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May 24, 2013

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: McLean's Mountain Wind Limited Partnership
Application for Feed-in-Tariff Program Electricity Generation Licence
Board File No. EB-2013-0015

Introduction:

We are counsel to McLean's Mountain Wind Limited Partnership ("McLean"), the Applicant in the above captioned matter.

The Applicant's general partner is McLean's Mountain Wind GP Inc. ("McLean's GP"), which is equally owned by Northland Power Inc. ("NPI") and Mnidoo Mnising Power Limited Partnership ("MMP"). NPI and MMP are also the limited partners of the Applicant. MMP's general partner is Mnidoo Mnising Power General Partner Inc. MMP has six First Nations as limited partners: Aundeck Omni Kaning First Nation; M'chigeeng First Nation; Sheguiandah First Nation; Sheshegwaning First Nation; Whitefish River First Nation; and Zhiibaahaasing First Nation. MMP was formed to lead renewable energy projects on Manitoulin Island in order to protect First Nations' rights and heritage and to ensure the future for First Nations' youth.

This Application relates to the 60 MW McLean's Mountain Wind Farm (referred to here as the "Generation Facility") to be located south of Little Current on Manitoulin Island. On April 12, 2010 the Applicant received two contracts from the Ontario Power Authority (the "OPA") for the purchase of electricity generated by the Wind Farm. The contracts, with contract capacities of 50 MW and 10 MW, were awarded through the Ontario Feed-in-Tariff ("FIT") program (enabled by the *Green Energy and Green Economy Act, 2009*).

The Generation Facility and related infrastructure have been approved through the Renewable Energy Approval ("REA") process, and the Board has granted McLean leave to construct the transmission facilities that will connect the Generation Facility to the IESO-controlled grid (Board File No. EB-2011-0394). The granting of the Licence that is requested in this Application will enable McLean to generate electricity from the Generation Facility in accordance with the *Ontario Energy Board Act, 1998* (the "OEB Act").

The Generation Facility has been the subject of significant public and Aboriginal consultation since 2004. There have also been numerous meetings with Aboriginal communities including the Wikwemikong Unceded Indian Reserve No. 26 (referred to here as "Wikwemikong") throughout the same period of time as the public consultation was undertaken.

The Board's Notice of Application and Written Hearing (the "Notice") in the current proceeding indicated that "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." Persons objecting to a written hearing were to provide written reasons why an oral hearing is necessary. Those submissions were due to the Board and McLean by February 28, 2013.

As noted in our correspondence of March 6, 2013, McLean received a request for an oral hearing from Wikwemikong dated February 28th. On March 5, 2013, McLean received correspondence from Raymond Beaudry of MCSEA, the Manitoulin Coalition for Safe Energy Alternatives. MCSEA was previously a party to the McLean leave to construct proceeding and the REA appeal proceeding brought before the Environmental review Tribunal. MCSEA had initially appealed the REA approval, but withdrew its appeal. Mr. Beaudry's correspondence appears to be a letter of comment on the application, but Mr. Beaudry also writes that "We also wish to have the board recognize the request for an oral hearing by the Wikwemikong Unceded First Nation in EB-2013-0015."

On March 8, 2013, McLean delivered its reply submission to the Board. McLean submitted that an oral hearing is not warranted in this matter, for the reasons discussed in the submission. McLean requested that the Board proceed with this Application on the basis of a written hearing, consistent with its Notice.

The Board's Decision on Oral Hearing and Procedural Order No. 1

On April 26, 2013, the Board issued its Decision on Oral Hearing and Procedural Order No. 1 (referred to here as "PO#1"). In PO#1, the Board considered the scope of this proceeding; the Wikwemikong oral hearing request; and the duty to consult, and denied the Wikwemikong request. In summary, the Board made the following findings:

- With respect to the scope of the proceeding, the Board found (with reference to its Decision and Order of March 23, 2010 in York Energy Centre LP's Electricity Generation Licence proceeding – EB-2009-0242) that "An electricity generation licence permits the licensee to participate in the Ontario energy market. The licence does not grant approval to build the generation facility itself. It is, therefore, a process for licensing the applicant, not the facility" and that:

  "The scope of a licence application procedure does not include a review of the merits or impact of the generation facility or the transmission facilities which connect the generator to the electricity grid. The

generation and transmission facilities are subject to environmental and other permitting processes which are not conducted by the Board. The transmission facilities are subject to a leave to construct proceeding before the Board, but that review is limited by the Act and does not include environmental issues. McLean's was granted leave to construct the transmission facilities by the Board's Decision and Order of June 28, 2012 (EB-2011-0394)."

- With respect to the Wikwemikong Oral Hearing request, the Board confirmed that it had considered the Wikwemikong request (including Wikwemikong's reasons for requesting an oral hearing), and determined that an oral hearing is not required. Specifically, the Board found:

"Wikwemikong has identified that the *project* may interfere with the guarantees set out in the treaty. However, the project (specifically the wind farm and the associated transmission line) is not within the scope of this licence proceeding. Wikwemikong has identified no issues that are within the scope of this licence proceeding, namely the financial viability, technical capability, and conduct of the applicant. Accordingly, the Board concludes that an oral hearing is not required to hear Wikwemikong's evidence."

- With respect to the duty to consult, the Board made the following findings:

"As described above, the "project" (the wind farm and associated transmission line) is not the subject of the current proceeding. The Board's authority to determine questions of law and fact is specifically limited in section 19 of the Act to areas within its jurisdiction. As outlined above, the Board has no jurisdiction with respect to the siting, contracting, construction or impacts of the wind farm and only limited jurisdiction over the transmission line which connects the wind farm to the electricity grid. This limited jurisdiction over the transmission line has already been exercised by the Board in a different proceeding (EB-2011-0394). Wikwemikong has raised no issues with respect to the duty to consult which are directly related to matters before the Board in this licence application proceeding."

The Board discussed its Decisions in the Yellow Falls Power Limited Partnership leave to construct proceeding (EB-2009-0120 – see Appendix 1 to PO#1) and ACH Limited Partnership and AbiBow Canada Inc.'s combined Licence Amendment proceeding (EB-2011-0065/EB-2011-0068 – see Appendix 2 to PO#1), and made the following findings:

"In the ACH/AbiBow decision, the Board stated that "there must be a clear nexus between the matter before the Board (i.e. the applications the Board is being asked to approve) and the circumstances giving rise to the (possible) duty to consult." The Board went on to describe the limited nature of a licence application proceeding:

> Section 57 of the Act requires electricity generators to be licensed by the Board. The licence itself does little more than authorize the licensee to generate electricity for the Independent Electricity System Operator ("IESO") administered markets, purchase electricity from the IESO administered market, and sell electricity to the IESO administered market.

The Board finds that Wikwemikong has identified no issue related to the Crown's duty to consult which is within the Board's jurisdiction in this licence proceeding. Therefore, the Board has no jurisdiction to assess whether there has been adequate consultation."

In PO#1, having denied Wikwemikong's request for an oral hearing, the Board allowed Wikwemikong until May 3, 2013 to deliver its submission, if any, in accordance with the scope of the proceeding. McLean was allowed until May 10, 2013 to file its reply submission, if any. It appears that during the afternoon of Friday, May 3, 2013, counsel to Wikwemikong faxed to the Board a letter requesting an extension of the Wikwemikong filing deadline to Monday, May 6th. Neither we nor McLean received a copy of that letter. Late in the afternoon of Tuesday, May 7,

2013, counsel to Wikwemikong apparently faxed a submission to the Board, with a copy to the Applicant. On May 10, 2013, we wrote to the Board to advise that McLean intended to respond to the May 7th Wikwemikong letter, and to submissions of other persons who have filed letters in this proceeding to the extent that those submissions may be within the scope of this proceeding. In light of the timing of the Wikwemikong filing, we advised that McLean would require a brief amount of additional time to file its reply, and that we anticipated that McLean's reply submission would be delivered by Tuesday, May 14, 2013.

By letter dated May 13, 2013, Board Staff requested an opportunity to file a submission; that it be given until May 17, 2013 to file its submission; and that the due date for McLean's reply submission be extended to May 24, 2013.

Procedural Order No. 2 and the late submission of Anna Marie General

In Procedural Order No.2 ("PO#2"), the Board granted Board Staff until May 17, 2013 to file their submission, and extended the filing deadline for the McLean submission to May 24, 2013.

On May 17, 2013, we received the Board Staff submission.

There was no provision in PO#1 or PO#2 for further submissions in this matter beyond those of Wikwemikong, Board Staff and McLean. However, it appears that Anna Marie General, who had originally filed a submission in March, delivered a further submission to the Board on May 17th. We did not receive a copy of it, nor did McLean. It was found in the Board's web drawer for this proceeding. Persons wishing to file submissions on the application were to have done so by March 6th, and Ms. General did so. Wikwemikong was allowed an opprtunity to file a submission on the application itself as its original submission had been on the issue of the form of hearing for this proceeding.

Ms. General's May 17th submission should not be considered by the Board. However, McLean seeks a Decision from the Board on this Application, and does not believe it would be productive or appropriate to engage in a further exchange of submissions regarding this late filing by Ms. General. Accordingly, McLean offers the following comments in respect of the Wikwemikong submission and others filed in this proceeding, including the late May 17th submission from Ms. General.

The Wikwemikong Submission of May 7, 2013 raises no grounds for rejecting this Application.

McLean respectfully submits that the Board very clearly articulated the scope of a generator licensing proceeding and, more particularly, the scope of a FIT generator licensing proceeding, in PO#1, with reference to its Decision in the York Energy Centre licensing proceeding. Specifically, the Board found (at pp.2-3 of PO#1):

> "The scope of a generation licence application process has been articulated by the Board in its Decision and Order of March 23, 2010 for York Energy Centre LP's Electricity Generation Licence proceeding (EB-2009-0242). In that decision, the Board stated:
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> > In the exercise of its licensing function, the Board's practice is to review a licence application based on the Applicant's' ability to own and/or operate a generation facility and to participate

reliably in Ontario's energy market. The Board uses three main criteria to assess an electricity generator licence applicant:

- The applicant's ability to be a financially viable entity with respect to owning and operating a generation facility in Ontario's energy market;
- The applicant's technical capability to reliably and safely operate a generator; and
- The applicant and its key individuals' past business history and conduct such that they afford reasonable grounds for belief that the applicant will carry on business in accordance with the law, integrity and honesty.

When an applicant for an electricity generation licence is a FIT Program participant, the OPA undertakes a rigorous assessment of the applicant's financial viability, technical capability and conduct. If the OPA is satisfied with the results of this assessment, the OPA grants the applicant a Notice to Proceed. Because of the rigour of the OPA assessment process, the Board will generally grant a generation licence to an applicant if it has received a Notice to Proceed from the OPA."

Wikwemikong was provided an opportunity to make submissions on matters within the scope of this proceeding, but instead has simply reargued the oral hearing request that has already been denied by the Board. McLean respectfully submits that Wikwemikong has provided no suggestion that McLean has not met the Board's criteria for the issuance of a FIT generator Licence. As with its initial request for an oral hearing, the Wikwemikong submissions of May 7th are beyond the scope of this proceeding. Wikwemikong has raised no good reason to revisit the Board's rejection of the oral hearing request, nor has it raised any reason to deny McLean a Generator Licence.

To begin, as noted above, the Generation Facility and related infrastructure were the subject of a lengthy Aboriginal and public consultation process in the context of the REA and prior to the advent of the REA process in 2009. In fact, the Generation Facility was the subject of significant public and Aboriginal consultation since 2004. There were also numerous meetings with Aboriginal communities including Wikwemikong throughout the same period as the public consultation was undertaken. McLean met with Wikwemikong as early as June 2006 to discuss the Generation Facility and on numerous other occasions to discuss the details of the then proposed project. The details of the consultation were not included in McLean's response to the initial Wikwemikong oral hearing request, nor are they included with this letter, as McLean submits that this information is not required for the Board to make a determination of this matter. However, the details of the extensive consultation with Wikwemikong were available in the Consultation Report that was filed as part of, and considered in the approval of, the REA.

The REA process allowed for the consideration of a wide range of matters related to the Generation Facility, including environmental matters, and approval was granted. As noted above, the approval was appealed by MCSEA, but MCSEA withdrew its appeal before the proceedings commenced.

There was no appeal or judicial review initiated of the Aboriginal consultation undertaken as part of the REA or its approval by Wikwemikong or any other party. The adequacy of the Aboriginal consultation regarding the development of the generation facility ought to have been considered during or following the consideration and approval of the REA, during which Aboriginal consultation was undertaken, considered and approved.

McLean respectfully submits that Board Staff is correct in their May 17, 2013 submission when they state that "there is no causal connection between the conduct of the Crown [in considering whether to grant an electricity generation licence] and any potential infringement to Aboriginal or treaty rights." Aboriginal consultation was considered in other regulatory processes and ought not to be raised during this proceeding under the current circumstances.

The transmission facilities connecting the Generation Facility to the IESO-controlled grid were the subject of an application for leave to construct under Section 92 of the OEB Act, and that application was in turn the subject of a lengthy written proceeding. The Board granted leave to construct by its Decision and Order dated June 28, 2012, subject to the conditions contained therein. Among the intervenors were MCSEA and the Wikwemikong Unceded First Nation Elders and Youth (referred to in the list of parties in that proceeding as the Wikwemikong Unceded Indian Reserve, at the address shown in Wikwemikong's correspondence in the current proceeding). Requests for an oral hearing were considered and denied by the Board in the leave to construct proceeding. In denying the oral hearing request in Procedural Order No.1 in the leave to construct proceeding, issued on January 27, 2012, the Board wrote:

> **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.

In Procedural Order No. 1 in that proceeding, the Board also discussed the scope of a section 92 leave to construct application, as follows:

> "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."

[1] Yellow Falls Power Limited Partnership, *Decision on Questions of Jurisdiction and Procedural Order 4*, EB-2009-[0120], November 18, 2009. See also, Northgate Minerals, *Procedural Order 2*, EB-2010-0150, July 29, 2010."

The Board considered a further request from MCSEA for an oral hearing on McLean's evidence later in the process, and that request was again denied. In Procedural Order No. 6, issued on April 24, 2012, the Board made the following findings (at pp. 2-3):

> "On April 12, 2012 the Board issued Procedural Order No. 5 in which it ordered that McLean's respond to the second round of interrogatories by April 18, 2012. It also ordered that parties should make submissions regarding the appropriateness of an oral hearing by April 20, 2012. Submissions were received from MCSEA, which argued in favour of an oral hearing on Manitoulin Island, and the applicant, which argued that no oral hearing is necessary.
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> MCSEA's arguments in support of an oral hearing can be grouped into four general categories: deficiencies in the public notice, deficiencies in the application, incomplete or inaccurate information respecting the nature of the applicant's partnership structure, and incomplete or inaccurate information respecting the specifics of the proposed route.
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> The Board is of the view that none of these reasons justify an oral hearing. The Board will conduct an oral hearing where it is determined to be the appropriate means of acquiring additional factual evidence which is required to reach a decision, or as a means of allowing parties to cross-examine on the written evidence. The Board has concluded that given the scope of the proceeding and the matters on which MCSEA proposes to cross-examine, an oral hearing on McLean's evidence would be of insufficient probative value to warrant its conduct."

McLean reiterates its March 8, 2013 submission that the reasons for denying the oral hearing request in the current case are similar. The matters being raised by Wikwemikong are beyond the scope of this proceeding. The Board determined in PO#1 that there is no need to conduct an oral hearing in this proceeding, and it is neither necessary nor appropriate to consider that request once again.

The submissions of MCSEA (Raymond Beaudry), Emily Weber and Anna Marie General are beyond the scope of this proceeding and raise no grounds for refusal of the requested FIT Generator Licence.

McLean is in receipt of correspondence from Raymond Beaudry on behalf of MCSEA dated March 5, 2013, from Emily Weber in her personal capacity dated March 1, 2013, and from Anna Marie General in her personal capacity dated March 6, 2013. Ms. General is a member of the Aundeck Omni Kaning First Nation, which is a member of MMP. As noted above, Ms. General filed a further submission with the Board on May 17th.

None of those submissions raises matters that are within the scope of this proceeding.

The MCSEA submission has two themes – opposition to the government's FIT program (particularly as it relates to wind projects) and to pricing under the FIT contracts; and allegations of alleged breaches by McLean of the conditions of the Board's June 28, 2012 Decision granting leave to construct the transmission facilities that will be used to convey the output from the McLean wind farm to the IESO-controlled grid. The MCSEA letter also alleges that one of the members of MMP did not execute a resolution in support of the project, and requests that the Board recognize the Wikwemikong oral hearing request.

McLean has already made its submissions with respect to the oral hearing request on more than one occasion. The Board found no basis for an oral hearing request, there is still no basis for an oral hearing, and it should not be reargued or revisited.

MCSEA made allegations about the legitimacy of MMP in the leave to construct proceeding, and the Board disposed of them in that proceeding. McLean rejects the renewed MCSEA assertions regarding the legitimacy of MMP in the current proceeding. The composition of MMP has remained unchanged, and the Sheguiandah First Nation, the subject of the MCSEA assertion in the current proceeding, remains part of McLean.

With respect to the MCSEA allegations regarding compliance with the conditions of the Board's Order granting leave to construct, McLean submits that it has in no way breached the Board's conditions in its Decision and Order in EB-2011-0394. In any event, the appropriate forum for allegations of that kind is the leave to construct proceeding, and McLean has already responded to the MCSEA allegations in the context of that proceeding. The MCSEA allegations do not provide a basis for denying the licence requested in this Application. As the Board noted in PO#1, "The scope of a licence application procedure does not include a review of the merits or impact of the generation facility or the transmission facilities which connect the generator to the electricity grid."

Ms. Weber's submission mentions First Nations consultation, already addressed by the Board in PO#1 and by McLean in its March 8th submission and in the preceding pages. Ms. Weber mentions environmental concerns, but as discussed above, those concerns are beyond the scope of this proceeding and were addressed at length through the REA process. Finally, as with the MCSEA submission, Ms. Weber expresses concerns about the provincial government's FIT program and the pricing thereunder. As with the other matters raised by Ms. Weber, McLean submits that these concerns are out of scope. To reiterate the Board's comments in Procedural Order No. 1 in the leave to construct 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."

McLean respectfully submits that there is similarly no basis to enquire into these matters in the context of a FIT licence application. The Board is not approving the generating facility – it is considering the ability of the Applicant to meet its obligations as a licensee, and in the case of a FIT Generator Licence, it is considering whether the OPA has granted the Applicant a Notice to Proceed, which the OPA has done in this case. No party has raised any matters which should lead the Board to conclude that McLean should not be granted a FIT Generator Licence.

Ms. General's March 6, 2013 correspondence addresses the duty to consult. As discussed above, the Board has already held in PO#1 that "Wikwemikong has raised no issues with respect to the duty to consult which are directly related to matters before the Board in this licence application proceeding." McLean respectfully submits that Ms. General's March 6th letter raises no basis for the Board to modify that finding.

Finally, Ms. General's May 17, 2013 correspondence raises matters related generally to the generation facilities and the transmission lines that will convey their output to the IESO-controlled grid, including environmental matters; Aundeck Omni Kaning First Nation's membership in MMP; and consultation in respect of the project. McLean respectfully submits that none of those matters is within the scope of this proceeding. With respect to Ms. General's comments regarding Aundeck Omni Kaning First Nation, as noted previously, MCSEA had made allegations about the legitimacy of MMP in the leave to construct proceeding, and the Board disposed of them in that proceeding. McLean rejects Ms. General's assertions regarding the legitimacy of MMP in the current proceeding. The composition of MMP has remained unchanged, and Aundeck Omni Kaning First Nation, the subject of Ms. General's assertion in the current proceeding, remains part of McLean. McLean's submissions above regarding environmental matters; matters related to the routing of the transmission line; and consultation are also applicable to Ms. General's May 17th filing.

For all of the foregoing reasons, McLean respectfully requests that the Board grant it the requested FIT Generator Licence.

Should you have any questions or require further information in this regard, 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: Sushil Samant, McLean's Mountain Wind Limited Partnership
Gordon Potts, McLean's Mountain Wind Limited Partnership
Duke Peltier, Wikwemikong Unceded Indian Reserve No. 26
Emily Weber
Anna Marie General
Raymond Beaudry, MCSEA
George Dimitropoulos, Board Staff

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