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April 25, 2013

BY COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Submissions of The Corporation of the County of Dufferin (the "County")
EB-2012-0365**

Pursuant to Procedural Order No. 6 dated April 4, 2013, we enclose two (2) hard copies of the Submissions of the County in the above referenced proceeding.

An electronic version of the Submissions will be filed on the Board's RESS as directed.

Yours truly,

AIRD & BERLIS LLP

Original Signed

Scott Stoll

SAS/hm
Encl.

cc: J. Hammond, DWPI
C. Keizer, Torys LLP
J. Myers, Tory LLP
All Intervenors

14538750.1

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Dufferin Wind Power Inc. for an Order or Orders pursuant to Section 92 of the *Ontario Energy Board Act, 1998* (as amended) granting leave to construct transmission facilities in the Township of Melancthon, the Town of Shelburne and the Township of Amaranth, all of which are in the County of Dufferin, Ontario.

SUBMISSIONS OF THE CORPORATION OF THE COUNTY OF DUFFERIN

PART I. INTRODUCTION

1. The Corporation of the County of Dufferin (the “**County**”) is an upper tier municipality as defined by the *Municipal Act, 2001*, S.O. 2001, c.25 (the “**Municipal Act**”). The County is comprised of several lower tier municipalities including other participants in this proceeding.
2. The County is the owner of certain lands, (the “**Rail Corridor**”) over which the Applicant seeks to locate the proposed transmission line. As stated in paragraph 33 of the Applicant submissions, the Rail Corridor is approximately 31.2km and the County is the owner but has noted there a several parcels for which there exists a title defect. The Applicant has been working with the County in respect of the title defects.
3. As part of the Application, the Applicant is seeking approval of a form of agreement to be offered the County for rights associated with the transmission line as required by section 97 of the *Ontario Energy Board Act 1998*, S.O. 1998, c. 15 (Sched. B) (the “**OEB Act**”). The County is not taking a position regarding any issue except those pertaining to the use of the Rail Corridor.
4. The County wishes to ensure any use by the Applicant of the Rail Corridor does not interfere with the County’s intended use of the Rail Corridor including a public trail and a local railway. As such, the County will seek to protect its rights in this regard.
5. There has been correspondence regarding a recent report prepared by County Staff that County Council voted to receive. Voting to receive the report did not change or alter the status of the County’s position regarding the state of negotiations between the Applicant and the County. The

decision to enter into any agreement is a decision of the Council for the County and these submissions are not to be taken in anyway as a fettering of Council's authority.

6. The County assumes any order of the Board would require compliance with applicable laws. However, the County wishes to be clear that such a requirement exists in the Board's order. Therefore, the County requests the order include the obligation to comply with all applicable laws, including the *Line Fences Act*, R.S.O. 1990, c. L-17.
7. The County is making no submission regarding the Applicant's satisfaction of the requirements of Section 92 and sub-section 96(2) of the OEB Act other than with respect to the location chosen.
8. The Applicant has indicated that it will be an unlicensed transmitter in accordance with the OEB Act and regulations. The County request the Board confirm that any future change of ownership or control of the transmission line will be subject to the requirements of the OEB Act, or any successor thereto, and that the Applicant be obligated to inform the County prior to any such change.

Part II. Location

9. On February 7, 2013, Council passed a resolution indicating that it did not support any above ground transmission lines connecting wind projects and that any transmission lines avoid the Town of Shelburne.¹ A copy of the resolution has been included as Appendix A to these submissions.
10. With respect to making the transmission line underground, the County submits there would be no technical deficiency from the Applicant's perspective.
11. While there would be a cost increase, as the Applicant has stated, the cost to the Applicant is not an issue or concern for the Board. The OPA and ratepayers pay the cost for electricity delivered to the transmission grid and so any increase in installation costs are to the account of the Applicant. Section 96(2) does not provide the Board with the authority to consider the cost impact on the Applicant.
12. Even in the present case, the Applicant has modified its design in the Amendment to satisfy an adjacent landowner. The Council for the County has clearly stated its desire regarding the transmission line in the resolution and the Board should respect the County's request regarding the installation.

¹ This resolution was included in a letter to Interested Parties from the County which is included in the record of this Proceeding as Appendix 1 to the Core Submission on the Need for an Oral Hearing dated February 21, 2013.

13. Therefore, the County respectfully requests the Board order, if it grants leave to construct, require the Applicant to install the transmission line underground.

PART III. Section 41(9) of the Electricity Act not Applicable to Corridor Lands

14. The *Electricity Act*,² sub-section 41, provides a transmitter or distributor with certain rights in respect of any public street or highway. Sub-section 41(7) provides that

41. (1) A transmitter or distributor may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and lines.

(8) Subject to clause (7) (c), the transmitter or distributor is not required to pay any compensation in order to exercise its powers under subsections (1), (2) and (3), and the *Expropriations Act* does not apply in respect of anything done pursuant to those powers.

15. The Electricity Act does not define “street” or “highway”. However, the *Public Transportation and Highway Improvement Act*³ includes the following definition:

“highway” includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct, trestle or any other structure incidental thereto, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

16. As such, the County submits the Rail Corridor is not a public street or highway and the Applicant has no right to use such lands under any authority granted by section 41 of the Electricity Act. Therefore, if the County and the Applicant are unable to enter into an easement agreement the Applicant would have to either select a different route or apply to the Ontario Energy Board for the right to expropriate such lands and provide compensation as contemplated by the OEB Act and the *Expropriations Act*.⁴

PART IV. The Offered Agreement

17. The Applicant has included a form of agreement (the “**Offered Easement**”) to be offered by the Applicant to the County.⁵ The County would request the

² *Electricity Act*, 1998, S.O. 1998, c.15 (Sched. A).

³ R.S.O. 1990, c-P.50, section 1.

⁴ R.S.O. 1990, c-E-26.

⁵ Exhibit F, Tab 2, Schedule 1, Appendix 6.

Board state clearly that approval under this section 97 of the OEB Act refers to a starting point for negotiation and not a finding that the term is appropriate nor is it consistent with any rights that would be granted under a subsequent expropriation proceeding.

(d) **Term**

18. The proposed term, Condition 1, of the Offered Easement is 45 years. The Applicant has entered into a 20 year agreement with the Ontario Power Authority to sell electricity. Assuming a reasonable period of time for planning, construction and decommissioning, there is no need for the rights of the Applicant to extend for such a long period of time.
19. The County would note the FIT Contract does not provide for a right of renewal or extension beyond the 20 year term. The termination date of the FIT Contract is 20 years from the Milestone Date for Commercial Operation and so there is only a need for a reasonable decommissioning and clean up time period following such date. A copy of the form of FIT Contract from the website of the Ontario Power Authority has been provided as Appendix A to these submissions.
20. As such, a more appropriate period of time would be 23 years which would provide adequate time for the Applicant to fulfill the terms of the FIT Contract.
21. As such, the County request the Board to either amend section 1 the Offered Easement Agreement to a term not exceeding 23 years.

Current Evidence

1. Subject to the terms of this Agreement, the County does hereby agree to grant and convey to DWPI for a period of forty-five (45) years commencing on the date hereof (the "**Term**")...

County Requested Amendment

1. Subject to the terms of this Agreement, the County does hereby agree to grant and convey to DWPI for a period of twenty-three (23) years commencing on the date hereof (the "**Term**")....

(b) **Exclusivity**

22. The Offered Easement is non-exclusive which the County requires.

23. The Rail Corridor lands are subject to certain pre-existing encumbrances and the County intends to create a public trail and potentially, a local rail line within the Rail Corridor.
24. The use of the Rail Corridor should not interfere with the County's future use of the Rail Corridor. The Applicant has confirmed its design will permit the future redevelopment of the railway.⁶ The County requests that the Board's order require Applicant's design accommodate the use of the Rail Corridor by the County for a railway without imposing any additional costs upon the County.
25. The County would note the Rail Corridor is used by snowmobilers and the Dufferin-Grey ATV Club. The County understands the Applicant has eliminated the use of guy wires, in part, as a result of the safety issue in this regard. The County requests that Applicant be required to maintain a public liaison committee to meet regularly with representatives of the community regarding the use of the Rail Corridor.
26. The Offered Easement has a condition whereby the Applicant will provide a schedule of maintenance activities to the County. The County requests that the Applicant be required by order of this Board to post such schedules at locations along the trail and publish notice of any such scheduled maintenance in the local newspaper at least 15 days in advance of such work.

(c) **Extent of the Requested Easement**

27. The Applicant seeks a non-exclusive easement that is 10 metres in width during the majority of the Rail Corridor. The Applicant has noted that it may require an easement approximately 11.5 metres in width to accommodate certain equipment and changes in specific locations.
28. The County would note the Offered Easement is a non-exclusive permanent easement over a portion of the Rail Corridor. While the Offered Easement does contemplate the Applicant performing certain works regarding a public trail, there are no express provisions that provide for the Applicant to access the Rail Corridor beyond the permanent easement requested.
29. Typically, the County understands that temporary working easements may be negotiated with landowners for construction purposes. Given the likely public scrutiny of the Applicant's activities, if there is no such temporary access expressly provided for in the Offered Easement or a separate working easement, there will be requests for the County to strictly enforce the terms of any agreement or expropriation order.

⁶ Exhibit G, Tab 1, Schedule 1, Page 5, ll. 24-5.

30. The Offered Easement, Condition 10, would appear to provide a right to use lands beyond those provided for in the Easement without condition or restriction. This is not acceptable to the County.
31. The County requests the Applicant to clarify if there are any requirements beyond the 10metre permanent easement sought, and if so, how the Applicant intends to deal with such situation.
32. Further, it is not clear to the County that the Applicant will be able to properly access the proposed Transmission Line within the requested easement for any maintenance activities or emergency response measures.
33. The County requests that the Applicant confirm it does not require any further access rights beyond those provided in the Offered Easement. If the Applicant is unable to make such a commitment, prior to any final decision of this Board, the County requests:
 - (i) the Applicant indicate its actual requirements both during and after construction; and
 - (ii) the County be provided with the opportunity to comment upon this issue to respond to the Applicant's updated request.

(d) **Environmental**

34. The County, as landowner, has certain obligations placed upon it by law, including responsibility for environmental contamination.
35. Condition 14, below, of the Offered Easement provides that the Applicant is responsible for Pollutants which it brings onto the lands.

14. DWPI shall not bring into or allow to be brought onto the Easement Lands or the County Lands any Pollutants, except such as are disclosed in Schedule "D" attached hereto or existed in or on the County Lands at the date of this Agreement. If DWPI or its employees or those for whom it is in law responsible shall bring, create, discharge or release upon, in or from the County Lands, including the Easement Lands, any Pollutants, whether or not disclosed in Schedule "D" and whether during the Term of this Agreement, then such Pollutants shall be and remain the sole property of DWPI and DWPI shall promptly remove same at its sole cost at the expiration or sooner termination of the Term or sooner if required by the County.

36. As noted, this is an old Rail Corridor and there may be pre-existing contamination as a result of the prior activities. Under current law, there is

no obligation upon the County to perform any remediation at this time. However, if the contamination becomes disturbed, the County may be required to undertake remediation. The Offered Easement does not place the onus on the Applicant for such remediation even though the Applicant is solely responsible for the need to remediate.

37. The County submits it is not appropriate nor reasonable to place that burden on the County and the public. As such, the County request an additional sentence be added to Condition 14 as provided below:

14. DWPI.....required by the County. In addition, DWPI shall in law be responsible for any Pollutants disturbed by the Works or DWPI's operations pursuant to this Agreement and shall, if requested by the County, remediate any disturbed Pollutants which would not have required remediation if not for the actions of DWPI pursuant to this Agreement.

PART V. Concluding Submissions

38. The County requests this Board:

- (d) to include in any order, the obligation to comply with all applicable laws including the Line Fences Act, R.S.O 1990, c. L-17.
- (e) require the transmission line to be installed underground and avoid the Town of Shelburne;
- (f) amend the terms of the form of the agreement offered pursuant to section 97 of the OEB Act as described above; and
- (g) require the Applicant to ensure the design will permit the future rail development without any additional cost to the County.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 25, 2013

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Counsel for The Corporation of the
County of Dufferin

APPENDIX A
COUNCIL RESOLUTION REGARDING WIND AND
TRANSMISSION

Council – February 7, 2013

44. Report – Chief Administrative Officer – Request for Easement Along former Rail Line

A report from the Chief Administrative Officer dated February 7, 2013 regarding the request by Dufferin Wind Power for an easement along the former rail line.

Moved by Councillor Campbell Moon, seconded by Councillor McGhee

THAT the report of the Chief Administrative Officer dated February 7, 2013 with respect to the request by Dufferin Wind Power for an easement along the former rail line be received;

AND THAT, staff be directed to submit comments, to the Ministry of the Environment through the Renewable Energy Approval process, pertaining to the following:

- Additional Studies and Reviews identified by the MMM Group;
- Items for Clarification and additional information identified by the MMM Group;
- Clarification of items raised by staff;
- A summary of general types of comments received from residents;
- Copies of all correspondence received from residents on this matter (both negative and positive).

AND THAT the Provincial approval authorities be advised as follows:

1. The County of Dufferin requests a moratorium on all wind development until the health studies currently being conducted (Two Year Health Canada Study on Wind Turbine Noise and Health) is completed and shared.
2. The County of Dufferin objects to any overhead lines that will connect with any wind development projects in Dufferin County.
3. The County of Dufferin requests that any transmissions lines, if approved, be located underground and not located in the Town of Shelburne.
4. Concerns and questions from Dufferin County residents and interested parties be responded to by the Ministry of the Environment prior a decision being made on the Dufferin Wind Project.

-Carried-