

**EB-2014-0139**

AND IN THE MATTER OF an application by Jericho Wind, Inc. for an Order or 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.

In accordance with the Ontario Energy Board's (the "**Board's**") Procedural Order No. 2 dated June 9, 2014, Jericho Wind, Inc. ("**Jericho**") makes this written submission in support of its application for an order or orders pursuant to Section 41(9) of the *Electricity Act, 1998* (as amended) (the "**Electricity Act**") establishing the location of Jericho's distribution facilities within certain public rights-of-way, streets and highways owned by Lambton County (collectively, the "**Road Allowances**") and in reply to the submissions of Lambton County (the "**County**") dated June 20, 2014 (the "**County Submissions**").

1     **1.0     THE PROJECT**

2     For reference, Jericho owns and will operate the generation and distribution assets of the  
3     Jericho Wind Energy Centre (the “**Project**”), which is located in the Municipality of  
4     Lambton Shores and the Township of Warwick in Lambton County, and in the  
5     Municipality of North Middlesex in Middlesex County, Ontario. In addition to wind  
6     turbines, the Project will involve 34.5 kilovolt (“**kV**”) underground distribution lines  
7     located on private property and municipal and county right-of-ways, which are essential  
8     to the Project in that they will convey electricity from each of the wind turbines to a  
9     transformer station (collectively, the “**Distribution System**”).<sup>1</sup> Board staff supports  
10    Jericho’s application for an Order of the Board establishing the location of Jericho’s  
11    proposed Distribution System within certain Road Allowances owned by the County.<sup>2</sup>

12    **2.0     DECISION TO UTILIZE ROAD ALLOWANCES AND RELATED**  
13    **SAFETY CONSIDERATIONS**

14    In the County Submissions, the County asserts that Mr. Jason Cole would not have  
15    approved the Distribution System within the Road Allowances if he had the power to  
16    make that determination.<sup>3</sup> The County therefore suggests the Distribution System should  
17    not be located within the Road Allowances. These assertions are either irrelevant or  
18    unsubstantiated for a number of reasons.

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<sup>1</sup> The Project is further described in Exhibit B, Tab 2, Schedule 1 of Jericho’s March 18, 2014 application (the “**Application**”).

<sup>2</sup> Board Staff Submission, p. 1.

<sup>3</sup> County Submissions, paras 3-8.

1 Firstly, it is outside the Board's jurisdiction to determine whether the Distribution System  
2 should be located within or outside of the Road Allowances. In section 41 of the  
3 Electricity Act, the provincial legislature clearly gave distributors like Jericho the right to  
4 locate their distribution systems within the road allowances should they choose to do so.  
5 As acknowledged by the Board in Procedural Order No. 1, the "scope of this proceeding  
6 is limited to determining the location of Jericho's Distribution System Facilities within  
7 the road allowances owned by Lambton County." In their June 24, 2014 submissions,  
8 Board staff also agrees with the limited scope of a section 41(9) proceeding. Paragraphs  
9 3, 4, 5, 6, 7 and 8 of the County's response are therefore irrelevant to this Application.

10 Furthermore, in paragraphs 3, 5, 6, 7, 8, 13, 14, 15, 19 and 22, the County makes various  
11 assertions about transmission infrastructure. These assertions are also irrelevant to the  
12 Application, which deals solely with the location of Jericho's distribution infrastructure.  
13 The location of Jericho's transmission infrastructure within Lambton County has already  
14 been determined in the Board's Leave to Construct Decision in EB-2013-0361.<sup>4</sup>  
15 Paragraphs 3, 5, 6, 7, 8, 13, 14, 15, 19 and 22 are therefore irrelevant to this Application.

16 Notwithstanding the issue of relevance, the County also makes unsubstantiated and  
17 incorrect assertions about the safety of the proposed Distribution System. For example, in  
18 the County Submissions the County attempts to characterize the opinion of Mr. Cole, the  
19 Manager of Lambton County's Public Works Department.<sup>5</sup> None of these statements are  
20 substantiated by affidavit evidence. To the contrary, as shown in Jericho's pre-filed

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<sup>4</sup> Application, Exhibit B, Tab 5, Schedule 1, Appendix N.

<sup>5</sup> County Submissions, paras. 4 and 5.

1 evidence, Mr. Cole has on three occasions recommended that the County authorize the  
2 Warden and Clerk to execute a Road Use Agreement with Jericho that would establish  
3 the location of the Distribution System within the Road Allowances.<sup>6</sup> Further, the  
4 County's assertions regarding the safety hazards associated with infrastructure in the  
5 Road Allowances seem premised on there being aboveground infrastructure (e.g. the  
6 County refers to the risk to motorists and passersby associated with immovable objects in  
7 the road allowances). However, as stated in Jericho's pre-filed evidence, the Distribution  
8 System will be located underground; Jericho can confirm, as stated in the Application  
9 that no aboveground distribution infrastructure will be located in the Road Allowances.<sup>7</sup>  
10 Additionally, the County's Submissions also suggest a concern around "safety during  
11 construction".<sup>8</sup> This concern is unsubstantiated given that the County identified no  
12 rationale for why the construction of the Distribution System poses any different safety  
13 risk than the frequent construction and maintenance of the County's own infrastructure  
14 within the Road Allowances. Jericho will ensure that appropriate mitigation measures  
15 are followed during the construction of the Distribution System to ensure the safety of  
16 workers and the travelling public.

17 In paragraph 22, the County again alleges that Jericho's proposed location does not allow  
18 the Board to determine a route "that will cause minimum threats to the travelling public,  
19 or impacts to the road allowance infrastructure, particularly in the face of the self-evident  
20 alternative to build transmission infrastructure on private lands well removed from the

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<sup>6</sup> Application, Exhibit B, Tab 5, Schedule 1, Appendices I and J; Jericho's Interrogatory Responses, Appendix A.

<sup>7</sup> Application, Exhibit B, Tab 2, Schedule 1, p. 1-2.

<sup>8</sup> County Submissions, paras 4-6.

1 travelling public.” Again the County confuses the issues. The present application is in  
2 respect of the location of an underground Distribution System.<sup>9</sup> The safety risks the  
3 County is describing (such as the potential for a car crash into an aboveground  
4 transmission pole) are irrelevant to belowground infrastructure. The County has provided  
5 no evidence to suggest any of these safety risks would be relevant to Jericho’s  
6 underground Distribution System.

## 7 **2.0 SUFFICIENCY OF INFORMATION**

8 In the County Submissions, the County suggests that Jericho’s proposed location for the  
9 Distribution System is insufficiently specific.<sup>10</sup> This assertion is invalid for the reasons  
10 outlined below.

11 Firstly, in its Decision and Order in EB-2013-0233 (which was filed with Jericho’s pre-  
12 filed evidence), the Board addressed the precision necessary for determining the location  
13 of distribution facilities in a section 41 application.<sup>11</sup> The Board wrote, “While section  
14 41 requires that the Board determinate a “location” under the road allowance, the Board  
15 agrees with East Durham that this wording does not require a precise location. The  
16 Board considers that the mapping and location information provided by East Durham is  
17 sufficient to determine the location for the purpose of this application.”<sup>12</sup> In its pre-filed  
18 evidence, Jericho submitted mapping and location information at least as detailed, if not

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<sup>9</sup> Application, Exhibit B, Tab 2, Schedule 1, p. 1-2.

<sup>10</sup> County Submissions, paras. 9-13.

<sup>11</sup> Application, Exhibit B, Tab 3, Schedule 1, Appendix C.

<sup>12</sup> Application, Exhibit B, Tab 3, Schedule 1, Appendix C, p. 8.

1 more detailed, than that submitted by East Durham in EB-2013-0233.<sup>13</sup> For example,  
2 similar to East Durham, Jericho included in its pre filed evidence a list of the affected  
3 Road Allowances, as well as the relevant mapping.<sup>14</sup> Jericho's list and mapping was  
4 even more detailed than that filed in EB-2013-0233, and includes information such as  
5 functionality, degree of necessity, the side of the road allowance and the approximate  
6 length of the line segment.

7 Furthermore, if the County wanted more detail on Jericho's proposed location, it could  
8 have requested such detail on various occasions but did not do so. In particular, despite  
9 claiming in its March 28, 2014 letter that Jericho's pre-filed evidence "lacks many  
10 specific technical details" and requesting an interrogatory process because the "County  
11 has a need, fundamental to its mandate as steward of the public road allowance, to be able  
12 to ask questions ...", the County did not submit a single interrogatory in this proceeding.  
13 Furthermore, the level of detail in Jericho's drawings (which were appended to the  
14 proposed Road Use Agreement and filed with Jericho's pre-filed evidence in this  
15 Application) was directly responsive to the level of detail requested by County staff.<sup>15</sup> In  
16 particular, in finalizing a Road Use Agreement acceptable to County staff, Jericho  
17 provided staff with the drawings included at Schedules B11 and B10 of the proposed  
18 Road Use Agreement (which are the same maps included as Jericho's proposed location  
19 for the Distribution System). Schedule B11 (included at Exhibit B, Tab 6, Schedule 1,  
20 Appendix B of the Application) shows a plan view routing of the Distribution System.

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<sup>13</sup> Application, Exhibit B, Tab 2, Schedule 1 and Exhibit B, Tab 6, Schedule 1.

<sup>14</sup> Application, Exhibit B, Tab 6, Schedule 1, Appendix A.

<sup>15</sup> Application, Exhibit B, Tab 4, Schedule 1, Appendix A.

Schedule B10 (included at Exhibit B, Tab 6, Schedule 1, Appendix C of the Application) contains detailed drawings of all road crossings, including minimum depths for Jericho's Distribution System underneath the travelled portion of the road.<sup>16</sup> Staff agreed that this level of detail would be sufficient for the County to approve a Road Use Agreement establishing, among other things, the locations of the Distribution System within the Road Allowances. Jericho also provided staff with the drawings located at Schedule B9 of the Road Use Agreement to show a typical example of the level of detail that would be submitted to the County prior to construction.<sup>17</sup> Had the County staff required more detailed drawings prior to their recommendation of a Road Use Agreement, they could have done so.

### **3.0 ALLEGED LACK OF ALTERNATIVES**

In paragraphs 14-19 of the County Submissions, the County alleges that Jericho had not properly considered environmental, social and technical considerations in arriving at the proposed location for the Distribution System. For example, the County baldly asserts that Jericho prefers to locate the Distribution System within the Road Allowances simply for economic reasons.<sup>18</sup> This is clearly false. Jericho has offered the County, through the proposed Road Use Agreement (included with the pre-filed evidence), considerable compensation for the use of its Road Allowances.<sup>19</sup> It is only because of the County

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<sup>16</sup> Application, Exhibit B, Tab 4, Schedule 1, Appendix A, Schedule B10.

<sup>17</sup> Application, Exhibit B, Tab 4, Schedule 1, Appendix A, Schedule B9.

<sup>18</sup> County Submissions, para. 17.

<sup>19</sup> Application, Exhibit B, Tab 4, Schedule 1, Appendix A, p. 18-19.

1 Council's refusal to engage Jericho on that Road Use Agreement – and in doing so reject  
2 such compensation – that has made the present Application necessary.

3 Furthermore, the County acknowledges that there are multiple County staff reports  
4 endorsing the execution of the proposed Road Use Agreement, but suggests those staff  
5 recommendations are not as important as the position of Council.<sup>20</sup> In Jericho's view, the  
6 recommendations of County staff are critical for the Board's consideration of this  
7 Application, given that County staff – and not Council – has direct familiarity with  
8 Jericho's proposal and the technical expertise to evaluate it. County staff's  
9 recommendations therefore lend important technical weight to Jericho's proposal. In  
10 contrast, the County Council's position seems not to be driven by technical  
11 considerations, but rather by political motivations to prevent wind energy development,  
12 as seen in the Council resolutions included in Jericho's pre-filed evidence.<sup>21</sup> As stated in  
13 Jericho's pre-filed evidence, County Council did not even discuss the Road Use  
14 Agreement or its provisions (and did not raise any technical questions in respect of same)  
15 in either AM Committee meeting where staff had endorsed the execution of the proposed  
16 Road Use Agreement or at the Council level. During the first AM Committee meeting, a  
17 motion was made to table the staff's recommendation until the next meeting.<sup>22</sup> At the  
18 next AM Committee meeting, no discussion was held; a motion was made to put the  
19 Road Use Agreement out for a 60-day public comment period.<sup>23</sup> The County Council has

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<sup>20</sup> County Submissions, paras. 18 and 19.

<sup>21</sup> Application, Exhibit B, Tab 5, Schedule 1, Appendices A, B, C and D.

<sup>22</sup> Application, Exhibit B, Tab 5, Schedule 1, Appendix J, p. 4.

<sup>23</sup> Application, Exhibit B, Tab 5, Schedule 1, Appendix K, p. 4.

repeatedly declined to engage Jericho in any relevant technical discussions concerning the Distribution System or the Road Use Agreement.

#### **4.0 ALTERNATIVE PROPOSED**

The County submits that Jericho's proposed location has not excluded all other reasonable alternatives and therefore should not be approved.<sup>24</sup> This position is untenable for the reasons outlined below.

Firstly, the County inaccurately suggests that the County could not have proposed any alternative locations because Jericho has a statutory right to locate the Distribution System within the Road Allowance.<sup>25</sup> This is untrue. At any point, the County Council could have proposed an alternative location within the Road Allowance. It did not do so.<sup>26</sup> Indeed, the parties had been in discussions about the location of infrastructure for approximately 3 years and the locations provided reflect the suggestions of County staff within the context of those discussions.<sup>27</sup>

Secondly, in the County Submissions the County asks the Board not to grant Jericho's proposed location until Jericho can satisfy the Board that there is no other reasonable alternative available to it.<sup>28</sup> This request mischaracterizes the statutory requirements of section 41. In particular, section 41 requires both of the distributor and the owner of the road allowances (in this case, both of Jericho and the County) to reach an agreement

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<sup>24</sup> County Submissions, paras. 20-22.

<sup>25</sup> County Submissions, para 20.

<sup>26</sup> Argument in Chief, pp. 7-8.

<sup>27</sup> Application, Exhibit B, Tab 5, Schedule 1, p. 2.

<sup>28</sup> County Submissions, para 21.

1 regarding the location of the Distribution System. Both parties have a statutory  
2 obligation to attempt to reach such an agreement. If they cannot, an application can be  
3 filed with the Board to determine the matter. In hearing such an application, Jericho  
4 submits based on fundamental principles of administrative law that the Board must  
5 decide whether the proposed location is reasonable – not whether there are no other  
6 reasonable alternatives. This is especially the case given that the County has presented  
7 no alternative proposals. If the County truly believed there were other reasonable  
8 alternatives available, it could have proposed them either to Jericho in the context of the  
9 Road Use Agreement negotiations, or to the Board in the context of this proceeding. In  
10 the absence of any alternatives from the County, the Board must only determine whether  
11 Jericho’s proposal is reasonable. In this regard, Jericho agrees with Board staff’s  
12 submissions that it is outside the scope of a section 41 proceeding for the Board to  
13 consider the merits, prudence or any other environmental, health or economic impacts  
14 associated with the Project generally.<sup>29</sup>

## 15 **5.0 POSITION ON COSTS**

16 The County submits that costs are not appropriate.<sup>30</sup> The submissions suggest that the  
17 County did not fail to negotiate, but simply negotiated unsuccessfully. This is a  
18 mischaracterization of the facts. In fact, Jericho and the County staff negotiated

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<sup>29</sup> Board Staff Submission, p. 2.

<sup>30</sup> County Submissions, paras. 23-25.

1 successfully, but the County Council refused to accept staff's recommendation, and did  
2 not negotiate with Jericho at all on its own accord.<sup>31</sup>

3 Furthermore, Jericho did not raise the issue of costs at the outset of the proceeding in the  
4 event the County raised in good faith questions about Jericho's proposal in the context of  
5 the present proceeding. However, the County did not do so, and instead has drawn out  
6 the proceeding by making various assertions and demands that it has not pursued. In  
7 particular, in its March 28, 2014 letter, the County made various assertions, including  
8 about the need for interrogatories and the importance of a process that would involve the  
9 County in the determination of the location of the Distribution System. Yet the County  
10 did not submit any interrogatories, or any response to Jericho's reply to the County's  
11 March 28 letter (as Procedural Order No. 1 allowed the County to do). In fact, the  
12 County did not submit any evidence at all in this proceeding, and has provided no  
13 alternatives to or specific feedback on Jericho's proposal. Jericho has no choice but to  
14 conclude that the County does not have a genuine interest in finalizing a Distribution  
15 System location with Jericho, but instead seeks only to frustrate the development of the  
16 wind project and is inappropriately drawing out the present proceeding in an attempt to  
17 do so. As a result, in Jericho's view, it has become apparent throughout this proceeding  
18 that it may be appropriate for the Board to award costs against the County. Note that at  
19 this stage Jericho has not formally requested costs but has only reserved its right to do so.

20 **6.0 OTHER**

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<sup>31</sup> Application, Exhibit B, Tab 5, Schedule 1, p. 4-5.

1 In paragraph 8 of the County Submissions, the County raises a concern about the  
2 potential for future relocations of Thompson Line.<sup>32</sup> As the County will know, in the  
3 version of the Road Use Agreement recommended by Mr. Cole on May 21, 2014, Jericho  
4 had offered to accommodate the County in respect of such relocations.<sup>33</sup> As Mr. Cole  
5 writes in his February 2014 report (included as an Appendix to Jericho's pre-filed  
6 evidence), "The Draft Road Use Agreement specifically addresses future improvement  
7 and widening of the road allowance along the transmission route. If the County requires  
8 the relocation of any portion of the transmission line for road improvements and  
9 widening, Jericho Wind Inc. is responsible for carrying out the relocations at their  
10 expense."<sup>34</sup> It is disingenuous for the County to raise this concern here when Jericho had  
11 already offered to address through a proposed Road Use Agreement.<sup>35</sup> As noted above,  
12 the issue is also irrelevant to this proceeding.

13 In paragraph 16 of the County Submissions, the County highlights how it felt an oral  
14 hearing was important for this proceeding. Jericho notes that the County had an  
15 opportunity, as set out in Procedural Order No. 1, to provide a response to Jericho's  
16 position that a written hearing was more appropriate. The County did not do so.<sup>36</sup>

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<sup>32</sup> County Submissions, para. 8.

<sup>33</sup> Jericho's Interrogatory Responses, Appendix A.

<sup>34</sup> Application, Exhibit B, Tab 5, Schedule 1, Appendix K, p. 3; See s. 23 of the Road Use Agreement included in the Application, Exhibit B, Tab 4, Schedule 1, Appendix A, p. 15.

<sup>35</sup> Note – Jericho has transmission and distribution located on private lands adjacent to Thompson Line. During the Road Use Agreement negotiations, County staff indicated that they may look to expand the right-of-way ("ROW") into areas where the electrical infrastructure will be located on those private lands. If that occurred, under section 23 of the proposed Road Use Agreement, Jericho would have been responsible for the cost of moving any affected portions of the Distribution System either in the ROW or on the private lands abutting the ROW should the County obtain rights to expand the road onto these properties.

<sup>36</sup> County Submissions, para. 16.

Finally, the County suggests that Suncor's application in EB-2014-0022 is instructive.<sup>37</sup>  
Jericho disagrees. EB-2014-0022 is a leave to construct proceeding for transmission  
infrastructure, not a section 41 application for the location of distribution infrastructure.

#### **7.0 ORDER SOUGHT**

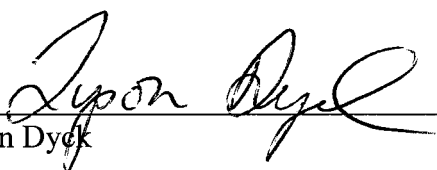
Jericho therefore requests that the Board, pursuant to Section 41(9) of the Electricity Act,  
issue an order or orders establishing the location of the Distribution System within the  
Road Allowances. More particularly, Jericho requests that the Board issue an order or  
orders establishing such location in accordance with the location proposed in Part 2.0 of  
Jericho's Argument in Chief. In this regard, Jericho notes that Board staff supports the  
request made by Jericho in respect of the location of the Distribution System within the  
Road Allowances.<sup>38</sup>

Finally, as stated in the Argument in Chief, Jericho respectfully reserves its right to  
request costs in this proceeding.

DATED at Toronto, Ontario, this 25th day of June, 2014.

All of which is respectfully submitted by:

JERICHO WIND, INC.  
By its counsel,

  
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Tyson Dyck

<sup>37</sup> County Submissions, para. 12.

<sup>38</sup> Board Staff Submission, p. 2.