

ONTARIO ENERGY BOARD

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.

FINAL SUBMISSIONS OF THE CORPORATION OF THE COUNTY OF MIDDLESEX

1. The Corporation of the County of Middlesex (the “County”) hereby provides the following final submissions for the Board.

Road Use Agreement

2. Through discussion with the Applicants, Jericho Wind Inc. (the “Applicant(s)”) and the written hearing process, the County and the Applicant have entered into an agreement with respect of the use, installation, construction, maintenance and operation of transmission infrastructure on, over, under and within County road allowances (the “Agreement”),¹

3. The Agreement addresses the following legitimate concerns of County with respect to the Applicant’s application for leave to construct transmission infrastructure on, in and under the road allowances of the County:

- (a) the need for the proposed infrastructure to follow a specific, detailed and pre-determined route² which is carefully thought out by the Applicant and demonstrates regard for the safe use of the road, maintenance of the road allowance, other users thereof, which is approved by the County Engineer;
- (b) the need for such route to address the MTO Road Safety Guidelines (clear zone width requirements) and/or to provide adequate mitigation measures thereunder, which Upper Tier municipalities in Ontario (such as the County) implement, monitor and enforce on behalf of the Province with respect to roads within their respective geographical territory (as a result of delegation pursuant to the *Municipal Act, 2001*, S.O. 2001, Ch. 25);

¹ See, *Appendix “A”* to these submissions, Road Use Agreement, recital I and content of entire Agreement.

² *Ibid.*, at section 3(e), 7(c) and *Schedule “B”*.

- (c) the need for the commitment of the Applicant to follow the County's by-law process requiring full applications to be completed for and approved by the County Engineer prior to construction, which through approved plans, provide important construction particulars with respect to the structure, design and placement of the proposed infrastructure in the road allowance (including but not limited to location of poles, engineering details of poles (type, material, size, foundation, construction methods, guying details), line arrangement (height of cables, vertical clearances, expected cable sag/sway), and exact alterations to the road allowance (ditch grading and guardrails);³
- (d) the need for all relevant municipal permits in relation to the access to and work on/in County road allowances and movement on/in County roads (in accordance with the *Highway Traffic Act*, R.S.O. 1990 Chapter 198 ("*Highway Traffic Act*")) to be obtained in accordance with its by-laws;⁴ and
- (e) the need for the Applicant to provide a level of responsibility and financial commitment with respect to its proposed infrastructure, such that the County is as comfortable as possible given the legislative context of renewable energy promotion, in endorsing an agreement required by section 41(9) of the *Electricity Act, 1998, Ch. 15, Sch. A* and sections 96 and 97 of the *Ontario Energy Board Act, 1998, S.O. 1998, c. 15*.⁵

Request to the Board

4. As a result of the Agreement, the County does not object to leave to construct pursuant to the application of the Applicants as it relates to the use of County of Middlesex road allowances, so long as approval of leave to construct, if granted by the Board, is conditional upon the Board approving the specified route and construction parameters (mitigation measures) which exist in *Schedule "B"* of the Agreement and the need for the Applicant to follow the County's by-law process by obtaining all necessary permits, as provided for in s. 7(e) and *Schedule "D"* of the Agreement.

Jurisdiction

5. It is important to note that the matters addressed in paragraphs 3(a-e) above are not merely matters of direct self-interest or financial/commercial interest of the County.

6. The County is an Upper-Tier municipality as defined by the *Municipal Act* and as such is a democratically elected government with provincially delegated authority from the Province to

³ *Ibid.*, at ss. 3(e), 7(c), 32-35 and *Schedule "B"*.

⁴ *Ibid.*, at ss. 7(e) and *Schedule "D"*.

⁵ *Ibid.*, at recital E, redacted *Schedule "A"*, ss. 7(f-m), 14-16, 21-27, 36-41, 43-44.

regulate the use, access and work in on and under public highways within its geographic territory.⁶ The County is a government authority acting in the public interest, within the parameters of other provincial and federal legislation and the Applicant confirms such in the Agreement.⁷

7. Pursuant to the province's delegation of authority, the Province relies upon and entrusts the Engineering departments of Upper Tier Municipalities (such as the County) to regulate the use, construction and safety within road allowances.

8. In Procedural Order of EB-2013-0040 and EB-2013-0041, the Board confirmed that "matters relating to road safety for County roads are generally under the authority of the County."⁸

9. In its and its Decision and Order in EB-2013-0040 and EB-2013-0041 dated November 12, 2013, the Board after confirming that the transmission facilities in that proceeding were in the public interest pursuant to section 96 of the Act and approving the forms of agreements in that proceeding (including the County's), approved the construction of the transmission facilities under or over a highway, utility line or ditch subject to the "condition" that the proposed facilities be constructed in accordance with road use agreements between the Applicants and the County to the extent that the terms of the agreements address matters that are within the jurisdiction of the Board pursuant to section 101 of the Act" (*emphasis added*).⁹

10. The County's regulatory role resulting from the *Municipal Act* is not nullified by provisions of the *Electricity Act, 1998*, c. 15, Sched. A ("*Electricity Act*").

11. In Ontario, the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B ("*Ontario Energy Board Act*"), the *Green Energy Act, 2009*, S.O. 2009, ch. 12, Sch. A and the *Electricity Act* work together in providing a process for applications to take place with the goal of furthering the development of renewable energy sources in the province. The Province was sure to have in place, however, legislation which would ensure that only reasonable developments would be approved and approval would not be granted if such applications were not consistent with the Province's other legislation.

⁶ See, Appendix "B" to these Submissions, *Municipal Act* Excerpts.

⁷ *Ibid.*, at recitals B and I.

⁸ See, Appendix "C" to these submissions, EB-2013-0040 and EB-2013-0041, *Procedural Order #8* at pg. 3.

⁹ See, Appendix "D" to these submissions, EB-2013-0040 and EB-2013-0041 Decision and Order dated November 12, 2013, at pg. 10-12.

12. Subsection 41(1) of the *The Electricity Act* does provide that 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.”

13. Section 41(1) cannot be read in isolation, however. The *Electricity Act* is not the only statute which applies to this Application in Ontario. Subsection 41(1) does not indicate that a transmitter may construct its structures in, on or under a road allowance in any manner in which it pleases or in a manner that is contrary to the *Municipal Act* or the *Ontario Energy Board Act*. Further, subsection 41(9) of the *Electricity Act* and Sections 97 of the *Ontario Energy Board Act* requires the location of any structures, equipment or facilities constructed or installed in the road allowance to be agreed to with the owner of the highway.

14. Regulatory power pursuant to the *Municipal Act* and the provisions of the *Electricity Act* are not in conflict. Both pieces of legislation co-exist along with the *Ontario Energy Board Act*, which provides the Board with specific authority and power to deal with applications for leave to construct.

15. As alluded to in paragraph 11 above, the provincial government in its wisdom of promoting renewable energy sources was careful to ensure that not just any renewable infrastructure would be promoted (as an isolated reading of section 41(1) the *Electricity Act* and a the Applicants’ argument in chief may cause one to think), but rather, only that responsible infrastructure would be promoted.

16. This check on uncritical and irresponsible construction of electrical resources is specifically provided for in section 92, 96, 97 and 101 of the *Ontario Energy Board Act*.

Reliability and Quality of Electrical Service

17. S. 96(2) of the *Ontario Energy Board Act* provides:

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 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.

18. With respect to this application, each of the needs described in paragraph 3(a-e) of these submissions speak to reliability and quality of electrical service. But for the County ensuring through a road use agreement and its by-law/permit process:

- (a) a safe location within the road allowance for the infrastructure within the road allowance and MTO Road Safety Guidelines or other mitigation measures compliance; and
- (b) construction particulars which provide appropriate mitigation measures to mitigate conflicts with users of the road and the road allowance;

the otherwise unregulated location of the infrastructure within the road allowance would be at risk of placement in locations where interaction with the public and other uses of the road allowance would impact the reliability and quality of the electrical service over the long term of a FIT contract. Motor vehicle accidents or other accidents due to the transportation of wind farm materials, incompatibilities with other road allowance uses (gas, oil, water, sanitary sewer and telecommunications infrastructure), widening of the travelled portion of the road and/or related to the regular maintenance of the road allowance are all examples of occurrences which would if not mitigated through municipal regulation with respect to placement, would certainly harm the regular operation of the proposed electrical infrastructure (which is critical to providing a reliable and quality of electrical service). Certainly, electrical infrastructure that would be subject to regular damage and accidents due to poor placement would not provide for a reliable and quality electrical service.

19. With respect to this application, the County has ensured that such mitigation has occurred, which is within its mandate pursuant to the *Municipal Act*, is in the public interest pursuant to section 96(2)1 of the *Ontario Energy Board Act* and does not offend section 41(1) of the *Electricity Act*.

Government Policy

20. S. 96(2) of the *Ontario Energy Board Act* provides:

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 making of the interconnection, is in the public interest:

2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy resources.

21. The County submits that the meaning of this section is that in the event that a renewable energy source is promoted as a result of leave to construct being granted by the Board pursuant to a

section 92 application, such promotion can only occur if the construction, expansion or reinforcement of the electricity transmission line or the making of the connection is in the public interest as being consistent with the policies of the Government of Ontario.

22. As explained in paragraphs 6, 8-10 and 16 of these submissions, the County has the authority to regulate the use, access and work in, on and under public highways within its geographic territory. In its comprehensive policy, created through duly passed by-laws pursuant to the *Municipal Act*, the County regulates approval of the location and particulars of infrastructure which is constructed in its road allowances. To date, all gas, oil, water, sanitary sewer, telecommunications, public and now wind farm electrical users in the County (including the Applicant) follow its comprehensive policy.

23. With respect to this Application, the County's comprehensive policy provides the means which ensures that those constructing infrastructure on, in or under County road allowances have prior to construction: identified all relevant property lines; located all other existing utilities; completed the relocation of utilities that interfere with approved pole locations; and have acquired all of the required permits it is required to have acquired from other relevant authorities such as the conservation authority and the Department of Fisheries. Without such policies in place, the above would not occur on the ground prior to construction.

24. In addition, the County's comprehensive policy provides for the interface or communication protocol between the Upper Tier regulatory authority with respect to the road allowances, the Applicant, its consultants, contractors and the numerous transport companies involved in the construction of infrastructure. This interface coordinates the timing of work on the road allowances, ensures travel at safe times of year and hour, prevents the running of damaging track equipment on pavement, ensures identification of the locations of signs and guardrail, and schedules the movement of overweight and over-dimensional loads complete with OPP cartel (as required by the *Highway Traffic Act*), all of which protects the safety of the public and prevents damage to existing infrastructure.

25. The County submits that such comprehensive governance of the road allowance, duly delegated to the County pursuant to the *Municipal Act* is an applicable and indispensable policy of the Government of Ontario which serves a vital role for the Ontario Government in preserving the public interest, which but for the policy, would not occur. The County submits that the valuable role of road

allowance regulation to the entire process of infrastructure approval should not be overlooked, for the Province does not wish to have just any renewable energy infrastructure to help it proceed to meeting its numerical targets but rather, it wants responsible infrastructure.

26. It is notable that the County's policy is not in conflict with and does not diminish the provisions of the *Electricity Act*. As the Board can see with respect to this Application, the *Electricity Act*, *Municipal Act* and *Ontario Energy Board Act* can all be complied with simultaneously. Indeed, in this Application, the proposed infrastructure in Middlesex County if approved, would be located in the road allowance in accordance with the *Electricity Act*, would meet the needs of the municipal process in relation to the use of the road allowance in accordance with the *Municipal Act* and is subject to the approval of the Board pursuant to section 92 of the *Ontario Energy Board Act*.

Land Owner

27. Section 97 of the Ontario Energy Board Act provides:

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

28. The County is a landowner whose land (road allowances) is affected by the proposed route of the infrastructure, for the road allowance which it owns is proposed to be used to locate infrastructure. As such, the County submits that pursuant to section 97 of the *Ontario Energy Board Act*, leave to construct cannot be granted unless the form of agreement between Applicant and landowner is approved by the Board.

Conclusion

29. With respect to this Application:

- (a) the County has implemented its regulatory governance delegated to it pursuant to the *Municipal Act* and the Applicants have complied with that process to the degree that the requirements of the process have been met with respect to the use of the County road allowance;
- (b) the County process has addressed appropriate subjects pursuant to section 96 of the *Ontario Energy Board Act*;
- (c) an agreement has been reached between the Applicants and the County, which requires approval of the Board as a result of section 41(9) of the *Electricity Act*,

section 92 and 97 of the *Ontario Energy Board Act* and pursuant to the Agreement itself.¹⁰

30. Pursuant to section 19 of the Ontario Energy Board Act, the Board has exclusive jurisdiction in all cases in respect of all matters which jurisdiction is conferred, has in all matters within its jurisdiction, authority to hear and determine all questions of law and fact, and is required to make any determination in a proceeding by order. This provides the Board to make a conditional order in relation to sections 92, 96, 97 and 101 of the Act.

31. Given the importance of the public interest provisions addressed in the Agreement, including but not limited to their contribution to promotion of quality and reliable electrical service and forwarding of the important Government policy/governance delegated to the County pursuant to the *Municipal Act* and the status of the County as a landowner whose land is proposed to be used to locate proposed infrastructure, the County requests for approval of the Application in relation to Middlesex County to be conditional upon the Board approving the specified route and construction parameters (mitigation measures) which exist in *Schedule "B"* of the Agreement and the need for the Applicant to follow the County's by-law process by obtaining all necessary permits, as provided for in s. 7(e) and *Schedule "D"* of the Agreement. The purpose of such a conditional order would be to ensure that the important public interest provisions provided for therein are protected by the Board as the final decision-maker with respect to the public interest and not by private contract law protection alone.

32. The County further submits that given that the Applicant has followed the municipal process, has committed to following such process as a result of the Agreement and confirms that the Agreement is subject to the approval of the Board¹¹ in its application for leave to construct, the Board should apply the legal principle of estoppel, estopping the Applicant from arguing that approval should not be made conditional on the provisions of the Agreement.

¹⁰ See, Appendix "A" to these submissions, Agreement, recital J.

¹¹ *Ibid.*

Respectfully submitted this 6th day of March, 2014.

CORPORATION OF THE COUNTY OF MIDDLESEX

By its Counsel

Wayne P. Meagher



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**FINAL SUBMISSIONS OF THE CORPORATION OF
THE COUNTY OF MIDDLESEX**

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