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BY E-MAIL

November 15, 2013

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

Dear Ms. Walli:

**Re: Niagara Region Wind Corp. ("NRWC")
Application for Leave to Construct
Board Staff Submission on Preliminary Issues
Board File No. EB-2013-0203**

In accordance with Procedural Order #1, please find attached Board Staff's submission on preliminary issues in the above noted proceeding. The applicant and all the intervenors have been copied on this filing.

Yours truly,

Original Signed By

Stephen Vetsis
Analyst – Applications & Regulatory Audit

Encl.



BOARD STAFF SUBMISSION

EB-2013-0203

November 15, 2013

Application & Background

Niagara Region Wind Corporation (the “Applicant”) filed an application with the Ontario Energy Board (the “Board”) on May 7, 2013 under sections 92 and 96(2) of the *Ontario Energy Board Act, 1998* (the “Act”). The Applicant has applied for an order of the Board granting leave to construct an electricity transmission line and related facilities (collectively the “Facility”) to connect the Niagara Region Wind Project (“NRWP”), to the IESO-controlled grid, and for an order under section 97 of the Act approving the forms of agreements that have been or will be offered to affected landowners. The Facility will consist of:

- two Substations, one at each of NRWP’s generation sites;
- a transition substation where the transmission line transitions from overhead to underground cables prior to traversing under the Niagara Escarpment area;
- an Interconnect Station where the transmission facility terminates at Hydro One Networks Inc.’s decommissioned Q5G line;
- 10 km of 115 kV transmission line between the North and South Substations, 34 km of 115 kV transmission from the North Substation to the Transition Station, and 5km of underground transmission line from the Transition Station to the Interconnect Station (“the Transmission Line”);

The Board established the scope of this hearing in its Notice of Application. The scope is largely defined by section 96 (2) of the Act which provides the criteria that the Board must consider in determining whether the proposed Transmission Facilities are in the public interest.

Section 96 (2) sets out the following criteria:

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.

The scope of this hearing is also defined by section 97 of the Act which requires the Board to approve the form of agreement that has been or will be offered to land owners:

In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.

Procedural Order No. 1

In Procedural Order No. 1 issued on November 1, 2013 the Board set out its decision with respect to intervenor status. The Board referenced the request made by the Township of West Lincoln ("the Township") which based its request for intervention status in part on its interest in the form of agreement with land owners affected by the route or location of the Transmission Line.

Two grounds for intervention raised by the Township were the location of the Transmission Line and the fact that there is no existing road use agreement. It is the Township's submission that the evaluation of the Application in the public interest in accordance with sections 96 (2) and section 97 of the Act requires consideration of the terms of the Road Use Agreement for both the municipal and regional road allowances.

Location of the Transmission Line and Road Use Agreement

The Board noted in Procedural Order No. 1 that the Applicant has sought approval for two forms of agreement under section 97: an "Exclusive Option for Substation" and a "Land Use Agreement (Transmission)". The Board further stated that "although the Application references certain "Road Use Agreements" that the Applicant is seeking to negotiate with affected municipalities (including one or more with the Township), it does not appear to be seeking any approval for these particular agreements from the Board. It is therefore not clear if the Township's concern with respect to its road allowance and section 97 are within the scope of this proceeding."

Threshold Questions asked by the Board

The Board asked for submissions from the parties and Board staff on the interplay between section 97 of the Act and section 41 of the *Electricity Act*. In particular, the Board asked the parties' for their views on whether an approval under section 97 for the form of road use agreements is required under the current circumstances.

Further the Board asked for submissions on the appropriate interpretation of section 97. Section 97 states that an offer must be made to each owner of land "affected by the approved route or location". The Board asked for parties' views respecting what is meant by "approved route or location" and how it is determined. In this regard, parties were reminded of the interplay between section 97 and section 96(2).

Relevant Legislative Provisions

Section 41 of the *Electricity Act* provides as follows:

Public streets and highways

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 [...]

Location

(9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.

Application of subs. (9)

(10) Subsection (9) does not apply if section 92 of the Ontario Energy Board Act, 1998 applies.

Section 97 of the Act provides:

In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the ***approved route or location an agreement in a form approved by the Board.***

Section 92

(1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

(2) Subsection (1) does not apply to the relocation or reconstruction of an existing electricity transmission line or electricity distribution line or interconnection where no expansion or reinforcement is involved unless the acquisition of additional land or authority to use additional land is necessary.

I. Submissions on Threshold Questions: Interplay between Section 97 of the Act and Section 41 of the *Electricity Act*

Board staff has reviewed previous Board decisions wherein the Board has considered the application of section 41 of the *Electricity Act*. There are not many cases however the Board's decision in *Plateau Wind Inc.* EB-2007-0253 ("Plateau") does provide some helpful discussion and findings with respect to the interpretation of section 41 of the *Electricity Act*. Plateau Wind filed an application with the Board dated July 30, 2010, under subsection 41(9) of the *Electricity Act*, for an order of the Board establishing the location of Plateau's proposed distribution facilities ("Distribution Facilities") within road allowances owned by Grey Highlands.

As Plateau and Grey Highlands could not reach an agreement with respect to the location of the distribution facilities, Plateau filed the Application with the Board for an order or orders, pursuant to section 41(9) of the *Electricity Act*, establishing the location of Plateau's Distribution Facilities within the road allowances.

Plateau stated that it chose to route certain power lines, poles and other facilities associated with the Distribution System within the road allowances pursuant to the statutory right of distributors under section 41(1) of the *Electricity Act*.

Plateau also submitted that because of the limited scope of section 41(9) and because the two parties were unable to reach an agreement on the location of the Distribution Facilities within the road allowances, the only issue before the Board was determining location. Subsection 41(9) of the *Electricity Act* states that the location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter and the owner of the street or highway and, in the case of disagreement, shall be determined by the Board.

In its Decision in the Plateau case the Board considered its legislative authority as set out in section 41 of the *Electricity Act*. The Board noted that the “legislation limits the Board's role in this proceeding to a determination of the location of Plateau's proposed Distribution Facilities within the Road Allowances. The language in section 41 refers to constructing or installing structures “*over, under or on any public street or highway*”. Given the legislative restriction on the Board's jurisdiction, the Board noted it is not its role to approve or deny the project or the Distributions Facilities, to consider the merits, prudence or any environmental, health or economic impacts associated with it or to consider alternatives to the project.”

In a more recent Decision of the Board, *Bornish Wind, LP, Kerwood Wind, Inc. and Jericho Wind, Inc. (Re)* (EB-2013-/0040 & EB-2013-0041) (“Bornish”) the Applicants filed an application with the Board, under sections 92, 97 and 101 of the *Act*. The Applicants argued that the scope of the Board's jurisdiction under Sections 92 and 96 of the *Act* was affected by the Applicants' reliance on the rights granted under Section 41 of the *Electricity Act*, relating to the use of public highways for the purpose of a transmission system.

By way of background, in the Bornish case the Applicants proposed locating the transmission lines within County road rights-of-way (“ROWs”) except to the extent that certain portions of the transmission lines would be constructed on private lands adjacent to the ROWs. In proposing to use the ROWs, the Applicants indicated that they were relying upon their rights under Section 41 of the *Electricity Act*. The Bornish Applicants submitted that the Board's consideration of the public interest under Sections 92 and 96 in respect of the routing of the transmission lines is subject to those rights.

In its Decision the Board noted that the Applicants decided that the municipal road right of way was the preferred route for the transmission line. The Board noted that the Applicants reported that they had reached agreement with the County on modifications to the routing of transmission lines and the form of road use agreements, and that the Applicants addressed all of the County's

outstanding concerns with the proposed transmission facilities. As such, it was not necessary for the Board to comment or make any findings on the Applicants' reliance on their rights under section 41 of the *Electricity Act*. That being said, the Board did approve the form of all agreements submitted by the Applicant including the road use agreement.

The only limitation on any of the rights provided for in section 41 is found in subsection 41(10) which provides that subsection (9), which deals with location, does not apply if a leave to construct order is required pursuant to section 92 of the Act. As such, Board staff submits that if there is disagreement as to location, while section 41(9) may not apply, the various other subsections of section 41 apply even in a section 92 application.

The question then becomes whether or not, if there is a section 92 application, it is necessary for the Board to approve the form of a road use agreement. Board staff submits that in reading section 41 of the *Electricity Act* it is clear that the plain language of the section provides transmitters and distributors with certain rights with respect to the construction of electricity transmission and distribution systems (including poles and lines) under, over or on any public street or highway. These rights include the right of a transmitter or distributor to inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities constructed or installed under subsection (1) and to enter the street or highway at any reasonable time to exercise the powers noted.

Subsection 41 (5) provides that these rights do not require the consent of the owner of or any other person having an interest in the street or highway.

In the Bornish case the Applicant argued that "subsection 41(10) does not amend or affect the rights granted to transmitters in Subsections 41(1) to 41(8), or render those provisions inapplicable. As such, the rights granted to transmitters under subsections 41(1), (2) and (3) (location, ongoing rights to maintain and entry) remain in effect, as does the right to do so without the owner's consent under subsection (5). As a result, the application of section 92 of the Act does not diminish the Applicants' rights under s.41 to be in the road allowance¹."

Board staff submits that this argument however does not exempt the Applicant from the requirement set out in section 97 of the Act that requires an applicant to offer a form of agreement approved by the Board to each owner of land affected by the route or location. While section 41 of the *Electricity Act* does give a transmitter or distributor certain rights over municipal rights of way without having

¹ *Bornish Wind, LP, Kerwood Wind, Inc. and Jericho Wind, Inc. (Re)* (EB-2013-/0040 & EB-2013-0041), Argument in Chief filed October 2nd, 2013, para 19.

to pay compensation, nowhere in the section does it reference “the form of agreement” or section 97 of the Act. In this case, the Township is a landowner that is affected by the route. As such Board staff submits that the agreement is subject to approval as required by section 97 of the Act. In further support of the position that the Board does approve road use agreements the Board has historically engaged in this practice, although it is recognized that in all such cases there was no dispute with respect to the form of agreement that was filed and as such no discussion by the Board.

If the Board agrees with this position and determines that it is required to consider and approve the form of agreement for a municipality, and in this case a road use agreement, then Board staff submits that the approval should be limited to the review of a standard form of agreement which represents the initial offering to the affected landowner.

This position is consistent with a Decision of the Board in *Enbridge Gas Distribution Inc. (Re)* (EB-2006-0305)². In that case Enbridge filed an application with the Board for an Order for leave to construct a natural gas pipeline. Enbridge required an easement from the Toronto Economic Development Corporation (“TEDCO”), an intervenor in the proceeding.

TEDCO asked the Board to modify the form of agreement proposed by Enbridge with respect to two clauses. The Board stated, at paragraph 43:

When considering the standard form agreement to be offered to affected landowners, the Board considers the agreement anew and in the context of the application in which it has been filed. The Board approves a standard form agreement which represents the **initial offering** to the affected landowner. Once the Board is satisfied with the standard form agreement, and in this case the Board is satisfied with the form as filed by Enbridge, the parties are free to negotiate whatever terms they believe to be necessary to protect their specific interests. The Board does not become involved in the detailed negotiation of the clauses in the agreements between one landowner and the Applicant. It is also accepted that a review by this Board under Section 97 does not extend to the amount of compensation or the structure of compensation arrangements.⁶
[Emphasis added]

The Board recently reaffirmed this position in its Decision in the Bornish case at page 10:

In each application seeking approval under section 97, the Board reviews the forms of agreements filed by the Applicant in order to satisfy itself that the form of agreement, which represents the initial offering to an affected

² *Enbridge Gas Distribution Inc. (Re)* EB-2006-0305 2007 LNONOEB 49

landowner, is acceptable. Once the Board is satisfied with the ***initial offering*** to an affected landowner, the parties are free to negotiate terms to meet their respective interests. In this proceeding, the Board is satisfied with the forms of agreements filed by the Applicants. In addition, no concerns were expressed to the Board concerning the forms of agreements proposed by the Applicants. [Emphasis added]

Board staff submits that the role of the Board in approving the form of agreement offered to each owner of land affected by the route or location is limited to satisfying itself with the initial offering presented to an affected landowner and the Board is not required to review each individual term and/or clause of the agreement. While section 41 of the *Electricity Act* does give a transmitter or distributor certain rights over municipal rights of way, nowhere in the section does it reference “the form of agreement” or section 97 of the Act.

II. Submissions on Threshold Questions: Interpretation of “approved route”

The second question raised by the Board in Procedural Order No. 1 was a request for parties’ views respecting what is meant by “approved route or location” and how is it determined. In this regard, the Board suggested that parties may wish to consider the interplay between section 97 and section 96(2).

Section 97 of the Act states:

In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board

Board staff notes that, in addition to the statutory requirements, the Board’s *Filing Requirements for Electricity Transmission and Distribution* speaks to the route in a leave to construct proceeding. In setting out the project details, the Filing Requirements note that “the route of the line is critical because the Board will only provide leave to construct for a specific route. Any material deviations to the approved route following Board approval will invalidate the leave to construct.”³

While section 97 of the Act speaks to an “approved route or location” and the Filing Requirement state that the Board will only provide leave to construct for a specific route, Board staff has considered past decisions of the Board with

³ Board’s *Filing Requirements for Electricity Transmission and Distribution* (EB-2006-0170), Exhibit D, page 14

respect to its role in approving the route or location in a leave to construct transmission line proceeding.

In *Hydro One Networks Inc.* (EB-2007-0050), an Order of the Board for leave to construct 180 km of transmission line adjacent to an existing transmission corridor, the Board considered the application in relation to the Environmental Assessment (“EA”) and other permitting processes.

In that same proceeding, the Board held an Issues Day to determine the issues to be considered during the course of the hearing. In the Issues Day Decision and Order the Board set out the following:

Should leave to construct be granted now or should the consideration of the need and justification for the line and the leave to construct being sought be deferred until the completion of an approved Environmental Assessment Report, or alternatively at least approval of the EA Terms of Reference?

The issue was proposed by Powerline Connections and was supported by Pollution Probe and the landowners represented by Mr. Ross and by Mr. Fallis. The issue was opposed by Hydro One and PWU.

The Board has to some extent addressed this issue already in its Decision and Order on Motion, dated July 4, 2007, as follows:

Both the Leave to Construct and the EA approval are required before the project may proceed, but neither process is completely dependent upon the other. There is the potential for conflicting results, but that potential arises no matter which process goes first.

.....

The Board, however, is of the view that the two processes should not be significantly out of step. For example, the leave to construct would be significantly affected if the EA Terms of Reference did not include the same route. Therefore, the Board will proceed with the Leave to Construct application, but we will reassess the matter in advance of the oral phase of the hearing if the Terms of Reference are still not approved at that time.

The Board’s mandate is to assess the proposal in terms of price, reliability and quality of electricity service. Part of that assessment involves an analysis of alternatives. Any assessment of alternatives in

the EA process will be in terms of environmental and socio-economic impact. To the extent that alternatives raised in the EA process are relevant and material to the comparison of alternatives in terms of price, reliability and quality of electricity service, those alternatives may appropriately be considered in the Leave to Construct application.

Board staff submits that the Decision above makes it clear that the Board's process in hearing a leave to construct application and the process under the Ministry of the Environment's *Environmental Assessment Act* should not be significantly out of step as "the leave to construct would be significantly affected if the EA Terms of Reference did not include the same route." By ensuring the process under the EA or a Renewable Energy Approval ("REA") is completed prior to the leave to construct proceeding, Board staff submits that the Board can then assess the proposal, including route only with respect to terms price, reliability and quality of electricity service.

In order to better understand the interplay between the Renewable Energy Approval Process and the approvals under the leave to construct process, Board staff has set out below a summary of the Ministry of the Environment's *"Guide to Environmental Assessment Requirements for Electricity Projects"*.

RENEWABLE ENERGY APPROVALS PROCESS

A renewable energy generation project requires approval from the Ministry of the Environment (MOE) prior to connection of the Project to the Independent Electricity System Operator (IESO) controlled grid. Projects are subject to the Renewable Energy Approval (REA) process, as required under Ontario Regulation 359/09 (O. Reg. 359/09) under the *Environmental Protection Act*.

The Guide to Environmental Assessment Requirements for Electricity Projects provides the following:

A.5.1 Transmission Associated with Generation Transmission lines that are 115 kV or greater, and are associated with a generation facility that falls in Category B are to be reviewed through the Environmental Screening Process so that the entire project can be reviewed under one process, as a single project. ***Proponents of such transmission lines are encouraged to examine and evaluate different routes as part of their review under the Environmental Screening Process. Evaluation of alternative routes will assist the proponent in meeting other approvals that may be required for transmission lines.***

A.5.2 Transmission Not Associated with Generation

Transmission lines that are not associated with a generation facility that falls in Category B and that are • 115 kV and greater than 2 km in length; or • greater than 115 kV and less than 500 kV and greater than 2 km in length and less than 50 km; are required to follow the process under Ontario Hydro's (now Hydro One) Class Environmental Assessment for Minor Transmission Facilities.

A.5.3 Other Approvals for Transmission Projects

Under section 92 of the *Ontario Energy Board Act* proponents must also obtain Leave to Construct approval from the Ontario Energy Board (OEB) for some transmission lines. Regulation 365/00 under the *Ontario Energy Board Act* sets out what sizes of transmission lines require OEB Leave-to-Construct. Proponents are advised that Leave-to-Construct approvals are route-specific. Some of the information compiled under the Class EA for Minor Transmission Facilities or Environmental Screening Process may be used as part of the information required by the OEB for a Leave-to-Construct application.⁴

Board staff submits that the above guidance provided to proponents of certain electricity projects confirms that *proponents of transmission lines are encouraged to examine and evaluate different routes as part of their review under the Environmental Screening Process.*

In this proceeding the Applicant filed an REA which confirms the following:

2.2.2.5 Transmission Line and Tap-in Location

To facilitate the Project's connection to the provincial grid, a new 115 kV transmission line approximately 44 km in length will be constructed as part of the Project. **A preferred transmission line route** has been identified in the REA, as well as **some alternate transmission line routes** where further consultation with municipalities and local distribution companies will help to select the most ideal route. The configuration and routes **for the preferred and alternate transmission lines are shown in Appendix A.**

Board staff submits that the route approved in an REA or EA directly informs the Board and historically the Board has confirmed the importance of the environmental assessment process, which in most instances occurs prior to an application for leave to construct, in informing Board proceedings.

⁴ Guide to Environmental Assessment Requirements for Electricity Projects, (2011) Government of Ontario Publication. Legislative Authority: Environmental Assessment Act, R.S.O. 11990, Ontario Regulation 116/01

For example, in *White River Hydro LP (Re)* (EB-2011-0420) an application for leave to construct, the Board referenced the requirement that the project was subject to the environmental screening process for hydroelectric projects prescribed on Ontario Regulation 116/01, Electricity Project Regulation. A statement of Completion was then filed with the Ministry of Environment. Following the filing of the Statement of Completion, the Applicants decided to consider a minor modification to the transmission line routing. The Board noted the following:

The Board notes that the evidence provided by the Applicants during the discovery phase indicates that both the Ministry of Natural Resources (“MNR”) and the Ministry of Environment (“MOE”) confirmed that the minor modification in the Transmission Line route i.e., the “Niizh Portion” would only require a formal amendment to the Project Information Report/Environmental Screening Review Report (“PIR”).
Based on the clarifications and evidence during the discovery phase noted above, the Board is satisfied that the route now proposed has been approved by the MOE⁵.

The Board made an order granting the Applicant an Order for Leave to Construct.

In *Grand Renewable Wind LP (Re)* (EB-2011-0063)⁶, the Board sought information from the Applicant about the REA process and specifically for clarification of the extent to which the route identified in the application before the Board was expected to be the final route subject to the REA approval.

The Applicant confirmed that the route in the leave to construct application was the final route subject to REA approval. In its decision the Board stated that “Board’s focus would typically be on the cost effectiveness of the route where the price consideration is triggered by a cost to ratepayers.”

In *Hydro One Networks Inc. (Re)*, (EB-2006-0352),⁷ an application for approval to expropriate lands the Board noted that the landowners requested that the question of route selection be made an issue in the proceeding. The Board noted at para 53:

The preferred route for the transmission line was identified and approved through the environmental assessment process. As noted

⁵ *White River Hydro LP (Re)* (EB-2011-0420) p. 7

⁶ *Grand Renewable Wind LP (Re)* (EB-2011-0063), 2011 LNONOEB 325

⁷ *Hydro One Networks Inc. (Re)*, (EB-2006-0352), 2007 LNONOEB 13

above, this process was open to participation by the public, including the landowners affected by this application. As the route has already been approved through the appropriate process, the Board determined that it was not an issue in this proceeding.

The Board finds that it can and should address route alternatives that have a material impact on price, reliability and quality of electricity service. The Board notes that these alternatives may be alternatives in routing within the applied for corridor or alternatives outside the applied for corridor.

In considering alternatives outside the corridor in a leave to construct proceeding however may result in new, REA-like proceedings, and giving an unlimited right of rehearing by any landowner who takes issue with the corridor.

Board staff submits that the route approved through the REA or EA process directly informs the Board as it includes substantial consideration of alternative routes, involving the opportunity for all stakeholders including owners of land to provide input to the selection of the preferred route which is the subject of a leave to construct proceeding. Board staff also submits that the Board's focus in considering the route for electricity transmission leave to construct matters would typically be on the cost effectiveness of the route where the price consideration is triggered by a cost to ratepayers. The Board may consider route alternatives provided by the applicant but only where such alternatives are in the public interest with respect to price, reliability and quality of electricity service. Board staff notes that in this proceeding, the construction of the transmission line will be paid for by the applicant, not ratepayers, and this will be relevant to the Board's consideration of price.