evidence in this proceeding, the deponents have not demonstrated that they are properly qualified.

The Board’s Jurisdiction

3. K2 Wind has applied for:
- (a) leave to construct transmission facilities pursuant to section 92 and subsection 96(1) of the OEB Act; and
 - (b) approval of the forms of lease, purchase and easement agreement pursuant to section 97 of the OEB Act.
4. Section 96 of the OEB Act circumscribes the Board’s jurisdiction on a leave to construct proceeding under section 92 of the OEB Act. Section 96 provides as follows:

Order allowing work to be carried out

96. (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the

public interest, it shall make an order granting leave to carry out the work. 1998, c. 15, Sched. B, s. 96.

Applications under s. 92

(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:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.

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. [emphasis added]

The ESA's Jurisdiction

5. Part VIII of the Electricity Act entitled "Electrical Safety" confers, on the ESA, jurisdiction with respect to electrical safety issues and the installation of electrical equipment. Subsection 113(7) of the Electricity Act provides the ESA with broad authority "governing the design, construction and test of works, matters and things used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario..."
6. Subsection 113(1)(a) of the Electricity Act authorizes the Lieutenant Governor in Council to make regulations

prescribing the design, construction, installation, protection, use, maintenance, repair, extension, alteration, connection and disconnection of all works, matters and things used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario.
7. The Electrical Safety Code (Regulation 164/99 under the Electricity Act) (the "**Code**") prescribes comprehensive requirements for the safe transmission of electricity in Ontario. The effect of section 2 of the Code is to require that all activities in connection with the generation, transmission, distribution or use of electricity in Ontario, be done in compliance with the Code.
8. There is a distinction between requiring an applicant to comply with applicable electrical safety standards by way of conditions in a leave to construct order, on

the one hand, and prescribing or adjudicating what the standards are or should be, on the other. The former is within the jurisdiction of the Board. The latter is not.

9. By virtue of both the Electricity Act and the Code, the ESA, and not the Board, has jurisdiction to deal with technical matters related to the construction of electricity facilities and electrical safety issues in Ontario.

Construction Activities And Health Issues Are Not Within The Scope Of This Proceeding

10. By Procedural Order No. 1, dated February 19, 2013, the Board determined the scope of this proceeding to be as follows:

The Board reminds parties that the Act expressly limits the scope of the Board's review of the Proposal. Section 96(2) of the Act provides that in considering the public interest concerning the Proposal the Board can only consider "the interests of consumers with respect to prices 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." The Board also has the jurisdiction to approve the form of agreements with affected landowners pursuant to section 97 of the Act.

Environmental issues are not within the scope of the Board's review, but are considered within the Ministry of the Environment ("MOE") Renewable Energy Approval ("REA") process. Although the Board has no role in the REA process, any approval of this application would ordinarily be conditional on all necessary permits and authorizations being received, including an approved REA.

Issues relating to land-use, land valuation, construction activities, and health and aesthetics are also not within the scope of the Board's jurisdiction. [emphases added]

11. The issues raised in the Leitch Affidavit relate to technical aspects of how the proposed transmission line should be constructed and what measures should be put in place to protect the health and safety of individuals working or living in proximity to the proposed transmission line.
12. For example, the Leitch Affidavit discusses how directional borings should be drilled (paragraph 6); how underground cables should be installed (paragraphs 6,

7, 13, 22 and 25); how trenches should be dug and refilled (paragraphs 8, 12, 13, 21, 25 and 33); and whether construction of the transmission line should include mechanical protection (paragraphs 10, 14, 15, 17, 20, 21, 24, 28, 29 and 33). Health and safety issues are discussed at paragraphs 18, 20, 21, 31, 32 and 33 of the Leitch Affidavit, as well.

13. The Brindley Affidavit relates to human and animal health issues allegedly caused by distribution facilities that are related to an entirely different project and have nothing to do with the Proposed Facilities.
14. Construction activities and health issues are outside the scope of this proceeding as delineated in Procedural Order No. 1 and are, therefore, not relevant.

The Deponents Are Not Experts

15. Paragraphs 4-15, 17-25 and 28-33 of the Leitch Affidavit are not based on the personal knowledge of the deponent (as required by Rule 12.01 of the Board's Rules of Practice and Procedure) and, instead, would appear to be expressions of opinion. To the extent that the Leitch Affidavit seeks to provide expert evidence in this proceeding, the deponent has not demonstrated that he is properly qualified as an expert in this regard.

Board Rules

16. K2 Wind relies on Rules 2.01, 3.01, 8 and 12 of the Board's Rules of Practice and Procedure.

DOCUMENTARY EVIDENCE:

17. K2 Wind will rely on the following documentary evidence in support of its motion:
 - (a) K2 Wind's application and pre-filed evidence;
 - (b) the evidence filed by K2 Wind in response to interrogatories;
 - (c) Procedural Order No. 1 issued by the Board on February 19, 2013;
 - (d) the evidence filed by the Residents Group on March 24, 2013; and
 - (e) such further evidence as counsel may advise and the Board may accept.

Dated April 1, 2013 at Toronto, Ontario.

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TO: Ms. Kirsten Walli
Board Secretary
Ontario Energy Board

All Intervenors