

Ontario Energy Board

EB 2014-0139

IN THE MATTER of the Ontario Energy Board Act, 1998, S.O., c. 15 (Sched B);

AND IN THE MATTER OF an application by Jericho Wind Inc. for an Order of Orders pursuant to Section 41(9) of the *Electricity Act, 1998* (as amended) establishing the location of the applicant's distribution facilities within certain road allowances owned by Lambton County of Lambton

RESPONDING MATERIALS OF THE CORPORATION OF THE COUNTY OF LAMBTON

1. In accordance with the Ontario Energy Board's ("the Board's") Procedural Order No. 2, dated June 9, 2014, The Corporation of the County of Lambton ("the County") makes this written response to the Argument-in-Chief of the Jericho Wind, Inc. ("Jericho") in opposition to the application for an order or orders pursuant to Section 41(9) of the *Electricity Act, 1998* (as amended) ("the Act"), seeking to establish the location of Jericho's electrical distribution facilities within certain public rights-of-way, streets and highways owned by Lambton County.
2. The County generally concurs with the background description of the project as described by Jericho.

Decision to Utilize Road Allowances

3. Jericho acknowledges that it seeks to rely upon its statutory rights pursuant to the Act. The County does not deny that this statutory right exists, it does however take the position that transmission infrastructure does not necessarily need to be constructed within road allowances, and in the case at hand would most certainly be safer for the public if said construction were to occur on private lands.
4. It is the position of Jason Cole, P. Eng, Manager of the Public Works Department, that if he had the power, capacity or right at law, he would not approve the construction of the proposed electrical infrastructure within the County owned road allowance, as it will unnecessarily result in potential human health and safety hazards to construction workers, motorists and passersby, added future expenses and burden on the County and partner municipalities.

5. Mr. Cole arrives at this position on the grounds that as a very basic premise of safe highway design, it is undesirable, and in this case unnecessary, to have large, construction equipment and workers installing electrical transmission infrastructure in close proximity to the travelled portion of the road allowance.
6. The construction of any immovable object within the non-travelled portion of the road allowance by definition creates a potential safety hazard which requires a degree of remediation.
7. While a considerable amount of the proposed transmission infrastructure would be subterranean, even subterranean infrastructure can pose safety hazards to other occupiers of the road allowance. When infrastructure is built underground, it causes challenges, particularly relating to construction and repair, for all other users. Anytime another utility (cable, water, gas, hydro), or the road authority itself, needs to repair, move or conduct maintenance upon the infrastructure, it creates a potential peril for those conducting the work, particularly during excavation. The transmission infrastructure will be high enough voltage in to cause a safety hazard, and would be substantially safer if buried under fields of corn, rather than in a location that is anticipated to experience future construction.
8. Rather than being an abstract potential danger for future construction purposes, Jericho is aware, as a result of the numerous consultations and negotiations between the parties, that one of the road allowances in question, being Thomson Line (County Road #6) has been identified for expansion, including being paved, widened and drainage improvements. The other road allowances already host various other public and private utilities, which can lead to greater conflicts and construction perils.

Insufficient Information

9. A fatal defect in the Applicant's proposed locations is that the materials lack the requisite degree of specificity required by any road authority prior to granting approval. Even when the County's administrative staff was working in a collaborative manner with Jericho staff, approval and signing of the potential RUA were contingent upon being provided with drawings of greater detail than are now before the OEB in this matter. These materials have never been received from Jericho. To the best of the County's knowledge, said materials do not currently exist.
10. Specifically, details are lacking regarding conflicts with existing municipal and private servicing, exact position within the County road allowance to determine impacts on future road construction, maintenance and other roadway improvements as well as potential degradation to existing municipal infrastructure.
11. At time of writing, the County (and therefore also this Board) continues to lack information from Jericho regarding the proposed horizontal and vertical alignment of the pipeline within the road allowance, its relation to existing property lines and existing roadway features such as culverts and other ditch lines, pavement, shoulders and other appurtenances as well as existing utilities that may conflict with the designed installation of the distribution lines. All of

the foregoing is necessary to make the appropriate engineering, environmental and health and safety standard decisions referred to in section 2.0 of Jericho's Argument-in-Chief.

12. It is both relevant and significant that the Suncor Energy Cedar Point Wind Power Project, which is currently before the OEB in File EB-2014-022, has provided design drawings to the County of sufficient detail to assess the risks and liabilities posed to the County and public from the distribution infrastructure. The Suncor Energy Cedar Point Wind Power Project will literally tie-in to the infrastructure being proposed by Jericho in this application.
13. In the event that the OEB accepts the submissions of Jericho, and rejects the County's submissions, it is still not currently possible for the OEB to be able to issue the order sought by Jericho, as the OEB cannot be fully satisfied that appropriate mitigation of safety hazards will result from the non-detailed materials that have been submitted.

Alleged Lack of Alternatives

14. The County concedes the basic submissions of Jericho that the general location (albeit lacking adequate specifics) of the proposed Transmission Infrastructure does reflect the work of both County and Jericho staff in attempting to identify the best possible route which Jericho is willing to consider, within the context of the County lacking the capacity to reject the proposition in the first place.
15. Jericho submits that it has no alternatives but to build where it has proposed to do so, because the County has not made a counter-offer or alternative suggestion. This argument completely ignores the fact that Jericho could, if so inclined, build its transmission infrastructure entirely on private lands and altogether avoid creating potential hazards on and other impacts to the public highways.
16. In section 3.0 of its Argument-in-Chief, Jericho baldly asserts that the decision to locate the Distribution System within the County's road allowance is "the best balance of various environmental, social, technical and economic considerations". There is absolutely no evidence to support the notion that there is an environmental benefit, or any social utility or technical superiority for this course of action. In fact, the complete lack of valid reasons in these regards is precisely why the County had sought an oral hearing in this matter, to expose the sheer flimsiness of these arguments.
17. The County does concede Jericho's assertion that there are economic considerations which warrant it preferring to construct the Distribution System in the road allowance. Self-evidently, it would be less expensive to build infrastructure on land where Jericho is not required to pay any compensation: it can build for free in the road allowance, but would have to compensate adjoining land owners. Clearly, price is a greater motivator for a for-profit entity than are safety considerations for motorists and travelling members of the public.
18. While Jericho is correct in identifying the existence of multiple County staff reports that endorsed signing the road user agreement, Jericho fails to appreciate that said reports constitute nothing more than the opinion of certain unelected individuals. Of far greater importance is the carefully considered position of Lambton County Council, which is a democratically elected body, constituting the senior leadership of the nine local municipalities which constitute the federation known as the County of Lambton.

19. Having received at least three reports on the RUA issue, and having completed a sixty day public consultation process, County Council determined that on the whole, it is not in the best interests of local residents to have industrial wind turbines within Lambton County, and further, that the transmission infrastructure should not be located within County operated road allowances. Further, County Council went through the effort of declaring the County to be an unwilling host to said electrical infrastructure. The financial inducements to sign the RUA which are identified by Jericho were not sufficient to overcome legitimate concern for the health of County residents, including users of the roadways.

Alternative Proposed

20. In section 3.3 of its Argument-in-Chief, Jericho accuses the County of failing to propose an alternate route for the Distribution System. This accusation implies that Jericho is open to building its infrastructure somewhere other than the road allowance, a possibility that has never previously been raised. Given that the Act does not provide the owner of the road allowance the capacity to prohibit or reject a request to build within the road allowance, there has been no point in suggesting an alternative, given that Jericho has cited its legal entitlement to build within the road allowance to the County on multiple occasions.
21. At this stage in the proceedings, the alternative that the County is prepared to recommend is that the Board deny the relief sought until such time as Jericho can satisfy the Board that there is no other reasonable alternative available to it, specifically including the construction of the infrastructure on or under private lands.
22. It is respectfully submitted that the most important consideration for the Board in granting the relief sought, is that the relief granted not create the potential of a public safety hazard, or undue hardship for users of the road allowance, and that all reasonable attempts to mitigate such have been made. Given the lack of requisite specificity of location, as has been provided to the Board in other proceedings, it is currently premature for the Board to grant the relief sought. The Board simply cannot determine that the route proposed will cause minimum threats to the travelling public, or impacts to the road allowance infrastructure, particularly in the face of the self-evident alternative to build transmission infrastructure on private lands well removed from the travelling public.

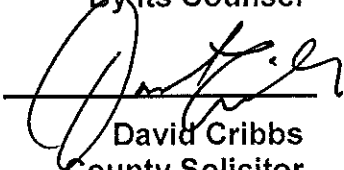
Position on Costs

23. The County concedes that Jericho did make multiple, serious and good faith efforts to engage its staff in negotiations and to develop a mutually agreeable RUA. Considerable time and effort was expended by both parties in this regard. Unfortunately, the parties were unable to arrive at a meeting of their directing minds. Failure to arrive at a meeting of the minds does not and should not constitute a reason to trigger cost consequences as a result of a public hearing (this process). The County did not fail to negotiate, nor did it negotiate in bad faith; it only failed to negotiate successfully. To impose costs after failed negotiations is essentially to require all negotiations to succeed on terms required by REA permit holders.

24. Further, and in the alternative, the appropriate time to identify whether a party is seeking costs from the OEB is at the beginning of the process. In none of the previous submissions by either party has it been suggested that either were seeking costs. Accordingly, it is not appropriate to seek costs at this point in time, in what can only be construed as a pressure tactic to attempt to impose "litigation chill" upon Lambton County Council.
25. It is not the usual practice of the Board to award costs either to those who oppose these applications, or to the applicants. There is a strong public interest argument to avoid creating litigation chill - to award costs to either party where there exist legitimate differences of opinion and issues of public safety, would dissuade future wind energy opponents from seeking a full exploration of their issues or a consideration of legitimate public interest challenges - such as road safety and human health.

THE CORPORATION OF THE COUNTY OF LAMBTON

By its Counsel

A handwritten signature in black ink, appearing to read 'David Cribbs', is written over a horizontal line.

David Cribbs
County Solicitor
LSUC #49176F