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VIA RESS AND COURIER

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

**Attention: Kirsten Walli
Board Secretary**

Dear Ms. Walli:

**Re: Niagara Region Wind Corporation
Board File No. EB-2013-0203
Submissions on Preliminary Issues**

We are counsel to Niagara Region Wind Corporation (the "Applicant") in the above-noted proceeding. Please find enclosed the Applicant's Submissions on Preliminary Issues.

Sincerely,

Signed in the original

George Vegh
Enclosure

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, as amended;

AND IN THE MATTER OF an application by Niagara Region Wind Corporation for an order or orders pursuant to section 92 of the *Ontario Energy Board Act, 1998* (the “**OEB Act**”) granting leave to construct transmission facilities in the townships of West Lincoln, Lincoln, Wainfleet, the Niagara Region and Haldimand County.

APPLICANT’S SUBMISSIONS ON PRELIMINARY ISSUES

1. These submissions are in response to Procedural Order No. 1, in which the Ontario Energy Board (the “**Board**”) requested the parties to provide submissions on preliminary issues relating to section 97 of the *OEB Act* (“**Section 97**”). Specifically, the Board requested submissions on (i) whether an approval of form of municipal road agreements is required under Section 97; and (ii) what is meant by the term “approved route” as it is used in Section 97.
2. These issues arise because the Township of West Lincoln (“**West Lincoln**”) seeks to address a proposed road use agreement in this proceeding. It claims that the road use agreement is an agreement for which Board approval is required under Section 97.
3. Niagara Region Wind Corporation (the “**Applicant**”) addresses these two questions below. In summary, the Applicant submits that a municipal road use agreement is not an agreement within the terms of Section 97. Rather, access to roads and highways are addressed entirely in s. 41 of the *Electricity Act, 1998* (the “**Electricity Act**”) which specifically provides that a transmitter’s right to construct and maintain facilities does not require the consent of the owner of the land or any other person having an interest in the land. There is therefore no obligation to offer any form of agreement to a municipality for road use. To the contrary, imposing such an obligation would effectively seek to apply the gas infrastructure approval regime under the *Municipal Franchise Act* (“**MFA**”) to electricity transmission. There is no legal basis for this approach.
4. These submissions are set out in greater detail below. Following those submissions, for the purposes of clarification, the Applicant will provide a correction to the record in respect of its communications with the Township of West Lincoln (“**West Lincoln**”) respecting the road use agreement.

5. Finally, in light of the Board's indication that it will decide whether an oral hearing is required once it has considered submissions on the preliminary issue,¹ the Applicant includes below its reasons as to why an oral hearing is not required in this proceeding.

Submissions on Preliminary Issues

Preliminary Issue One – Whether a municipal road use agreement is a landowner agreement under Section 97

6. The first question is whether approval of the form of road use agreement is required under Section 97 of the *OEB Act*.
7. The Applicant submits that it is not.
8. The *OEB Act* and the *Electricity Act* set out two distinct regimes respecting uses of land: a private landowner regime in ss. 97 to 100 of the *OEB Act* and a separate regime for public streets and highways in s. 41 of the *Electricity Act*. Each of these regimes provides different rights and responsibilities for transmitters, landowners and the OEB. They are described in turn.

The Private Landowner Contractual Regime in ss. 97-100 of the OEB Act

9. The private landowner regime in ss. 97 to 100 of the *OEB Act* is entirely contractual. It allows persons constructing hydrocarbon or electricity transmission/distribution lines to secure rights to private land. Under this regime, persons constructing these lines negotiate with private landowners over the specific commercial terms of a land use agreement. The contractual negotiation framework is overseen by the Board in that the Board must approve the form of agreement offered to landowners. The parties can then negotiate different terms. If the parties do not agree to terms, the Board may expropriate the landowners' land rights if it determines it is in the public interest to do so.
10. The Board has described this process as follows:²

¹ In recent leave to construct proceedings, the Board has determined whether an oral hearing is necessary at the conclusion of the interrogatory stage. The Applicant assumed that the Board would proceed in a similar manner in this proceeding, and for this reason did not submit an objection to requests for an oral hearing at an earlier stage.

² Decision and Order dated June 1, 2007 in EB-2006-0305 at page 10. The decision cited *Union Gas Limited*, Decision and Order, EB-2005-0550 (June 12, 2006) in this regard.

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.

11. Sections 97-100 of the *OEB Act* thus provide the structure in which private landowners and transmitters, etc. negotiate land use agreements; the ultimate terms of those agreements are negotiated between landowners and transmitters. In contrast to this contractual regime, the regulation of the use of public streets and highways is determined by statutory rights and obligations. This is addressed immediately below.

Public Streets and Highways Statutory Regime under Section 41 of the Electricity Act

12. Section 41 sets out a comprehensive set of rights of access to public streets and highways pursuant to which all the components of a distributor or transmitter's rights of access to and installation on public streets or highways are prescribed by legislation. Specifically, s. 41 provides that electricity transmitters and distributors have the right to:
 - Install structures, equipment and other facilities over, under or on any public street or highway (ss. 41(1));
 - Inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities (ss. 41(2)); and
 - Enter onto land to exercise statutory powers (ss. 41(3) and (4)).
13. Under the landowner contractual regime described above, all of these matters would have to be addressed in the form of contract under Section 97. However, under s. 41, all of these rights are exercisable without the consent of the owner or other person having an interest in the street or highway (ss. 41(5)).

14. Thus, under s. 41 the transmitter/distributor has the right to install facilities over a highway with or without the landowner's consent. In this case, West Lincoln does not have to consent to this through a road use agreement and does not have the authority to require the Applicant to agree to construct facilities underground.
15. The only component of the s. 41 process which is not prescribed by legislation arises when leave to construct is not required (see ss. 41(9) and (10)). However, this is not the case here because leave to construct *is* required. In any event, for completeness, in the hypothetical case where leave to construct is not required, then a landowner and transmitter/distributor who disagree upon the location of a facility may have that matter determined by the OEB.
16. In either event (whether leave to construct is required or not), a transmitter/distributor continues to have all of the rights and obligations in s. 41. Thus, for example, a transmitter/distributor always has the right to install facilities over any highway. If leave to construct *is not* required, then the location of the facilities that are constructed over a highway may be determined by the Board. If leave to construct *is* required, then the location of those facilities over a highway is not determined by the Board.³
17. This is not to suggest that the Board does not have *any* authority with respect to the placement of facilities on municipal roads where leave to construct is required. The Board does have authority in this regard with respect to matters that are within the public interest as prescribed in s. 96 of the *OEB Act*. For example, in the *Summerhaven* decision, the Board added a condition respecting the placement of poles on the municipal road ways to address concerns respecting the impact on the quality of distribution services caused by the placement of poles. Specifically, the Board stated:⁴

“The evidence is that close proximity of transmission and distribution facilities could result in negative impacts on the distribution system that require mitigation activities. In the Board's view, this situation requires assessment of the price, reliability and quality of distribution services...”

³ It may be worth noting, for completeness, that s. 101 of the *OEB Act* provides a residual right of leave to construct applicants to apply to the Board for approval to construct a “work” (defined in s. 89 of the *OEB Act* as “a hydrocarbon line, electricity distribution line, electricity transmission line, interconnection or station”) upon, under or over a highway, utility line or ditch. However, the applicant has not brought such an application under s. 101, so that provision is not relevant here.

⁴ Decision and Order granting Leave to Construct to Summerhaven Wind LP, November 11, 2011, p. 4.

18. Accordingly, if West Lincoln has concerns respecting the use of its road in a manner that impacts the price, reliability and quality of service, then it can address them for the Board's consideration. The Board has authority to address these concerns, for example, in conditions of approval. However, West Lincoln has not raised any such concerns. Rather, West Lincoln's concerns in respect of the road use agreement appear to reflect its assumption that such an agreement is required whether it addresses matters within the Board's jurisdiction or not.

Contrast between Section 41 and the Municipal Franchises Act

19. West Lincoln's position that the Board may address the terms of a road use agreement is fundamentally inconsistent with the current legal framework for electricity infrastructure investment. Indeed, this position ignores s. 41 of the *Electricity Act* and, instead, proposes a regime for electricity that would follow the framework for natural gas distribution infrastructure under the *MFA* despite the fact that electricity infrastructure is expressly excluded from the *MFA*.
20. Unlike electricity infrastructure, the installation of natural gas infrastructure requires an agreement with a municipality as approved by the OEB. The *MFA* requires municipal and OEB approval for the construction of works to supply natural gas to a municipality. The OEB has exercised its approval authority through the creation of a model franchise agreement that is binding on municipalities and gas distributors.
21. The model franchise agreement addresses matters that are addressed in s. 41 of the *Electricity Act*, such as constructing, maintaining and locating gas works on municipal roads.⁵ If West Lincoln's position is accepted, the Board's role in electricity infrastructure would be the same as its role in gas infrastructure under the *MFA*.
22. However, the *MFA* is restricted to gas works. It does not extend to electricity works. To the contrary, in 1998, with the passage of the *Electricity Act*, electricity works were expressly removed from the oversight regime of the *MFA*. The suggestion by West Lincoln that the Board should require the Applicant to enter into a road use agreement – and to approve the terms of that agreement – effectively overturns this legislative amendment and purports to apply the *MFA* regime to the electricity system.
23. As indicated below, the Applicant has communicated with West Lincoln and attempted to accommodate its concerns through the negotiation of a road use agreement. It will

⁵ See the "Gas Franchise Handbook" published by the Board, available at:
http://www.ontarioenergyboard.ca/documents/gas_franchise_handbook_230502.pdf.

continue to do so. However, these discussions and communications are all within the context of the legal rights established by s. 41 of the *Electricity Act*. Those rights cannot be impaired or limited by the leave to construct process. Specifically, the Board is nowhere given the authority to detract from the rights of transmitters prescribed in s. 41 of the *Electricity Act*.

Conclusion – Question One

24. To conclude on this question, Section 97 is part of a distinct regime which applies to the manner in which transmitters and distributors secure private land rights needed for their infrastructure. Under this regime, the Board ensures that it is satisfied with the form of the agreement offered or to be offered to private landowners. This regime does not apply to the framework of statutory rights of access to public highways established under s. 41 of the *Electricity Act*. Section 97 therefore has no application to the rights of access to public highways established under s. 41 of the *Electricity Act*, and the Board therefore does not have the authority to require electricity transmitters to enter into road use agreements with municipalities.

Preliminary Issue – Question Two

25. The Board has also requested submissions on what is meant by the term “approved route” in Section 97.
26. As for the word “route” itself, the Oxford Dictionary defines “route” as “the line of a road, path, railway”. This dictionary definition is consistent with the requirement to file and publish a “Route map” with a leave to construct application. Section 94 of the *OEB Act* provides the following under the heading “Route map”:

“An applicant for an order granting leave under this Part shall file with the application a map showing the general location of the proposed work and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed work is to pass.”

27. In other words, in the electricity transmission work context, the “route” is the line from the generation facility to the transmission network.
28. As for the term “approved route”, it thus refers to the route *applied for* by an applicant and *approved* by the Board in granting leave to construct.
29. Both of these italicized points are relevant.

30. First, the route must be applied for (not suggested by an intervenor). As stated in the Board's Filing Requirements for Electricity Transmission and Distribution Applications:⁶

[T]he Board will either approve or not approve the proposed project (i.e. the preferred option). It will not choose a solution from among the alternative options.

31. Second, in approving the route, the Board may only consider the public interest criteria listed in ss. 96(2) of the *OEB Act*. Put another way, an approved route is a route which the Board has found to meet the public interest criteria. Only those public interest criteria can be taken into account when defining an "approved route."

Conclusion – Question Two

32. To conclude on this point, the Applicant submits that the term "Approved route" refers to the route applied for by an applicant and approved by the Board in consideration of the criteria listed under ss. 96(2) of the *OEB Act*.

Correction to the Record of the Proceeding

33. Procedural Order No. 1 provides, at page 4, that the "Township [of West Lincoln] states that a proposed agreement has been provided to the Applicant and that it has not received a response."
34. As indicated, the Board does not have the authority to require the applicant to enter into an agreement with the municipality and therefore the allegations respecting the negotiation of the agreement are irrelevant to this proceeding. Nevertheless, to clarify the record, the Board should be aware that the Applicant submitted a draft road use agreement as part of a proposal to work with West Lincoln in the summer of 2012.
35. Despite requesting comments on the proposed agreement for close to one year, West Lincoln did not provide comments.⁷
36. In the spring of 2013, West Lincoln indicated that it was working on its own version of a road use agreement. In August 2013, the Applicant received West Lincoln's own version of a road use agreement. Within one month, the Applicant provided comments on West

⁶ See the OEB's Filing Requirements for Electricity Transmission and Distribution Applications, Chapter 4: Minimum Filing requirements for electricity transmission projects under s. 92 of the Ontario Energy Board Act, page 10-11.

⁷ The Applicant has considerable materials in support of these statements, including correspondence with West Lincoln throughout the period. If it would assist the Board, the Applicant could file these after it has addressed any potential confidentiality concerns with West Lincoln.

Lincoln's version of the road use agreement. The Applicant has continued to communicate with West Lincoln in respect of the draft road use agreement.⁸

37. It is therefore incorrect to say that “a proposed agreement has been provided to the Applicant and that [the Township] has not received a response.”

Submissions regarding the form of hearing

38. The Board indicated that it will decide whether an oral hearing is required once it has considered the parties' submissions.
39. The Applicant submits that an oral hearing is not required. West Lincoln has not identified concerns with the transmission facilities that are within the Board's public interest criteria. Certainly, the issue of a road use agreement does not qualify in that regard. Moreover, the Board's Notice of Application stated as follows at page 2:

The Board intends to use a written hearing for this case unless there is a good reason why an oral hearing is necessary.

40. The Applicant submits that no good reason has been provided that would indicate that an oral hearing is necessary. The Applicant requests, therefore, that the Board proceed with a written hearing in its determination of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

⁸ Please see footnote 7, above.