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November 22, 2013

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
Reply 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 Reply 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 (the “**Applicant**”) 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 REPLY SUBMISSIONS ON PRELIMINARY ISSUES

1. These submissions are in reply to parties’ submissions made pursuant to Procedural Order No. 1, in which the Ontario Energy Board (the “**Board**”) requested that parties provide submissions on preliminary issues relating to s. 97 of the *OEB Act* (“**Section 97**”).
2. In particular, these submissions reply to the submissions of Board staff and the Township of West Lincoln (“**West Lincoln**”) 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.
3. Each of the Board staff and West Lincoln submissions are addressed in turn. Following this, the Applicant sets out a request that the Board take steps to move this proceeding forward in a timely manner.

Board Staff submissions

Whether an approval of form of municipal road agreements is required under Section 97

4. Board staff agrees with the Applicant that s. 41 of the *Electricity Act, 1998* (the “**Electricity Act**”), which sets out a comprehensive set of rights of access to public streets and highways for distributors and transmitters, continues to apply (with the exception of s. 41(9)) in the case of a leave to construct application. Specifically, the Board staff submissions state at page 7:

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.

5. Board staff therefore agrees with the Applicant that the legal rights established by s. 41 of the *Electricity Act* cannot be limited by the leave to construct process.
6. Board staff also agrees that pursuant to s. 41(5) of the *Electricity Act*, the rights of access for transmitters and distributors do not require the consent of the owner of or any other person having an interest in the street or highway.¹
7. However, Board staff also submits that the Board should nevertheless approve form of road use agreements under Section 97.
8. The Applicant does not agree. In approving a form of road use agreement, the Board would be approving the minimum requirements – that is, the minimum terms and conditions – applicable to the use of public streets and highways, simply because a leave to construct is required.
9. The suggestion that the Board should set the minimum requirements of an agreement applicable to the use of public streets is directly contrary to s. 41 of the *Electricity Act*, which prescribes all the components of a distributor or transmitter's rights of access to public streets and highways, and expressly states that no agreement is required.² Board staff's suggestion that the Board should approve form of road use agreements under Section 97 would therefore overturn the legislative regime established by s. 41.³
10. One additional point should be made in respect of Board staff's submissions on the preliminary question. In its submissions, Board staff describes the Board's decision in EB-2010-0253, wherein Plateau Wind applied to the Board for an order under s. 41(9) of the *Electricity Act* establishing the location of distribution facilities within a road allowance.
11. In its description of the Plateau Wind decision, it appears that Board staff may have incorrectly inserted the language of s. 41(1) of the *Electricity Act* in its discussion of the

¹ See Board staff submissions dated November 15 at pg. 7.

² See the Applicant's submissions dated November 15 at pgs. 3-6.

³ See the Applicant's submissions dated November 15 at pgs. 5-6.

Board's determination of location under s. 41(9) of the *Electricity Act*.⁴ The Applicant notes that the Plateau Wind decision did not in any manner indicate that "location" under s. 41(9) involves the Board determining whether distribution will be over, under or on the road allowance. This matter remains the choice of the transmitter.

Interpretation of approved route under s. 97

12. In its submissions on what is meant by the words "approved route" under Section 97, it is not clear whether Board staff is suggesting that the Renewable Energy Approval ("**REA**") process in respect of the proposed transmission facilities should be complete prior to the Board making its decision in respect of the application for leave to construct.
13. If Board staff is suggesting that the REA process be complete prior to a decision being made on this application, the Applicant submits that there is no legal basis for this proposition. Moreover, the decisions cited by Board staff do not suggest that the Board should wait until a REA has been issued prior to deciding upon a leave to construct application.
14. The Board's practice has been to make leave to construct conditional on the route approved as part of the REA process. If there is a material change to the route of the transmission line due to the REA decision, an applicant must request the Board's approval for this change. There is no reason to depart from this practice here.

West Lincoln submissions

15. West Lincoln's principal submission appears to be that "it would not be a reasonable interpretation of the legislation" for the Board to determine location under s. 41 of the *Electricity Act* but that it would not determine location when leave to construct under s. 92 of the *OEB Act* is required.⁵
16. However, s. 96(2) of the *OEB Act* does in fact limit the role of the Board in a leave to construct application to the consideration of i) the interests of consumers with respect to prices and the reliability and quality of electricity service and ii) the promotion of the use of renewable energy sources.
17. Subsection 96(2) of the *OEB Act* is therefore quite clear on the Board's jurisdiction in a leave to construct application. Moreover, the legal rights established by s. 41 of the

⁴ See page 6, second paragraph.

⁵ West Lincoln submissions dated November 15, pg. 2.

Electricity Act continue to be in full effect when a transmitter or distributor has applied for leave to construct; the only exception to this is s. 41(9).

18. West Lincoln also suggests that “it would not make sense that a municipality would lose the opportunity to have the assistance and guidance from the Board” when the Board decides on a leave to construct application and s. 41(9) of the *Electricity Act* does not apply. The Applicant notes in response that if West Lincoln has concerns respecting the use of its road in a manner that relates to the price, reliability and quality of electricity service, it can raise these concerns with the Board and the Board can address these concerns, for example, in conditions of approval.⁶

Applicant’s request that the Board move expeditiously to set a timeline for interrogatories and next steps in this proceeding

19. The Board has now received submissions on its two preliminary questions. At this time, the Applicant takes the opportunity to note that as set out in the Applicant’s letter filed on October 30, 2013, there have been various delays in this proceeding which have not in any manner been caused by the Applicant itself.
20. As a result of these delays, it has been almost 200 days since the application was filed and the Board has not yet set a timeline for interrogatories. The Applicant notes that the Board’s performance standard for processing a leave to construct application with a written hearing is 130 days.
21. The Applicant is becoming increasingly concerned with the delays it has experienced in this proceeding. The Applicant therefore requests that the Board move expeditiously to set a timeline for interrogatories and next steps in this proceeding, such that the proceeding can move forward in an efficient and timely manner.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

⁶ See the Applicant’s submissions dated November 15 at pg. 5.