

April 8, 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;
Submission on Motion;
Board File Number EB-2012-0458**

We are writing in accordance with Procedural Order No. 4 to file the written submissions of K2 Wind Ontario Limited Partnership in support of the Notice of Motion it filed on April 1, 2013.

Yours truly,
Dentons Canada LLP

(signed) Helen T. Newland

Helen T. Newland
HTN/ko

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 (“**K2 Wind**”) for an order under section 92 and subsection 96(1) of the OEB Act granting leave to construct an electricity transmission line and related transmission facilities (the “**Proposed Facilities**”).

AND IN THE MATTER OF a motion (“**Motion**”) by K2 Wind, filed on April 1, 2013, to strike out the evidence of the intervenor, the Residents Group, filed on March 24, 2013.

AND IN THE MATTER OF Procedural Order No. 4 dated April 5, 2013 providing for submissions by K2 Wind on the Motion.

WRITTEN SUBMISSIONS OF K2 WIND

INTRODUCTION

1. These written submissions are filed pursuant to Procedural Order No. 4 of the Ontario Energy Board (the “**Board**”) in this proceeding.

THE MOTION

2. The Motion is for an order striking out three affidavits filed on March 24, 2013 on behalf of the intervenor, the Residents Group, as follows:
 - (a) the affidavit of Michael Leitch that deals with whether the Proposed Facilities meet specific requirements of applicable electrical safety and construction standards (the “**Leitch Affidavit**”);
 - (b) the affidavit of Ross and Darlene Brindley that raises the issue of alleged stray voltage from a 27 kV distribution line of Hydro One Networks Inc. (“**Hydro One**”) that is not proximate to and has

nothing to do with the Proposed Facilities (the “**Brindley Affidavit**”); and

- (c) the affidavit of Marianne and Paul Bollinger that discusses what transpired at a particular Ashfield-Colborne-Wawanosh Township (“**ACW Township**”) Council meeting (the “**Bollinger Affidavit**”) (collectively, the “**Affidavits**”).

SUBMISSIONS ON THE MOTION

The Board's Statutory 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;¹ and
 - (b) approval of the forms of lease, purchase agreement and easement agreement pursuant to section 97 of the OEB Act.²
- 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:³

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 Book of Authorities, Tab 1.

² *Ibid.*

³ *Ibid.*

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.
[emphases added]

The ESA's Statutory Jurisdiction

5. Part VIII of the *Electricity Act, 1998* ("**Electricity Act**"),⁴ entitled "Electrical Safety", confers on the Electrical Safety Authority ("**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 to "prepare and issue plans and specifications 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..."⁵

6. Subsection 113(11) of the *Electricity Act* provides the ESA with jurisdiction with respect to installation and other matters related to electrical safety. Specifically:

The Authority may issue such orders relating to work to be done, or the removal of things used, in the installation, removal, alteration, repair, protection, connection or disconnection of any of the works, matters and things mentioned in subsection (1) as the Authority considers necessary or advisable for the safety of persons or the protection of property and, in any such order or after having made it, the Authority may order any person to cease and desist from doing anything intended or likely to interfere with the terms of the order.⁶ [emphasis added]

7. 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,

⁴ Book of Authorities, Tab 2.

⁵ *Ibid.*

⁶ *Ibid.*

matters and things used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario.⁷

8. The Electrical Safety Code (Regulation 164/99 (the “**Code**”) is one such regulation made under the Electricity Act.⁸ The Code prescribes comprehensive requirements for the safe transmission of electricity in Ontario. Section 2 of the Code, in effect, requires that all activities in connection with the generation, transmission, distribution or use of electricity in Ontario, be done in compliance with the Code.

The OEB’s Safety Mandate

9. In contrast to the mandate conferred on the ESA, neither the OEB Act nor the Electricity Act confer express jurisdiction on the Board with respect to electrical safety or the installation of electrical equipment.
10. In its Supplemental Report on Smart Grid (EB-2011-0004) that was released on February 11, 2013, the Board recognized the jurisdiction of the ESA on matters related to safety:

4.1.2 Safety

Safety has always been a priority of the Board and is essential to good utility practice. The Board recognizes that the Electrical Safety Authority oversees safety issues directly through the development of its regulations, codes, and inspection program.⁹

11. The Board has previously made a distinction between requiring an applicant under section 92 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. For example, in the Grand Renewable decision, the Board stated that:

It is not necessary for the Board to make findings here as to the exact extent of what accommodation is required by [the applicant] to mitigate any negative

⁷ *Ibid.*

⁸ Book of Authorities, Tab 3.

⁹ Supplemental Report on Smart Grid, Ontario Energy Board, February 11, 2013, page 18, Book of Authorities, Tab 4.

impacts that its project will have on the existing distribution system. The existence of applicable construction standards and/or codes as well as any requirements of the Electrical Safety Authority, in its role pursuant to Ontario Regulation 22/04, to ensure compliance of distributors in managing distribution systems in accordance with the noted regulation should serve to identify what accommodation is required.

The Board conditions its granting of the leave to construct on GRWLP providing the financial contributions to HCHI necessary to accommodate any mitigation measures to existing distribution facilities deemed necessary to ensure compliance with any relevant code, standard or Electrical Safety Authority requirement.¹⁰

12. K2 Wind submits that the Board's practice of imposing conditions requiring compliance with all applicable regulations, codes and standards is entirely consistent with how the legislature of Ontario has allocated responsibility for safe transmission as between the OEB and the ESA.

Issues

13. The only matters that the Board may consider in this proceeding are whether and how the Proposed Facilities will, if at all, affect "[t]he interests of consumers with respect to prices and the reliability and quality of electricity service" and whether and how the Proposed Facilities will promote the use of renewable energy sources. The interests of consumers with respect to prices and the promotion of renewable energy sources are not at issue in this Motion.
14. Accordingly, the issue in this Motion may be stated as follows: are the matters raised in the Affidavits relevant to a determination of the impact, if any, of the Proposed Facilities on the reliability and quality of electricity service?

¹⁰ *Grand Renewable Wind, LP*, Ontario Energy Board Decision and Order, December 8, 2011 (EB-2011-0063), page 11 [*Grand Renewable*], Book of Authorities, Tab 5.

15. This issue has three distinct components:
- (a) impacts on the reliability of the Independent Electricity System Operator (the “**IESO**”) – controlled transmission grid; this component is referred to, hereafter, as “**Reliability**”;
 - (b) impacts on the reliability and quality of transmission service provided to transmission customers who are directly connected to the transmission facilities that the Proposed Facilities will also be connected to; this component is referred to, hereafter, as “**Quality of Service**”; and
 - (c) impacts on electricity distribution systems that are located proximate to the Proposed Facilities and on the reliability and quality of service provided by such systems to the customers they serve; this component is referred to, hereinafter, as “**Distribution System Impacts**”.
16. Each of the above-described three components is discussed below.

Reliability and Quality of Service

17. The Board has considered Reliability and Quality of Service in numerous proceedings under sections 92 and 96 of the OEB Act involving applications to construct electricity transmission facilities. In such cases, the Board has determined impacts on reliability and quality of electricity services by reference primarily to the System Impact Assessments (the “**SIA**”) that are conducted by the IESO and the Customer Impact Assessments (the “**CIA**”) that are conducted by the relevant transmitter, respectively:
- (a) *Hydro One Networks Inc.*, EB-2008-0023, page 5;¹¹
 - (b) *Summerhaven Wind LP*, EB-2011-0027, page 5;¹²
 - (c) *Ontario Power Generation Inc.*, EB-2011-0056, pages 5 and 6;¹³
 - (d) *Grand Renewable Wind, LP*, EB-2011-0063, pages 8 and 9;¹⁴

¹¹ *Hydro One Networks Inc.*, Ontario Energy Board Decision and Order, August 14, 2008, EB-2008-0023, page 5, Book of Authorities, Tab 6.

¹² *Summerhaven Wind LP*, Ontario Energy Board Decision and Order, November 11, 2011 (EB-2011-0027), pages 3-6, Book of Authorities, Tab 7.

¹³ *Ontario Power Generation Inc.*, Ontario Energy Board Decision and Order, October 28, 2011, EB-2011-0056, pages 5 and 6, Book of Authorities, Tab 8.

¹⁴ *Grand Renewable*, *supra* note 10 at pages 7-11, Book of Authorities, Tab 5.

- (e) *Detour Gold Corporation*, EB-2011-0115, pages 3 and 4;¹⁵
 - (f) *South Kent Wind LP*, EB-2011-0217, pages 4 and 5;¹⁶
 - (g) *McLean's Mountain Wind LP*, EB-2011-0394, pages 6 and 7; and¹⁷
 - (h) *White River Hydro LP and Gitichi Animki Energy Limited Partnership*, EB-2011-0420, pages 5 and 6.¹⁸
18. In this proceeding, none of the Affidavits filed by the Residents Group challenge or even discuss the conclusions of the IESO and Hydro One that the Proposed Facilities can be connected to Hydro One's transmission system without adverse impacts, provided that the conditions that are specified in each of the SIA and the CIA are met.

Distribution System Impacts

19. The K2 Transmission Line will share the ACW Township municipal right-of-way with the Hydro One local distribution system for 1.07 km along Glens Hill Road. Hydro One did not apply for intervenor status in this proceeding despite having been served with a copy of the Notice of Application and the Application.
20. Local electricity distributors routinely intervene in leave to construct proceedings where they have concerns that proposed facilities could negatively impact them or their customers. For example, local electricity distributors intervened in the Grand Renewable¹⁹ proceeding and in proceeding EB-2012-0337 (Varna Wind Inc.)²⁰ in order to express their concerns about proposed transmission facilities. The fact that Hydro One did not intervene in this proceeding suggests that it is not concerned that the Proposed Facilities will negatively impact the reliability and quality of its electricity distribution service.
21. While the Brindley Affidavit raises the issue of potential induction effects on the local distribution system, the effects relate to completely different

¹⁵ *Detour Gold Corporation*, Ontario Energy Board Decision and Order, August 12, 2011, EB-2011-0115, pages 3 and 4, Book of Authorities, Tab 9.

¹⁶ *South Kent Wind LP*, Ontario Energy Board Decision and Order, October 11, 2011, EB-2011-0217, pages 4 and 5, Book of Authorities, Tab 10,

¹⁷ *McLean's Mountain Wind LP*, Ontario Energy Board Decision and Order, June 28, 2012, EB-2011-0394, pages 6 and 7, Book of Authorities, Tab 11.

¹⁸ *White River Hydro LP and Gitichi Animki Energy Limited Partnership*, Ontario Energy Board Decision and Order, May 10, 2012, EB-2011-0420, pages 5 and 6, Book of Authorities, Tab 12.

¹⁹ *Grand Renewable*, *supra* note 10, Book of Authorities, Tab 5.

²⁰ *Varna Wind Inc.*, Ontario Energy Board Procedural Order No. 1, February 4, 2013, page 1, Book of Authorities, Tab 13.

facilities, with a different electrical configuration. The Brindley Affidavit does not assert that the Proposed Facilities will or are likely to cause any impact on the Hydro One distribution system or on its customers. Moreover, none of the other Affidavits make such assertions.

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

22. 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. [emphasis added]

23. Most, if not all, of 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.
24. 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.

25. 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.
26. Construction activities and health issues are outside the scope of this proceeding as delineated in Procedural Order No. 1 and are, therefore, not relevant.

Bollinger Affidavit

27. The Bollinger Affidavit attaches, as Exhibit “A”, a copy of a letter (the “**Letter**”) from K2 Wind in response to letters of objection that it received from certain residents of ACW Township. The Bollinger Affidavit states that this Letter was presented to ACW Township council and that “Councillors expressed their disagreement with statements contained within the letter.”
28. The Bollinger Affidavit does not explain how, specifically, the Letter relates to the matters that are properly at issue in this proceeding. K2 Wind submits that in the result, the Bollinger Affidavit is not relevant and should be struck out.

Mr. Leitch Is Not a Qualified Expert

29. 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.
30. As the Supreme Court of Canada held in *R v. Mohan* (“**Mohan**”).²¹ expert evidence must satisfy the following four criteria:
 - (a) relevance;
 - (b) be necessary in assisting the trier of fact;

²¹ *R v. Mohan*, [1994] 2 S.C.R. 9 at page 20 [*Mohan*], Book of Authorities, Tab 14.

- (c) the absence of any exclusionary rule; and
- (d) be offered by a properly qualified witness.

31. In *Williams v. Canon Canada Inc.* ("**Williams**"),²² Justice Strathy disqualified the experts put forward by the Plaintiffs on a certification motion, as they did not meet the criteria established in *Mohan*. He cited the Ontario Court of Appeal decision in *R v. A.K.*²³ and stated that if a witness does not qualify as an expert in accordance to the criterion stated above, he cannot give opinion evidence:

The opinion rule is a general rule of exclusion. Witnesses testify as to facts. As a general rule, they are not allowed to give any opinion about those facts. Opinion evidence is generally inadmissible. Opinion evidence is generally excluded because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inferences from the evidence and to form his or her opinions on the issues in the case...

In a nutshell, the opinion rule can be stated as follows: Opinion evidence is generally inadmissible unless it meets all four [of the Mohan] criteria set out above.²⁴

32. Justice Strathy went on to emphasize the importance of the expert being properly qualified to give evidence:

The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify...

The plaintiffs seek to qualify Mr. Atkins as a "consumer product failure expert." His main qualification, prior to becoming a consultant, seems to be his work at Canadian Tire. To conclude that Mr. Atkins is a "product failure expert" and is therefore qualified to express opinions on the failure of a digital

²² *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 at paras. 69 and 70 [*Williams*], Book of Authorities, Tab 15, affirmed by Divisional Court, 2012 ONSC 3692, Book of Authorities Tab 16.

²³ *R v. A.K.*, 1999 CanLII 3793 (ON CA) at paras. 71 and 75, Book of Authorities, Tab 17.

²⁴ *Infra*, note 22.

camera because he has experience in inspecting, testing and developing specifications for lawnmowers, bicycles and weed whackers is a leap of faith that is not supported by any evidence. I cannot conclude that his work experience with power tools, lawnmowers and the like qualifies him to give an opinion about the alleged failure of what he himself describes as an “intricate and highly complicated” optical unit of a camera, which has its own internal computer mechanism, or about the design features that should have been installed in the camera to prevent a failure, the cause of which he does not even identify. Never having examined a camera other than the Canon cameras he bought over the internet and having had no training or experience in camera inspection, repair and design, he can have no way of knowing what is, or is not, appropriate design.²⁵

33. To the extent that the Leitch Affidavit seeks to adduce expert evidence in this proceeding, the deponent has not demonstrated that he is properly qualified as an expert in accordance with three of the four criteria laid down in *Mohan*.
- (a) Mr. Leitch's evidence is not relevant to this proceeding since it would require the Board to engage in matters within the exclusive jurisdiction of the ESA and outside the scope of the proceeding, as defined in Procedural Order No. 1.
 - (b) Since the evidence put forth by Mr. Leitch is not relevant to this proceeding, it will not assist the Board in deciding whether to issue an order for leave to construct the Proposed Facilities.
 - (c) Mr. Leitch has not demonstrated that he possesses the special knowledge, educational and professional experience about the issues he discusses in his affidavit to qualify as an expert in the matter. The single sentence included in paragraph 1 of the Leitch Affidavit describing Mr. Leitch's Hydro One job as involving the “design of high voltage hydro lines” is not a sufficient demonstration of qualifications, expertise and experience in this regard.

²⁵ *Williams, supra*, note 22 at paras. 71 and 109, Book of Authorities, Tabs 15 and 16 and *Mohan, supra* note 21 at para. 27, Book of Authorities, Tab 14.

34. Mr. Leitch does not meet three of the four *Mohan* criteria and, accordingly, cannot be properly qualified as an expert. He is a witness of fact and his affidavit is nothing more than personal opinion and should be struck out.

Conclusion

35. 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 do not appear to be related to the “reliability” and “quality of electricity service” under section 96 of the OEB Act, as these terms have been interpreted by the Board in numerous prior decisions on leave to construct applications;
 - (b) 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 ESA pursuant to Part VIII of the Electricity Act;
 - (c) 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;
 - (d) the stray voltage issues that are raised in the Brindley Affidavit relate to an entirely different project that is unrelated to the Proposed Facilities;
 - (e) the Bollinger Affidavit describes what transpired at a particular ACW Township Council meeting without explaining the relevance of the description to the matters at issue in this proceeding; and
 - (f) to the extent that the Leitch Affidavit purports to offer expert evidence in this proceeding, the deponent has not demonstrated that he is properly qualified.

Dated April 8, 2013 at Toronto, Ontario.

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TO: Ms. Kirsten Walli
Board Secretary
Ontario Energy Board

All Intervenors