

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

AND IN THE MATTER OF an application by Jericho Wind, 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 Municipality of Lambton Shores, Lambton County and the Municipality of North Middlesex, Middlesex County, Ontario.

THE CORPORATION OF THE COUNTY OF LAMBTON'S SUBMISSIONS

March 5, 2014

A. INTRODUCTION

1. These submissions are filed on behalf of The Corporation of the County of Lambton ("Lambton County") in EB-2013-0361. Lambton County is an upper-tier municipality and consequently a road authority, within the meaning of those terms pursuant to the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended. As such, Lambton County is responsible for the care and maintenance of a public highway system (including the structure, design and placement of all property within the road allowance) within the geographic confines of Lambton County. The Applicant proposes to build electrical transmission infrastructure within road allowances owned and maintained by Lambton County.
2. Because of its statutory responsibility for the safe maintenance and provision of certain public highways (road allowances), Lambton County was granted Intervenor Status with respect to this Application.

B. APPLICATION

3. The only portion of this Application with which the County of Lambton makes submissions pertains to the proposed electrical infrastructure within road allowances for which the County of Lambton has statutory authority.

C. LEGISLATIVE FRAMEWORK

4. The Applicant's Argument-in-Chief makes no mention whatsoever of public safety, road safety or the legitimate use of road allowances by other third parties. It is Lambton County's position that a conjunctive reading of the *Municipal Act*,

2001 and the *Highway Traffic Act* is also necessary to fully appreciate the public safety elements of the Province's legislative framework, as appreciated in its appropriate totality. The *Municipal Act* in particular, makes municipalities responsible for the safe provision of public highways (road allowances) and thus any consideration of the establishment of infrastructure within a road allowance must look to any applicable municipal legislative regime. The County of Lambton pleads that it operates such a legislative regime through the exercise of its permit and by-law processes.

5. It is common ground that section 96 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, sets out the relevant test for an application under s. 92 of the Act:

(1) If, after considering an application under section . . . 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

(2) 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 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.

6. The County disagrees with the Applicant's characterization of the law and process with respect to the interaction between the *Ontario Energy Board Act, 1998* and the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A. Essentially, the Applicant's position would result in the Board having little to no power to make any substantive ruling with respect to the placement of electrical infrastructure in a road allowance within the context of this Application.
7. By its own admission at paragraph 12 of its Argument-in-Chief document, the Applicant is relying upon rights it argues are established by the *Electricity Act*. The Applicant explains in great detail that s. 41 of the *Electricity Act* gives it the power to construct, repair and maintain electrical infrastructure, even without the consent of the owner.

8. Unfortunately, and incorrectly, the Applicant then goes on to argue that while s. 41(9) of the Act says that there shall be agreement between an Applicant and the owner of the highway, and failing agreement the Board shall rule, said section does not apply in this application because of the capacity to follow a different process. If accepted, this argument would lead to the absurd result that in the context of this application, this Board could not impose conditions regarding the placement of electrical transmission infrastructure in the road allowance. Effectively the Applicant argues, without actually using the words, that the only possible role for the Board is to grant this Application, without conditions.
9. The County acknowledges the Applicant's considerable rights pursuant to the *Electricity Act*, but rejects the Applicant's self-serving argument that the *Electricity Act's* requirements of agreement or in the alternative the requirement of the Board to impose conditions does not apply. Clearly the Act either governs or it does not; neither party is free to simply pick and choose the sections which provide rights, but then completely disregard the sections which give rights to other interests.
10. The Applicant has accurately identified and characterized the existence of two reports written by Lambton County staff, both of which endorse the tentative details of a proposed Road User Agreement ("RUA") as between the County and the Applicant. What the Applicant has failed to mention however is that Lambton County Council, being a democratically elected body which constitutes the guiding mind of Lambton County, has yet to exercise its will to accept, reject or vary the proposed RUA.
11. At time of writing, the County's Committee AM has passed a motion that will permit a 60 day period for public commentary on the proposed RUA. This 60 day period can only commence upon ratification by the entire County Council, which is scheduled to occur on March 5, 2014. Accordingly, this aspect of these proceedings is premature and unnecessarily rushed, as there can be no binding vote or debate upon the proposed RUA at County Council until June 4, 2014.
12. It is the County's position that the OEB should delay its consideration of the portion of the Application which addresses transmission lines and related infrastructure within public road allowances that are owned and maintained by Lambton County, until such time as County Council has had an opportunity to receive public input, hold a debate (if any) and then consider the staff reports with their attendant recommendations.

13. Lambton County and the Applicant have a realistic opportunity to arrive at a mutually agreeable RUA which amongst other things would govern where and how infrastructure is to be located, and would create mechanisms for the two parties to hold each other accountable.
14. It is the County's position that negotiations pertaining to the RUA between the Applicant and Middlesex County began prior to the similar negotiations between the Applicant and Lambton County. Consequently, Middlesex County had adequate time to fully consider the various ramifications of its RUA. Lambton County should be given equal and adequate opportunity to consider the proposed RUA between itself and the Applicant. The OEB would better serve its public interest and regulatory mandate by allowing the parties the full opportunity to come to a meeting of the minds.
15. In the alternative, being that the OEB is unwilling to allow the County the opportunity to complete its public, democratic decision-making process, the OEB should at a minimum impose conditions equivalent to all terms contained within the tentative RUA between Lambton County and the Applicant, on the grounds that the tentative RUA establishes locations for infrastructure which have been reviewed by professional engineers and consider both public (traffic) safety and the needs and presence of other utilities within the existing road allowance.

D. PUBLIC INTEREST CONSIDERATIONS

16. The only parties in this Application that actually represent the public interest are the County of Lambton and Middlesex County, given that both are accountable, democratically elected governments. Middlesex County has been able to negotiate a RUA with the Applicant that offers, from the perspective of Middlesex County, protection to all users of the public road allowances, including but not limited to traffic and other utility providers that place infrastructure within the existing road allowances. Lambton County seeks the opportunity to do the same, but has not been granted adequate time in which to do so.
17. The Applicant has narrowly defined public interest considerations to include only those factors as identified by the test in section 96(1) of the *Ontario Energy Board Act*. This ignores the fact that the policies of the Government of Ontario must also be considered. Clearly, provincial policies, as codified by statute, including highway safety considerations, as contained in both the *Municipal Act*,

2001 and the *Highway Traffic Act*, are of at least equal importance and equal public interest, properly and broadly construed.

18. It is acknowledged that traffic safety, highway design and the placement of infrastructure within road allowances are not within the traditional competency of the OEB. It is submitted that this is exactly why municipalities have, pursuant to the *Municipal Act*, the duty and capacity to legislate the manner in which third parties such as utility companies can place infrastructure within the road allowance, and further, is why the OEB typically expects RUAs to be in place prior to exercising final approvals to construct - only then can the OEB be satisfied that the public interest with respect to road allowance safety has in fact been appropriately addressed.
19. A major public interest consideration which has not been identified in the Applicant's materials is the interest of all other users of the road allowance. One aspect of a municipality's responsibility for a road allowance is to ensure that third party infrastructure (including, but not limited to ditches, drains, hydro poles, gas pipelines, oil pipelines, water pipelines, sanitary sewers and telecommunications infrastructure) can co-exist safely and efficiently within the road allowance - it is not only generators and transmitters of electricity that have the right to use the road allowance. In addition, municipalities place guidelines and restrictions on infrastructure in the road allowance so as to ensure that future users also have an opportunity to build as necessary - to say nothing of ensuring the municipality's capacity to upgrade or expand the roadways in question.
20. While the *Electricity Act* does provide a number of significant rights to the Applicant with regard to its capacity to enter into and use public road allowances, the Act is silent however with regard to how such entry is to occur and what if any rules might govern how or where infrastructure is to be constructed. Lambton County submits that this omission is intentional, as there exists a legislative regime, which is the jurisdiction of municipalities, that addresses these issues. Hence, the agreement and approval that is contained within a RUA is necessary to demonstrate that the public interest, broadly construed, is in fact being met by the Applicant.
21. In this instance, the Applicant has clearly indicated that it will rely upon its considerable rights pursuant to section 41 of the *Electricity Act*. It has not indicated however that it will exercise these rights in a prudent manner or show any regard for other users of the road allowance. This omission is exactly why a RUA is necessary, and ironically emphasizes the importance of same.

22. This Application anticipates that a RUA or similar agreement is reached between the Applicant and the applicable road authority. This has the benefit of providing comfort to the OEB that the public interest considerations as they pertain to road safety have been adequately addressed, allowing the Board to consider the other issues, such as prices, reliability and quality of service, which are more traditionally within its scope and mandate. In the case at hand, two RUAs are required for the Board to have this comfort, but only one RUA, between Middlesex County and the Applicant, has been finalized.

E. CONCLUSIONS

23. In its Procedural Order #2, dated January 27, 2014, the OEB established a timeline for submissions that seemed appropriate and reasonable at that time. Since then, it has been determined that the County of Lambton's legislative and consultative process will require until June 4, 2014 to be complete. It is suggested that given the importance of the public interest and safety concerns pertaining to the construction and location of infrastructure within public road allowances, and the real potential and capacity of Lambton County and the Applicant to arrive at an agreed RUA, given adequate time, any decision by this Board should be held in abeyance until at least June of 2014.

24. In the event that the Board is unable or unwilling to delay its process, the Board should reject the submissions of the Applicant which imply it cannot impose terms with respect to the location of electrical infrastructure within road allowances, and exercise its power and authority pursuant to section 41(9) of the *Electricity Act* to impose conditions identical to those in the proposed RUA between the County of Lambton and the Applicant.

All of which is respectfully submitted this 5th day of March, 2014.

THE CORPORATION OF THE COUNTY OF LAMBTON
By its Counsel

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