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October 23, 2014

Reply To: Thomas Brett
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Our File No. 134380

VIA RESS, EMAIL AND COURIER

Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto Ontario
M4P 1E4

Attention: Kirsten Walli,
Board Secretary

Dear Ms. Walli:

**Re: Suncor Energy Products Inc. ("Suncor") – Reply Argument
Board File No. EB-2014-0022**

Pursuant to Procedural Order No. 7, please find enclosed Suncor's Reply.

Yours sincerely,

FOGLER, RUBINOFF LLP

Thomas Brett

TB/dd

Encls.

CC: All Parties

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

AND IN THE MATTER OF an application by Suncor Energy Products 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, the Town of Plympton-Wyoming, and the Township of Warwick, all in the County of Lambton, Ontario.

APPLICANT'S REPLY ARGUMENT

October 24, 2014

Suncor respectfully requests the Board to approve its Leave to Construct Application (the "Application") for the reasons outlined in its detailed Argument-in-Chief, filed on August 25, 2014, a copy of which is attached to this Reply Argument as Appendix A. This Reply Argument will not repeat those arguments, but will address HONI's final submission dated October 17, 2014. Board Staff was strongly supportive of the Application in its submission.

In its submission, HONI requested (page 5 of 5) that the Board defer its decision on the Application until Suncor has executed HONI's proposed Emergency Services Agreement ("EMS Agreement") and the Perpendicular Crossings Operational Agreement ("Crossings Agreement"). HONI has filed redacted copies of drafts of these agreements as part of its response to Board Staff Interrogatory No. 8 (Exhibit I, Tab 1, Schedule 8, Attachment 1).

HONI has effectively merged the Crossings Agreement and the EMS Agreement into one agreement, notwithstanding the fact that they deal with separate issues.

The Crossings Agreement is a comprehensive agreement that sets out the relationship between Suncor and HONI as two independent entities that will own transmission and distribution assets in proximity to one another, particularly with respect to the six road crossings which Suncor's transmission facilities are required to make of rural roads, along which Hydro One (Distribution) has primary and secondary pole lines. It sets out Suncor's and HONI's rights and obligations with respect to the operational and financial matters regarding these respective assets on the defined lands, including construction of new lines, moving existing lines, putting overhead lines underground, access for maintenance, and detailed procedures to deal with emergencies. It is a long term agreement, for the life of Suncor's twenty year contract.

The EMS Agreement provides for Suncor to retain HONI, as an independent contractor (not an agent) to, upon discovery, or being notified by a customer or a third party, that Suncor's assets require emergency remediation work, to notify Suncor by placing a telephone call to Suncor's Emergency Line, which shall be manned 24/7. After receiving such notification, Suncor's emergency personnel must arrive at the relevant site within 120 minutes of the receipt of the call. Meanwhile, HONI will, with its personnel, take whatever steps are necessary to render the area of the emergency safe, and not a hazard to the general public, including restricting public access to the immediate area and clearing roadways of debris. The EMS Agreement also sets out the compensation to HONI for providing those services, both fees and recovery of expenses. The EMS Agreement reflects the fact that given HONI Distribution's historical and current presence in rural Ontario, a third party (often a HONI Distribution customer) discovering, or affected by, an electrical emergency, would normally call HONI's call centre¹. The EMS Agreement is for a

¹ HONI Distribution is required by the Service Quality Requirements (performance standards) (Section 7) of the Distribution System Code (the "Code") to give to the public a customer care number, to answer calls on that

term of five years and is renewable. While the EMS Agreement is described as non-exclusive, the nature and context of the EMS Agreement requires that it be exclusive (our emphasis).

HONI has inextricably linked the two Agreements by stipulating, in section 7 of the Crossings Agreement, that within thirty days of the coming into force of that agreement:

"the parties shall execute the EMS Agreement, in the form attached hereto as Schedule B".

As noted, the EMS Agreement is made a Schedule to the Crossings Agreement. Section 14.5 of that agreement provides that:

"Schedules: The following schedules attached hereto are to be read with and form part of this Agreement:

Schedule "A" – Description of Lands
Schedule "B" – Form of EMS Agreement".

Finally, Section 4.1 of the Crossings Agreement, entitled Operational Matters, provides that, in the event that HONI is required to move an Overhead Secondary Line underground, because Suncor wishes to install a Transmission Line that would cross the secondary line, the "Proponent" (Suncor) shall not energize its new line until the later of:

"(3) the delivery of the executed EMS Agreement referred to in clause 7.1 below".

To summarize, in order to be able to implement the Crossings Agreement, Suncor must execute the EMS Agreement.

number within a prescribed time period (subsection 7.6.1), and to respond to Emergency Calls (from fire, police or ambulance services) within 120 minutes in rural areas, when response means assuring the arrival of a qualified service person onsite (subsection 7.9).

In addition, section 4.5 of the Code requires HONI to develop and maintain appropriate emergency plans, and to establish and operate a call centre or equivalent service to provide customers with available information regarding all outages.

Suncor urges the Board not to defer its approval or to condition its approval on executing the Agreements in their current form, for the following reasons.

First, to do so would be unfair to Suncor in that it sanctions HONI's behaviour of using the regulatory process to force Suncor to sign the EMS Agreement (see above), which contains a blatantly unfair indemnity clause. In Suncor's view, such behaviour is inappropriate and should not be encouraged or condoned.

Suncor set out the clause in question in the Addendum to its Argument-in-Chief (the "Addendum") dated October 7, 2014, a copy of which is attached as Appendix B to this Reply Argument.

The clause states:

"7. Indemnity

Except with respect to any damages not caused by the Services Recipient and directly incurred by the Services Provider while the Services Provider is en route to the Assets of the Services Recipient requiring the Emergency Services, the Services Recipient shall be liable for and shall indemnify the Services Provider and the Services Provider's successors and assigns, shareholder, directors, officers, employees, contractors and agents (collectively, the "Indemnitees") from and against any and all any loss, damage or injury (including death) to persons or property and any and all actions, manner of actions, causes of actions, damages, suits, proceedings, claims, debts, obligations, liabilities, expenses, demands, penalties, fines and costs arising therefrom and connected therewith, of any nature or kind whatsoever (including, without limitation, any economic loss, loss of goodwill, loss of profit or for any special, indirect or consequential damages), which are attributable to, based upon or related to, any actions or omissions of the Services Provider including, without limitation, the Services Provider's performance and/or non-performance of its obligations under this Agreement (and any amendments or additions thereto that are mutually agreed to in writing), whether arising from or based on breach of contract, tort, negligence, strict liability or otherwise and the Services Recipient does hereby for itself and its successors and assigns release and forever discharge the Indemnitees from and against any and all such aforementioned liability" (our emphasis)."

As Suncor noted in its Addendum:

"This indemnity agreement is not fair and balanced, in that, it requires Suncor to indemnify HONI even in circumstances where HONI is in breach of the Agreement, or is negligent or commits another tort in performing its obligations under the Agreement, or does something where it is held liable because of the doctrine of strict liability. HONI refuses to consider any change to those provisions."

In addition, unlike in normal commercial agreements, the Indemnity Agreement is unfair and unbalanced in that it requires Suncor to hold HONI harmless for "economic loss, loss of goodwill, loss of profit, or for any special, indirect, or consequential damages". These types of losses are very rarely indemnified against in any circumstances in normal commercial agreements, let alone in instances where the party seeking indemnification is at fault. For example, neither of these provisions are found in section 1.9, the Liability Clause in HONI's Conditions of Service. It states:

"1.9 Liability

Hydro One shall be liable to a Customer and a Customer shall be liable to Hydro One for any damages that arise directly out of the willful misconduct or negligence of:

- (i) Hydro One in providing Distribution Services to the Customer;
- (ii) the Customer in being connected to the Distribution System; or
- (iii) Hydro One or the Customer in meeting their respective obligations or exercising their respective rights under these Conditions of Service, their licences and any other Applicable Laws.

Notwithstanding the above, neither Hydro One nor the Customer shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise." (page 11, HONI Distribution Conditions of Service, May 21, 2013)

Section 1.9 of HONI's Conditions of Service is an example of a fair and balanced liability/indemnity clause, in that it is reciprocal and excludes indirect and consequential damages. BOMA believes there is no justification for the double standard.

Second, as Suncor noted in its Addendum, Suncor and HONI have agreed on all other terms of the EMS Agreement and the Crossings Agreement. That is HONI's evidence in this case, provided at line 36, page 4, in response to Board Staff's Interrogatory No. 1 on September 24, 2014 (Exhibit I, Tab 1, Schedule 1, page 4). In that response, in commenting on the status of the two agreements, HONI stated:

"Today, the one thing requiring settlement is the treatment of the indemnity between the two parties in the EMS Agreement."

All the other issues pertaining to the two agreements have been agreed upon. The parties negotiated for a considerable period of time to reach those agreements.

In support of its insistence on being indemnified for all losses including consequential and indirect damages, arising from its own negligence or breach of contract, HONI makes two points in its October 17, 2014 submission. The first is that:

"The proposed Emergency Services Agreement addresses services which Suncor may voluntarily choose to procure from Hydro One Distribution" (page 4 of 5; Hydro One Net Works Argument, EB-2014-0022).

This statement is incorrect, disingenuous, and is likely to mislead the Board. As noted above, in order to implement the Crossings Agreement with HONI, Suncor must sign the EMS Agreement.

Second, HONI states that:

"the terms and conditions in this agreement have been agreed to by other parties in similar circumstances" (Ibid, page 4 of 5).

This is a very broad statement, offered with no substantiation. HONI does not say which other parties, so Suncor cannot verify the claim, nor how many other parties, nor in what way the circumstances were similar. Moreover, even if some of the many wind generators in the province requiring HONI's collaboration have agreed to such an indemnity clause, they may well have done so only under duress. Their signing, if it occurred, does not make the clause fair.

Given that all of the other issues have been settled, Suncor is prepared to execute the Crossings Agreement now, providing it is amended to make it clear that by so doing, it does not agree to the EMS Agreement in its present form, that is with the indemnity clause (section 7) as currently drafted. With the indemnity clause made more fair and balanced, it is prepared to sign the EMS Agreement as well.

In Suncor's view, it is not appropriate for the Board to decide this issue either directly, or indirectly by conditioning its Leave to Construct approval on, or worse still, deferring its decision until, the Crossings Agreement and the EMS Agreement have been executed. The form of any indemnity and liability clause is a commercial matter, best left to the parties to work out. Moreover, as a contractual matter, it is likely beyond the scope of the Board's jurisdiction as set out in section 96(2) of the Act.

HONI and Suncor have dealt with one another on these agreements since January 2014 and are well aware of the nuances of each other's requirements related to the construction and operation of transmission lines and distribution lines in proximity to one another, and how to ensure that any emergencies are handled properly, with due regard for safety and good customer service. Left to their own devices, with some encouragement from the Board to HONI to negotiate a solution to the indemnity clause in good faith, the parties will devise a reasonable

indemnity/liability clause. Suncor requests the Board to urge HONI to negotiate a more balanced and commercially reasonable indemnity clause. Doing so would be consistent with the Board's electricity objectives, especially section 1.(1)5 of the Act.

Third, having filed its Application on January 21, 2014, Suncor has incurred considerable delay in the completion of this proceeding, in part as a result of HONI's interventions, its "evidence" and its serial repetitive representations. The parties have agreed for some time, that the only issue remaining between the parties is the indemnity clause in the EMS Agreement. Further delay would prejudice Suncor's project.

Finally, Suncor is of the view that the Varna case (EB-2012-0442), which HONI cited as an instance where the Board deferred its decision until the applicant's negotiations with affected landowners and HONI, were undertaken and agreements, if any, reached, deals with circumstances completely different from the present case. In Varna, negotiations with the landowners had just commenced and negotiations with HONI on a range of issues, including costs, were in an early phase. The Board deferred its decision to allow good faith negotiations to be undertaken. In this case, there are no negotiations with affected landowners, and the negotiations with HONI are complete, save for one clause of one agreement. The Board should not give Varna any weight.

In conclusion, Suncor requests that the Board grant it Leave to Construct, and that the Board urge HONI to negotiate a reasonable, balanced indemnity clause in the place of the existing clause 7 of the EMS Agreement.

All of which is respectfully submitted, this 24rd day of October, 2014.

SUNCOR ENERGY PRODUCTS INC.

By its counsel,

Fogler, Rubinoff LLP

A handwritten signature in black ink, appearing to read "Tom Brett", written over a horizontal line.

Tom Brett

APPENDIX A

EB-2014-0022

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

AND IN THE MATTER OF an application by Suncor Energy Products 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, the Town of Plympton-Wyoming, and the Township of Warwick, all in the County of Lambton, Ontario.

APPLICANT'S ARGUMENT-IN-CHIEF

August 25, 2014

A. INTRODUCTION

1. These submissions are filed on behalf of Suncor Energy Products Inc. ("**Suncor**" or the "**Applicant**") in EB-2014-0022 (the "**Application**"). In the Application, Suncor seeks leave to construct under Section 92 of the *Ontario Energy Board Act* (the "**OEB Act**") an electricity transmission line and a collector/transformer substation (the "**Proposed Facilities**") that will help connect the Cedar Point II Wind Energy Project (the "**Project**") to the IESO-controlled grid. These facilities will connect to certain transmission facilities (owned by Jericho Wind, Inc.) that were recently approved by the Ontario Energy Board (the "**Board**") in EB-2013-0361 (the "**Jericho Facilities**"). The Jericho Facilities will convey the electricity to the Bornish TS station, and then through certain other transmission facilities (the "**Shared Transmission Facilities**") to the IESO-controlled grid. That pathway permits electricity generated by the Project to enter the IESO-controlled grid. The Shared Transmission Facilities are described in the EB-2013-0040 Application for Leave to Construct Transmission Facilities by Bornish Wind, LP, Kerwood Wind, Inc., and Jericho Wind, Inc. ("**Jericho**"), all of which are controlled by NextEra Energy Canada ("**NextEra**"). That application was approved by the Board on November 12, 2013. A schematic diagram of the pathway from the collector/transformer

substation to the IESO-controlled grid is at Exhibit B, Tab 2, Schedule 5 of the Application.

2. In order to secure this pathway to the IESO-controlled grid, Suncor has obtained options from NextEra to interconnect with, and utilize as licensee, the Jericho Transmission Facilities, and the Shared Transmission Facilities. These arrangements, incorporated in substantial commercial agreements, provide Suncor, upon taking up of the options, with capacity on those transmission facilities sufficient to convey the electricity from the Project to the IESO-controlled grid. Suncor plans to exercise those options once it has received the required approvals for the Project and the Proposed Facilities. Redacted versions of the Agreements are in evidence.
3. The Applicant also seeks Board approval under Section 97 of the OEB Act for the form of land agreement that has been offered to landowners affected by the proposed transmission facility locations and routing, as well as for an order under Section 101 of the OEB Act approving the construction of transmission facilities upon, under or over a highway, utility line or ditch.
4. The Applicant has, through its pre-filed evidence and interrogatory responses, provided detailed, comprehensive and specific information in support of the Application. The evidence demonstrates that the public interest test for leave to construct under Section 96(2) of the OEB Act has been met and that the proposed transmission facility locations and route are appropriate. Accordingly, the Applicant submits that leave to construct the proposed transmission facilities should be granted for the following reasons:
 - (a) the interests of consumers with respect to prices are protected as the costs of the facilities, including interconnection, will not be passed onto consumers through electricity rates;
 - (b) based upon the Independent Electricity System Operator's ("IESO") System Impact Assessment ("SIA") report, the connection of the Project to the IESO-controlled grid by means of the proposed transmission facilities will not have a material adverse impact on the reliability of the integrated power system;

- (c) based upon the Hydro One Networks Inc.'s ("**Hydro One**") Customer Impact Assessment ("**CIA**") report, the connection of the Project to the Hydro One transmission system by means of the proposed transmission facilities will not have any adverse impact on the Hydro One transmission customers in the area;
- (d) the proposed transmission facilities are required to convey electricity from the Applicant's renewable energy generating facility to the IESO-controlled grid and are thereby consistent with the Province of Ontario's policy of promoting renewable energy; and
- (e) the location of the proposed substation and the routing of the proposed transmission line on private lands are on the consent of each relevant landowner.

B. APPLICATION

5. In the Application, Suncor has sought leave to construct electricity transmission facilities comprised of:
 - (a) a collector/transformer station (the "**Transformer Station**") located on Parcel PIN 430310087, Partial Lot 8, Concession 16, Township of Bosanquet, in the Municipality of Lambton Shores, at which power from the 34.5 kV collection system, which gathers the electricity from the Project will be stepped up from 34.5 kV to 115 kV transmission line voltage;
 - (b) a 15 km single circuit 115 kV transmission line (the "**Transmission Line**"), connecting the Transformer Station with a station to be built as part of NextEra's Jericho Transmission Facilities (the "**Jericho Substation**"), which was approved by the Board on May 6, 2014 (EB-2013-0361). The Transmission Line will connect to the high voltage side of the Substation through a 115 kV circuit breaker and related equipment, located within the Substation.
6. Under a separate application approved by the Board on November 12, 2013 (EB-2013-0040), Jericho together with Bornish Wind, LP ("**Bornish**") and Kerwood Wind, Inc. ("**Kerwood**") as co-owners (together, the "**Co-owners**"), were granted leave to

construct the Shared Transmission Facilities. The Jericho Transmission Facilities and the Shared Transmission Facilities, together with Suncor's applied for facilities will enable Suncor to convey electricity from the Project to the IESO-controlled grid. The facilities that were approved in the Co-owners' LTC Application include the Bornish Customer Switching Station (to which the Jericho Transmission Facilities will connect), the Parkhill Customer Transformer Station and a transmission line connecting the Bornish Customer Switching Station to the Parkhill Customer Transformer Station (all of which facilities comprise the Shared Transmission Facilities), each as described in the EB-2013-0040 Application. The Parkhill Customer Transformer Station will be connected to the IESO-controlled grid at Hydro One's planned Evergreen Switching Station, which will sectionalize Hydro One's circuit B562L between Bruce A TS and Longwood TS. As noted above, a schematic diagram of the facilities is shown at Exhibit B, Tab 2, Schedule 5 of the evidence.

7. As the Applicant will be both a transmitter and a generator and will be transmitting electricity only for the purpose of conveying electricity to the IESO-controlled grid, the Applicant relies upon the exemption from the requirement to obtain a transmission license as set out in Section 4.0.2(1)(d) of *Ontario Regulation 161/99*.

C. LEGISLATIVE FRAMEWORK

8. The Application is brought under Section 92(1) of the *OEB Act*, which provides that:

"No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection."

9. Section 96 of the *OEB Act* sets out the relevant test for an application under Section 92:

- "(1) If, after considering an application under sections 90, 91 or 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 electricity distribution 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."
10. As the Board has noted in several comparable cases, its jurisdiction in considering an Application for leave to construct the Proposed Transmission Facilities is limited to the application of the public interest test set out in Section 96(2), namely to a consideration of the interests of consumers with respect to prices, the interests of consumers with respect to the reliability and quality of electricity service, and the promotion of the use of renewable energy sources consistent with government policy. The Board's jurisdiction on the Application is also limited to the Proposed Transmission Facilities. The associated wind generation facility and its 34.5 kV collector system are beyond the scope of the proceeding.
11. In Procedural Order No. 1, the Board acknowledged its limited scope of review under Section 92. The Board stated that matters relating to environmental issues, land-use issues, land valuation, health and aesthetic issues are not within the scope of the Board's jurisdiction. Rather, the Board noted, environmental issues are considered within the scope of the Ministry of the Environment's Renewable Energy Approval ("REA") process.
12. The scope of the Board's jurisdiction under Sections 92 and 96 of the *OEB Act*, in these proceedings, is also affected by the Applicant's reliance on the rights granted under Section 41 of the *Electricity Act, 1998* (the "*Electricity Act*"), relating to the use of public highways for the purpose of a transmission system.
13. Specifically, while Suncor has proposed locating its Transmission Line entirely on private lands on parcels which it has leased from landowners, the line will of necessity cross public roads or highways in several locations. In proposing to cross municipal rights-of-way ("ROWS"), the Applicant has indicated that it is relying upon its rights

under Section 41 of the *Electricity Act*. The Applicant submits that the Board's consideration of the public interest under Sections 92 and 96 in respect of the routing of the Transmission Line is subject to those rights.

14. As Section 41 of the *Electricity Act* provides transmitters and distributors with significant rights with respect to the construction of electricity transmission and distribution systems under, over or on any public street or highway. Under Section 2(1) of the *Electricity Act*, a transmitter means "a person who owns or operates a transmission system". The Applicant will own and operate a transmission system. As such, the Applicant is a transmitter under Section 41 of the *Electricity Act* and has the statutory rights granted under Section 41 of the *Electricity Act*.
15. As a transmitter, the Applicant under Section 41(1) of the *Electricity Act* 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 system, including poles and lines". Subsection (2) provides that a transmitter may inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities constructed or installed under Subsection (1). Subsections (3) and (4) grant rights of entry for transmitters and their employees and agents. Most significantly, Subsection (5) provides that "the exercise of such powers under (1), (2) and (3) does not require the consent of the owner of or any other person having an interest in the street or highway".
16. Subsection 41(9) of the *Electricity Act* states that the location of any structures, equipment or facilities constructed or installed under Subsection (1) shall be agreed on by the transmitter and the owner of the street or highway and, in the case of disagreement, shall be determined by the Board. However, as Section 92 of the *OEB Act* (in the case of a transmission line greater than 2 km in length) already provides a statutory process to establish the transmission line's location, Subsection 41(10) provides that Subsection (9) does not apply if Section 92 of the *OEB Act* applies so as to require leave to construct.
17. It is important to note that Subsection 41(10) of the *Electricity Act* in the case of transmission lines only makes inapplicable the process under Subsection (9). This is because, with the Board's powers established under Section 92 of the *OEB Act*,

Subsection 41(9) would otherwise be redundant. Subsection 41(10) only affects Subsection 41(9), being the process before the Board. Subsection 41(10) does not amend or affect the rights granted to transmitters in Subsections 41(1) to 41(8), or render those provisions inapplicable. As such, the rights granted to transmitters under Subsections (1), (2) and (3) (location, ongoing rights to maintain and entry) remain in effect, as does the right to do so without the owner's consent under Subsection (5).

18. As a result, the application of Section 92 of the *OEB Act* does not diminish the Applicant's rights to cross road allowances. Given Section 41, with respect to location of the Transmission Line, the question before the Board under Section 92 is not whether the Applicant has a right to cross the road allowance or whether it can cross the road allowance. Rather, the question for the Board is only with respect to where the Transmission Line will cross the road allowances, which is in turn largely determined by the route of the line.
19. Based on the foregoing, the scope of the Board's inquiry in respect of Section 92 in the present proceeding is whether the Proposed Transmission Facilities satisfy the public interest test established under Section 96(2) of the *OEB Act*.

D. PUBLIC INTEREST CONSIDERATIONS

Interests of Consumers with respect to Prices and Project Need

20. Section 96(2) of the *OEB Act* requires the Board, in applying the public interest test, to consider the interests of consumers with respect to prices. The *Electricity Act* defines "consumer" to mean a person who uses, for the person's own consumption, electricity that the person did not generate. The Proposed Transmission Facilities will not directly serve any "consumers" - they will be used only to convey electricity from the Applicant's wind generation facility to the Hydro One transmission system which forms part of the IESO-controlled grid. As indicated in the Application at Exhibit B, Tab 2, Schedule 1, paragraph 9, and as required by its FIT Contract, the costs of constructing and operating the Proposed Transmission Facilities will be the responsibility of and will be paid for entirely by the Applicant. These costs will not be passed on to consumers through

transmission rates. The pricing available under the OPA's form of FIT Contract is standardized and does not vary based on the particular transmission or interconnection costs that an individual supplier incurs for purposes of its generation facility. As such, the Proposed Transmission Facilities will not have an impact on transmission rates or prices in Ontario.

21. Although "project need" is not expressly mentioned in Section 96(2) of the OEB Act as a consideration for the Board, in circumstances where the applicant is seeking to recover its project costs from consumers through transmission rates the Board will typically consider whether the additional costs to ratepayers are justified by the need for the project. In such circumstances, the Board will also consider the various routing alternatives to ensure that the selected route is the most cost effective from a ratepayer perspective. In the present Application, as noted, all of the costs of the Proposed Transmission Facilities are being paid for by the Applicant. In Section 92 applications for non-rate-regulated transmitters that are connecting generation to the IESO-controlled grid, the Board is typically satisfied as to the need for the transmission facilities where there is evidence of a power purchase agreement with the OPA.¹

Interests of Consumers with respect to Reliability and Quality of Electricity Service

22. As noted above, the Proposed Transmission Facilities will not directly serve any "consumers". The only potential impacts on the interests of consumers with respect to reliability and quality of electricity service would, therefore, be as a result of impacts from the Proposed Transmission Facilities on Hydro One's transmission system or the IESO-controlled grid, which in turn directly and indirectly serve consumers. Any such potential impacts have been considered through the IESO's system impact assessment process and Hydro One's customer impact assessment process and will be addressed on an ongoing basis through the terms of the connection agreement that will govern the

¹ See, for example, Grand Renewable Wind LP, Decision and Order dated December 8, 2011 at pp. 11-12 (EB-2011-0063), South Kent Wind LP, Decision and Order dated October 11, 2011 at pp. 3-4 (EB-2011-0217), McLean's Mountain Wind LP, Decision and Order dated June 28, 2012 at p. 5 (EB-2011-0394), Summerhaven Wind LP, Decision and Order dated November 11, 2011 at p. 3 (EB-2011-0027), and Jericho Wind, Inc., Decision and Order dated May 6, 2014 (EB-2013-0361), and Bornish Wind, LP, Kerwood Wind, Inc., and Jericho Wind, Inc., Decision and Order dated November 12, 2013 (EB-2013-0040).

relationship between NextEra and Hydro One, which will be based on the Board's prescribed form of agreement.

23. Suncor received a Final System Impact Assessment ("SIA") Report on June 4, 2012. This report concluded that the proposed connection of the Project to the Shared Transmission Facilities is expected to have no material adverse impacts on the reliability of the integrated power system. The IESO therefore recommended that a Notification of Conditional Approval for Connection be issued. The Notification was issued to Suncor concurrently with the Final Report. This report is found at Exhibit H, Tab 2, Schedule 1.
24. Suncor received a final Customer Impact Assessment ("CIA") Report on June 8, 2012 from Hydro One in respect of the Proposed Transmission Facilities. This report concludes that electricity from the Project facilities can be conveyed to the IESO-controlled grid through the proposed Transmission Facilities, the Jericho facilities, and the Shared Transmission Facilities, and subject to the requirements specified in the Report, without adverse impacts on area customers. This report is found at Exhibit H, Tab 3, Schedule 1.

Promotion of Renewables Consistent with Government Policy

25. The Government of Ontario enacted the Green Energy and Green Economy Act, 2009 to increase renewable energy generation and promote the creation of clean energy jobs. Under this legislation, the Minister of Energy directed the OPA to develop the FIT Program to procure energy from renewable energy sources. The procurement of renewable energy in Ontario is guided by *Ontario's Long-Term Energy Plan* (the "LTEP"). Under the 2010 LTEP, the Government of Ontario committed to putting in place 10,700 MW of non-hydro renewable energy capacity (wind, solar and bioenergy) as part of the supply mix by 2018. Under the 2013 LTEP, the Government of Ontario reiterated its commitment to renewable energy and has targeted capacity of 10,700 MW of non-hydro renewable capacity by 2021 and total renewable capacity of 20,000 MW by 2025. The FIT Program has been the centerpiece of the Government's strategy for achieving this renewable energy target to date. The Government's efforts to increase renewable energy generation have also been closely tied to the Government's

commitment to phasing out coal generation in Ontario by 2014. The Province of Ontario made this commitment for purposes of reducing Ontario's carbon emissions and its impact on climate change, as well as for reducing local and regional air pollution and related health impacts.

26. The Applicant entered into a 20-year contract with the OPA for its wind energy generation facility under the FIT Program in July 2011 (the "**FIT Contract**"). Suncor's Project will further the Government of Ontario's objective of increasing the amount of renewable energy generation that forms part of Ontario's energy supply mix. In particular, the Project will contribute approximately 100 MW of renewable energy generation capacity towards this objective. The Proposed Transmission Facilities are required to convey the electricity generated by this facility to the IESO-controlled grid so as to enable the Applicant to realize this objective, consistent with the Province's renewable energy policies.

Facility Routing and Location

27. As discussed in Exhibit B, Tab 4, Schedule 1 of the evidence, at a high level, Suncor decided that the location of its Project, and NextEra's Bornish, Jericho, and Adelaide projects, relative to the IESO-controlled grid, suggested that the most economic, least intrusive path for electricity generated by the Project to the IESO grid was through NextEra's proposed transmission facilities, including the Shared Transmission Facilities, and the Jericho Transmission Facilities.

With respect to the best route for the transmission line from Cedar Point Transformer Station to the Jericho Station, Suncor identified and considered several alternative routes. Suncor selected its preferred route, following extensive consultations with members of the community, municipal officials, Hydro One and other stakeholders, as well as comprehensive technical and environmental reviews. As part of its Renewable Energy Approval ("**REA**") process, Suncor issued notices, delivered presentations, participated in public meetings, and met with local government officials. During the course of these

consultations, Suncor shared information and received feedback concerning the potential routes for the transmission facilities needed to connect the Project to the Jericho Station. This feedback was considered, together with Suncor's technical and environmental reviews, in order to help identify the range of transmission options available to Suncor and any relevant concerns.

Through this process, as noted below, Suncor identified several potential transmission routes, as well as various constraints on these potential routes. Suncor then evaluated the two most attractive route options in detail (see below) and the related constraints and determined that the preferred Transmission Line route is the one proposed for the Proposed Transmission Facilities. For reason of cost-effectiveness and ease of service, Suncor has chosen to use an overhead transmission line.

Suncor initially considered several alternatives for the Transmission Line. The principal alternative route had the Transmission Line starting at the same substation location, travelling East along the Cedar Point Line right of way for approximately 6100m to an abandoned and removed rail line where the transmission line would travel North East across private land for approximately 4800m . The abandoned rail line splits the land parcels in the area and runs past the Jericho Substation location. This alternative route would have followed a natural property line boundary and was a direct route (approximately 11,000m) compared to the preferred path of approximately 15,000m. However, Suncor does not have property control along the abandoned rail line. Moreover, the alternative placement would also impact farming operations as the Transmission Line would require crossing lands at an angle and structures would interrupt farming operations significantly.

28. The proposed location of the Project, as well as the proposed Transmission Line, are described in Exhibit B, Tab 2, Schedule 3 and are depicted in the detailed maps provided in Exhibit B, Tab 2, Schedule 4 of the Application, respectively. Suncor proposed minor changes to the proposal to avoid provincial wetlands, by way of a letter to the Board dated July 15, 2014 and Attachment, consisting of an amended Exhibit B, Tab 2, Schedule 1, page 2 of the evidence.

29. Suncor submits that the route of the Proposed Transmission Facilities is appropriate and the proposed route offers a number of advantages over the alternative routes that were considered. Accordingly, the Applicant submits that the route and Proposed Transmission Facility locations should be approved.

Land Matters and Forms of Land Agreements

30. As part of the Application, the Applicant seeks an order pursuant to Section 97 of the OEB Act, which provides that in an application under Section 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.
31. To support the Application, the Applicant has also filed detailed descriptions of the land area and land rights required, as well as the land acquisition process for the Proposed Transmission Facilities (Exhibit F, Tab 1, Schedule 1). The form of land agreement for which the Applicant seeks approval is provided in Exhibit F, Tab 2, Schedule 1 of the Application.

E. CONCLUSIONS

32. The construction and operation of the Proposed Transmission Facilities will not affect the interests of consumers with respect to prices because the facilities will be paid for entirely by the Applicant and will not be recovered through transmission rates in Ontario. The Proposed Transmission Facilities are consistent with the policies of the Government of Ontario with respect to the promotion of the use of renewable energy sources.
33. Through the impact assessments undertaken by Hydro One and the IESO, the results of which were included in the pre-filed evidence, the Applicant has demonstrated that the Proposed Transmission Facilities will not adversely impact the interests of consumers with respect to reliability or the quality of electricity service.

34. The Applicant has also demonstrated that the route for the Proposed Transmission Facilities, including the specific crossings of the road allowances, are appropriate. The route offers clear advantages over other alternatives considered and the specific locations proposed for transmission structures have been refined based on consultations with Hydro One and Lambton County.
35. For the reasons set out herein, we respectfully request that the Board grant to the Applicant leave to construct the Proposed Transmission Facilities pursuant to Section 92 of the *OEB Act*, along with such other relief as requested in the Application.

All of which is respectfully submitted, this 25th day of August, 2014.

SUNCOR ENERGY PRODUCTS INC.

By its counsel,

Fogler, Rubinoff LLP



Tom Brett

APPENDIX B



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October 7, 2014

Reply To: Thomas Brett
Direct Dial: 416.941.8861
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Our File No. 134380

VIA RESS, EMAIL AND COURIER

Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto Ontario
M4P 1E4

Attention: Kirsten Walli,
Board Secretary

Dear Ms. Walli:

**Re: Addendum to Suncor's Argument-in-Chief, filed August 25, 2014
Board File No. EB-2014-0022**

Suncor is of the view that HONI did not file any new evidence in response to Board Staff IRs other than perhaps the draft of the Perpendicular Crossing Operational Agreement, including Schedule B, a Form of Emergency Services Agreement.

The remainder of the reply was submissions, not evidence.

As for the two Agreements, as HONI noted at line 36 of page 4 of its IR response to Board Staff, the only issue remaining between the parties is the indemnity clause between the parties. HONI insists that Suncor agree to its proposed indemnity clause, set out at page 7 of its proposed Emergency Services Agreement, which reads as follows:

"Except with respect to any damages not caused by the Services Recipient and directly incurred by the Services Provider while the Services Provider is en route to the Assets of the Services Recipient requiring the Emergency Services, the Services Recipient shall be liable for and shall indemnify the Services Provider and the Services Provider's successors and assigns, shareholder, directors, officers, employees, contractors and agents (collectively, the "Indemnitees") from and against any and all any loss, damage or injury (including death) to persons or property and any and all actions, manner of actions, causes of actions, damages, suits, proceedings, claims, debts, obligations, liabilities,

expenses, demands, penalties, fines and costs arising therefrom and connected therewith, of any nature or kind whatsoever (including, without limitation, any economic loss, loss of goodwill, loss of profit or for any special, indirect or consequential damages), which are attributable to, based upon or related to, any actions or omissions of the Services Provider including, without limitation, the Services Provider's performance and/or non-performance of its obligations under this Agreement (and any amendments or additions thereto that are mutually agreed to in writing), whether arising from or based on breach of contract, tort, negligence, strict liability or otherwise and the Services Recipient does hereby for itself and its successors and assigns release and forever discharge the Indemnitees from and against any and all such aforementioned liability" (our emphasis).

This indemnity agreement is not fair and balanced, in that, it requires Suncor to indemnify HONI even in circumstances where HONI is in breach of the Agreement, or is negligent or commits another tort in performing its obligations under the Agreement, or does something where it is held liable because of the doctrine of strict liability. HONI refuses to consider any change to those provisions.

This clause is unacceptable to Suncor, and would not be found in any reasonable commercial agreement.

By asking the Board to condition Suncor's right to commence construction, or to defer approving the Leave to Construct until HONI and Suncor have signed the two Agreements, when the only issue outstanding, by HONI's own admission is the indemnity clause, HONI appears to be using its quasi-monopoly status to force Suncor to sign a blatantly unfair agreement. That is inappropriate.

Suncor urges the Board not to do as HONI asks, but rather, to allow the proceeding and, if Leave to Construct is granted, the project, to continue to their normal conclusions.

Yours sincerely,

FOGLER, RUBINOFF LLP

Thomas Brett
TB/dd

CC: All Parties