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December 9, 2014
File No.: 129316.1017

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Yonge-Eglinton Centre
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: wpd Fairview Wind Incorporated (the "Applicant")
EB-2014-0226**

We are the solicitors for the Applicant and we write further to Procedural Order No. 2 dated December 2, 2014. Attached please find the Applicant's Argument in Chief and Brief of Authorities.

Should you have any questions, please do not hesitate to contact me.

Yours truly,



IR: Ingrid Minott

IM/dl
Enclosures

TORONTO
MONTRÉAL
OTTAWA
CALGARY
VANCOUVER
NEW YORK
LONDON
SYDNEY

IN THE MATTER of an application by wpd Fairview Wind Incorporated for an Order or Orders pursuant to section 41(9) of the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A establishing a location for the applicant’s distribution facilities on public road allowances owned by the Municipality of Clearview, as set out in this application.

1 **APPLICANT’S ARGUMENT IN CHIEF AND BRIEF OF AUTHORITIES**

2 **INTRODUCTION**

3 wpd Fairview Wind Incorporated (“**wpd Fairview**” or the “**Applicant**”) filed an application
4 with the Ontario Energy Board (the “**Board**”) on July 22, 2014 (the “**Application**”) for an
5 order or orders under subsection 41(9) of the *Electricity Act, 1998* establishing a location for
6 the Fairgrounds Collector Line (defined below), which it proposes to locate within certain
7 public rights-of-way, streets and highways owned by the Township of Clearview (the
8 “**Township**”).

9 These written submissions are prepared in accordance with Procedural Order No. 2 dated
10 December 2, 2014, wherein the Board established a timeline for the filing of submissions
11 related to the Application.

12 **THE WIND PROJECT**

13 The Application pertains to a renewable wind energy facility that the Applicant intends to
14 construct, develop and operate within the Township (the “**Fairview Wind Project**”). The
15 Fairview Wind Project will consist of 8 SENVION MM92-2.05 MW wind turbine generators
16 owned and operated by the Applicant and will contribute 16.4 MW of renewable energy to
17 Ontario’s electricity grid. The Fairview Wind Project is further described in Exhibit C, Tab 1,
18 Schedule 1 of the Application.

1 **THE DISTRIBUTION SYSTEM**

2 The Fairview Wind Project will utilize 2 km of 44 kV underground collector line running
3 north beneath Fairgrounds Road to County Road 91 (the "**Fairgrounds Collector Line**") to
4 deliver electricity generated by Turbines 2 and 7 to a switching station located near Turbine
5 5 (the "**Switching Station**"). To convey electricity generated by Turbines 1, 3 and 4 through
6 8, the Fairview Wind Project will utilize a 44 kV underground collector line that runs east
7 beneath County Road 91 approximately 0.5 km to the Switching Station (the "**County Rd 91**
8 **Collector Line**").

9 The Fairview Wind Project will also utilize a 44 kV overhead electrical power distribution
10 line (the "**Distribution Line**"), traveling north approximately 45 m from the Switching
11 Station, to connect to an existing overhead local distribution system located on County Road
12 91 and which is connected to Hydro One Network Inc.'s ("**HONI**") Stayner Transmission
13 Station, which is turn connected to the IESO-controlled grid.

14 The Fairgrounds Collector Line, County Road 91 Collector Line, Distribution Line and their
15 associated facilities are collectively referred as the "**Distribution System**."¹

16 **STATUTORY RIGHTS OF THE APPLICANT AND THE AUTHORITY OF THE BOARD**
17 **TO DETERMINE THE LOCATION OF THE FAIRGROUNDS COLLECTOR LINE**

18 The Applicant intends to locate certain facilities associated with the Distribution System
19 within public rights-of-way, streets and highways owned by the Township and the County.

20 The Applicant has engaged in discussions with the County and anticipates that it will reach
21 an agreement with the County with respect to the Distribution Line and the County Road 91
22 Collector Line.

23 The Applicant has not been able to engage the Township in similar discussions. In choosing
24 to locate the Fairgrounds Collector Line within public rights-of-way, streets and highways
25 owned by the Township (the "**Road Allowance**"), the Applicant is relying on its statutory

¹ The Distribution System is further described in Exhibit C, Tab 1, Schedule 1 of the Application.

1 right under section 41 of the *Electricity Act, 1998* to utilize the Road Allowance without the
2 consent of the owner.² The nature of the rights granted by section 41 have been described
3 by the Board as follows:

4 Section 41 of the *Electricity Act* grants a transmitter or
5 distributor a statutory right to enter upon a road allowance
6 and to construct a transmission or distribution line without
7 seeking the approval of a municipality. The use of a municipal
8 road allowance for the purpose of locating electricity
9 transmission and distribution lines has a public benefit in that
10 it will reduce the need to acquire private lands for such a
11 purpose, and it may assist in land development by creating
12 corridors for the construction of necessary infrastructure.

13 ... No expropriation compensation is payable by a project
14 proponent to a municipality for its use of the road allowance.
15 In effect, section 41 of the *Electricity Act* provides a form of
16 statutory appropriation of the road allowance for a compatible
17 public use. It is a statutory alternative to expropriation where
18 a proponent of an electrical transmission or distribution line
19 wishes to avail itself of the use of a municipal road allowance.³
20 [Emphasis added and footnotes omitted.]

21 Under subsection 41(9) of the *Electricity Act, 1998* the Board has the authority to determine
22 the location of the Fairgrounds Collector Line within the Road Allowance where the
23 applicant and the municipality cannot agree upon the location. The Board has exercised this
24 authority where a municipality has refused or failed to engage in discussions with the
25 applicant about the location of the facilities.⁴

26 As confirmed by the Board's prior decisions, the scope of the Board's authority on an
27 application under subsection 41(9) is limited solely to the determination of the location of

² The Road Allowance proposed to be used by the Applicant, and the positioning of the Fairgrounds Collector Line within the Road Allowance can be found in additional evidence filed by the Applicant on November 17, 2014 in response to Board Staff interrogatories 2(a) and (b).

³ *Niagara Region Wind Corporation*, Decision on Threshold Questions and Procedural Order No. 2 dated February 4, 2014, EB-2013-0203, Applicant's Argument-in-Chief and Brief of Authorities, Tab 1.

⁴ *East Durham Wind, Inc.*, Decision and Order dated November 7, 2013, EB-2013-0233, Applicant's Argument-in-Chief and Brief of Authorities, Tab 2.

1 the proposed distribution facilities within the road allowance.⁵ The conditions under which
2 an applicant is permitted access to a road allowance are set out in subsection 41(7). The
3 Board does not have the authority to vary these conditions or impose additional terms of
4 access on an application under subsection 41(9). Nor is the Board able to consider alternative
5 routes outside of the proposed road allowances:

6 Given the scope of subsection 41(9), it is not the Board's role in
7 this proceeding to decide whether the Project should be
8 approved, consider issues relating to wind turbines or
9 renewable energy policy generally, or consider alternatives to
10 the Project such as routes for the Distribution System that are
11 outside of the Road Allowances.⁶

12 To make an order under subsection 41(9), the Board must be satisfied the applicant has
13 discharged its burden of proof to demonstrate the proposed location of the facilities within
14 the road allowance is "appropriate".⁷ The Board is not required to identify the "precise" or
15 "exact" location of the distribution facilities – the specification of a reasonable range within
16 the road allowance is considered sufficient (*e.g.* a 3 metre-wide corridor was considered
17 appropriate by the Board in *East Durham*).⁸

18 The ultimate location of the facilities will be influenced by the outcome of other regulatory
19 process, notably the Renewable Energy Approval ("REA") process. While an applicant must
20 comply with all other legal requirements to proceed with construction, an applicant is not
21 required to obtain "all necessary approvals, such as the REA" prior to seeking and obtaining
22 of relief under subsection 41(9).⁹ This approach is consistent with the Board's long-standing
23 treatment of concurrent regulatory approvals for electric facilities.¹⁰

⁵ *Plateau Wind Inc.*, Decision and Order dated January 12, 2011, EB-2010-0253, Applicant's Argument-in-Chief and Brief of Authorities, Tab 3; *Wainfleet Wind Energy Inc.*, Decision and Order dated June 27, 2013, EB-2013-0031, Applicant's Argument-in-Chief and Brief of Authorities, Tab 4.

⁶ *East Durham, supra*, Applicant's Argument-in-Chief and Brief of Authorities, Tab 2.

⁷ *Wainfleet, supra*, Applicant's Argument-in-Chief and Brief of Authorities, Tab 4.

⁸ *East Durham, supra*, Applicant's Argument-in-Chief and Brief of Authorities, Tab 2.

⁹ *Ibid.*, Applicant's Argument-in-Chief and Brief of Authorities, Tab 2.

¹⁰ *Hydro One Networks Inc.*, Decision and Order on Motion dated July 4, 2007, EB-2007-0050, Applicant's Argument-in-Chief and Brief of Authorities, Tab 5.

1 Because of the limited scope of subsection 41(9), the sole issue before the Board in this
2 Application is the determination of the location of the Fairgrounds Collector Line within the
3 Road Allowance.

4 **RATIONALE FOR THE PROPOSED LOCATION OF THE FAIRGROUNDS**
5 **COLLECTOR LINE**

6 The Applicant has limited choices regarding the location of the Fairgrounds Collector Line
7 within the Road Allowance and its choice of location is supported by engineering drawings
8 and carefully considered rationale including:

- 9 • The proposed location of the Fairgrounds Collector Line within the Road Allowance
10 is the best balance of various environmental, social, technical and economic
11 considerations.
- 12 • The Township has refused to engage in discussions with the Applicant and therefore
13 has not expressed any concerns regarding the location of the Fairgrounds Collector
14 Line.
- 15 • The Township has not proposed an alternative location for the Fairgrounds Collector
16 Line within the Road Allowance and did not ask any interrogatories regarding the
17 proposed location of the Fairgrounds Collector Line within the Road Allowance.

18 As a result, other than the proposal set out herein and in the Applicant's response to Board
19 Staff interrogatories 2(a) and (b), there is no evidence before the Board regarding suitable
20 alternatives for locating the Fairgrounds Collector Line within the Road Allowance. The
21 Applicant has clearly discharged the burden of proof to demonstrate that the proposed
22 location of the Fairgrounds Collector Line within the Road Allowance is appropriate.

23 **NEGOTIATIONS REGARDING THE LOCATION OF THE DISTRIBUTION SYSTEM**

24 The Applicant has repeatedly attempted to engage in discussions with the Township to
25 negotiate an agreement regarding the location of the Fairgrounds Collector Line. The

1 Applicant's efforts to consult with the Township are detailed in Exhibit D, Tab 1, Schedule 2
2 of the Application. As set out in the Applicant's response to Board Staff interrogatory 3(b),
3 as early as October 23, 2012 the Applicant attempted to engage with the Township
4 regarding the Fairgrounds Collector Line. Moreover, as described in Exhibit D, Tab 1,
5 Schedule 2 of the Application, the Applicant continued its attempts for 16 months until
6 February 2014.

7 Despite the Applicant's efforts, the Township has refused each of the Applicant's requests to
8 meet on the basis that the Applicant's requests are premature. As a result of the Township's
9 refusal to engage with the Applicant, the Applicant was unable to provide the Township
10 with any information about the Distribution System and, in particular, the Fairgrounds
11 Collector Line, including information regarding the timing and implications of the
12 construction, installation, operation, maintenance and decommissioning of the Fairgrounds
13 Collector Line and its proposed location. In addition, as a result of the Townships refusal to
14 meet with the Applicant, the Applicant has not been able to negotiate an agreement with the
15 Township regarding the location of the Fairgrounds Collector Line within the Road
16 Allowance.

17 **CONSIDERATION OF THE POTENTIAL ENVIRONMENTAL, SOCIAL, TECHNICAL**
18 **AND ECONOMIC IMPACTS**

19 In proposing to locate the Fairgrounds Collector Line within the Road Allowance the
20 applicant has considered and attempted to mitigate any potential environmental, social,
21 technical and economic impact associated with the proposed location. Relevant to the
22 Applicant's consideration, and further described at Exhibit D, Tab 1, Schedule 4 of the
23 Application, is the fact that as part of the approval process for the Fairview Wind Project,
24 the Applicant engaged in extensive government and public consultation regarding the
25 Fairview Wind Project, including the Distribution System, in accordance with Ontario
26 Regulation 359/09. The information collected by the Applicant as a result of this broad
27 consultation process and through the detailed environmental and other studies prepared in
28 respect of the Fairview Wind Project was considered by the Applicant in order to determine

1 the appropriate placement of project infrastructure, including the Fairgrounds Collector
2 Line.

3 Further, prior to the construction of the Distribution System, including the Fairgrounds
4 Collector Line, the Applicant will put in place a Construction Environmental Management
5 Plan and a Construction Emergency Response and Communications Plan that will ensure
6 good site practices and minimize any impact to the County, the Township, the local
7 community, the natural environment and other existing infrastructure and features. As a
8 result, the proposed location of the Fairgrounds Collector Line will not prejudice the
9 Township. In contrast, further attempts by the Applicant to engage with the Township to
10 determine the location of the Fairgrounds Collector Line could result in delays and cause
11 significant prejudice to the Applicant in the form of increased costs.

12 **ORDER SOUGHT**

13 The Applicant requests that the Board, pursuant to subsection 41(9) of the *Electricity Act,*
14 *1998*, issue an order or orders establishing the location of the Fairgrounds Collector Line
15 within the Road Allowance, in particular as provided in the Applicant’s response to
16 interrogatory 2(a) and (b) of Board Staff interrogatories.

17 In good faith, the Applicant attempted to engage with the Township to negotiate an
18 agreement regarding the Applicant’s use of the Road Allowance. However, for 16 months
19 the Township refused to meet with the Applicant resulting in the Applicant’s need to rely
20 on its statutory rights under section 41 and the necessity of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, Ontario, this 9th day of December, 2014

wpd Fairview Wind Incorporated
by its counsel
Stikeman Elliott LLP



Patrick Duffy
Ingrid Minott

TAB 1



EB-2013-0203

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

AND IN THE MATTER OF an application by Niagara Region Wind Corporation for an order or orders pursuant to section 92 of the *Ontario Energy Board Act, 1998* granting leave to construct transmission facilities in the townships of West Lincoln, Lincoln, Wainfleet, the Niagara Region and Haldimand County

BEFORE: Ken Quesnelle
Presiding Member

Ellen Fry
Member

Peter Noonan
Member

**DECISION ON THRESHOLD QUESTIONS
AND PROCEDURAL ORDER NO. 2**

February 04, 2014

Niagara Region Wind Corporation (the "Applicant") filed an application with the Ontario Energy Board (the "Board"), dated May 7, 2013 under sections 92, 96(2) and 97 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the "Act"). The Applicant has applied for an order of the Board granting leave to construct an electricity transmission line and related facilities (the "Transmission Facilities") to connect the Niagara Region Wind Project ("NRWP") to the Independent Electricity System Operator-controlled grid, and for an order approving the forms of agreements that have been or will be offered to affected landowners.

On November 1, 2013, the Board issued Procedural Order No. 1 in which it granted intervenor status to Hydro One Networks Inc. (“Hydro One”); the Independent Electricity System Operator (“IESO”); the Township of West Lincoln (the “Township”); Walker Road Landowners; Givens Farms Ltd; Canadian White Feather Farm Products; Archie & Nancy Huizinga; Ken & Susan Durham; Norman Vaughan; and Peter & Nelly Oosterhoff.

As one of its grounds for intervention, the Township submitted that the evaluation of the application under subsection 92(2) and section 97 of the *Act* requires consideration of the terms of a road use agreement for both municipal and regional road allowances. In considering this issue, the Board sought further submissions from parties on two threshold questions and noted that the scope of the Townships intervention would be “determined in consideration of the submissions on the preliminary matters”.¹

Threshold Questions asked by the Board

First, the Board asked for submissions from the parties and Board staff on the interplay between section 97 of the *Act* and section 41 of the *Electricity Act*. In particular, the Board asked the parties’ for their views on whether an approval under section 97 for the form of road use agreements is required under the current circumstances.

Second, the Board asked for submissions on the appropriate interpretation of section 97 of the *Act*. Section 97 states that an offer must be made to each owner of land “affected by the approved route or location”. The Board asked for parties’ views respecting what is meant by “approved route or location” and how it is determined. In this regard, parties were reminded of the interplay between section 97 and subsection 96(2).

Position of Parties

Pursuant to Procedural Order No. 1, the Board received submissions from the Township, Board staff, Walker Road Landowners and the Applicant. The Board also received reply submissions from the Applicant and the Township.

¹ Procedural Order No. 1, p.6

With respect to the first threshold question, Board staff submitted that section 41 of the *Electricity Act* does not exempt the Applicant from the requirement set out in section 97 of the Act that requires an applicant to offer a form of agreement approved by the Board to each owner of land affected by the route or location. Staff noted that while section 41 of the *Electricity Act* does give a transmitter or distributor certain rights over municipal rights of way, nowhere in the section does it reference “the form of agreement” or section 97 of the Act. Therefore, staff submitted that in this case, the Township is a landowner that is affected by the route and as such the road use agreement with the Township is subject to approval as required by section 97 of the Act. Board staff further submitted that the approval of the road use agreement should be limited to the review of a standard form of agreement which represents the initial offering to the affected landowner, i.e. the Township. This position, Board staff submitted, was consistent with the Board’s approach in previous proceedings.

With respect to the second threshold question, Board staff submitted that the Board may consider route alternatives provided by the Applicant but only where such alternatives are in the public interest with respect to price, reliability and quality of electricity service. Board staff notes that in this proceeding, the construction of the transmission line will be paid for by the Applicant, not ratepayers, and this will be relevant to the Board’s consideration of price”.

With respect to the first threshold question, the Township submitted that for purposes of an application under section 92 of the Act, as the Township is an owner of land affected by the approved location, the form of all relevant agreements must be approved as a condition for leave to be granted.

The Township stated: “... leave to construct under section 92 contemplates approval of the location of transmission facilities within a road allowance. This is supported by the language of section 97, which also defines the scope of the hearing, as well as subsection 41(10). The purpose of subsection 41(10) is simply to avoid duplication of proceedings”. The Township further stated: “It would not be a reasonable interpretation of the legislation that an issue appropriate for the Board to consider where leave is not required, is not an appropriate issue where leave is required. In other words, it would not make sense that a municipality would lose the opportunity to have the assistance

and guidance from the Board as contemplated under section 41(9) because a proponent requires approval under section 92 of the OEBA”.

With respect to the second threshold question, the Township noted that section 94 of the Act requires submission of a map showing the route and general location of the proposed works and therefore submitted that the approval of the route is part of the Board’s mandate

The Walker Road Landowners filed a response to Procedural Order No. 1 but did not address the threshold questions.²

With respect to the first threshold question, the Applicant submitted that approval of the form of a road use agreement under section 97 of the Act is not required. The Applicant submitted that a municipal road use agreement is not an agreement within the terms of section 97 of the Act rather that access to roads and highways is addressed entirely in section 41 of the *Electricity Act*. According to the Applicant, the legislation sets out two distinct regimes respecting uses of land: a private landowner regime in sections 97 to 100 of the *Act* and a separate regime for public streets and highways in section 41 of the *Electricity Act*. Each of these regimes, the Applicant submitted provides different rights and responsibilities for transmitters, landowners and the Board. The Applicant submitted that the private landowner regime in sections 97 to 100 of the Act is contractual, while the regulation of the use of public streets and highways in section 41 of the *Electricity Act* is determined by statutory rights and obligations. Accordingly the Applicant submitted that under the landowner contractual regime, all matters noted in subsection 41(1) to 41(4) of the *Electricity Act* (such as installation of equipment, maintenance and repair of equipment, access to land) are to be addressed in the form of a contract under section 97. In contrast, under section 41 of the *Electricity Act*, all these rights are exercisable without the consent of the owner or other person having an interest in the street or highway. The Applicant submitted that the Board has authority with respect to the placement of facilities on municipal roads where leave to construct is required and should exercise its mandate as prescribed in section 96 of the Act. The Applicant also submitted that the Township’s position is inconsistent with the current legal framework for electricity investment.

² Walker Road Landowners submission on Threshold Questions, dated November 14, 2013, p.2

With respect to the second threshold question, the Applicant submitted that the approved route refers to the route applied for by an Applicant and approved by the Board in consideration of the criteria listed under subsection 96(2) of the Act.

In its reply, The Township submitted that section 97 is not discretionary and that the Board has previously considered and approved road use agreements.

In its reply the Applicant submitted that Board's staff position, that the Board set the minimum requirements of an agreement applicable to the use of public streets is directly contrary to section 41 of the *Electricity Act*. Further, the Applicant submitted that Board staff's suggestion that the Board should approve the form of road use agreements under section 97 would effectively overturn the legislative regime established by section 41.

With regard to the submissions of the Township, the Applicant submitted that subsection 96(2) does limit the role of the Board in a leave to construct application and noted that if the Township has any concerns respecting the use of its roads in should raise these matters in so far as they are within the scope of subsection 96(2) of the Act.

Board Decision on the Threshold Questions

General

The Board has determined that in this proceeding it does not require the Applicant to submit a document to the Board showing a proposed form of agreement with the Township for purposes of section 97 of the Act.

Notwithstanding the Board's decision on this issue, the Board will permit the Township to participate as an intervenor with respect to the Board's determination of whether the Transmission Facilities are in the public interest as set out in section 96 of the Act.

The Board concludes that the "approved route or location" referred to in section 97 is the route or location approved by the Board in response to an application under section 92, approved in accordance with the criteria set out in section 96.

The reasons for the Board's decisions on the threshold questions are set out below.

***Majority Reasons of Ken Quesnelle and Peter Noonan, Board Members,
with respect to Threshold Questions 1 and 2***

This case concerns an applicant that has received a contract for the provision of electricity to the IESO grid from the Ontario Power Authority under the provincial Feed-in-Tariff ("FIT") program. The application for leave to construct a proposed transmission line to connect a proposed wind farm to the IESO electrical grid has prompted the Board to raise two preliminary questions of law concerning the scope of the Township's intervention.

The focus of the Board's attention in the preliminary questions is section 97 of the Act which is set out in full below:

97. In an application under section 90, 91 or 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.

Section 41 of the *Electricity Act* is also important in the Board's consideration of the preliminary questions. Section 41 provides statutory authority for a transmitter or distributor to place its lines in a municipal road allowance. The aspects of section 41 that are most relevant to this analysis are set out below:

41. (1) 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. 1998, c. 15, Sched. A, s. 41 (1).

[...]

(9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or

distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board. 1998, c. 15, Sched. A, s. 41 (9).

(10) Subsection (9) does not apply if section 92 of the *Ontario Energy Board Act, 1998* applies. 1998, c. 15, Sched. A, s. 41 (10).

Some mention should also be made of other legislation that bears upon the construction of electrical transmission and distribution lines. The Legislature has vested jurisdiction over the environmental assessment of electrical transmission or distribution line projects in the Minister of the Environment pursuant to the *Environmental Assessment Act*.

Section 97 of the Act

Section 97 of the Act provides a mechanism for a project proponent to obtain an interest through a negotiated agreement in the real property that it will require in order to construct its facilities. The Legislature is concerned in this provision with balancing the public interest in bringing the project to fruition with the need to protect the interests of landowners. Section 97 operates as a condition precedent to the exercise of the Board's power to grant a leave to construct order pursuant to section 92 of the Act.

Under section 97, the Board exercises discretion to approve the form of the agreements that an applicant may offer to an Ontario landowner. The Board thereby ensures that the forms of agreements provided to landowners are appropriate in the circumstances. It is noteworthy that the Board's jurisdiction is limited in a number of ways by the Act. Firstly, under section 97 of the Act the Board is concerned with agreements in relation to land and is not concerned with other agreements that may pertain to other types of legal relationships, such as those of a commercial or personal nature. Secondly, the powers of the Board are limited to approving the form of the agreements. Finally, the form of the agreements approved by the Board must be in relation to the approved route of the proposed transmission or distribution line.

In the context of section 97 “form” is separate and distinguishable from the “substance” of an agreement. The word “form” is defined in *The Dictionary of Canadian Law* as: “The contents or structure of a document distinguished from its substance.”³

In *Re Van Elslander and Hewitt* a Canadian court examined the meaning of “form” and after reviewing pertinent case law on the subject the court stated:

The cases concluded and embraced the principle, and I think reasonably so, that “form” does not included “substance”, but is simply meant to express the framework within which the substance must find itself.⁴

The substantive content of any clauses that the Board approves for inclusion within a proposed agreement are not approved by the Board. Rather, the approval of the substance of the clauses in the agreement is left to the contracting parties. While the initial starting point for a negotiation between a landowner and an energy company will be the form of agreement that is approved by the Board, it is open to the landowner and the energy company to consensually develop an agreement with different subject matter than the clauses in the form of agreement approved by the Board. This has recently been underscored by a judgment of the Ontario Divisional Court. In *Conserve Our Rural Environment v Dufferin Wind Power Inc.* (2013) ONSC 7307, (“CORE”) Justice Gordon stated:

It is important to understand that what the Board approved was a *form* of agreement which is the subject of subsequent negotiation between the parties. It represents terms from which the party propounding the project may not unilaterally resale.

Section 97 of the Act is essentially a narrow power that is concerned with the approval of the framework of agreements to be voluntarily negotiated between the parties to permit the construction of a proposed transmission or distribution line. The Legislature has been careful to ensure that the starting point for the conduct of those negotiations will not prejudice a landowner by requiring the Board to approve the initial terms of any agreement proposed to a landowner. In approving the form of agreements to be offered

³ *The Dictionary of Canadian Law*, 4th ed., Daphne Dukelow, Carswell, Toronto, 2011.

⁴ *Re Van Elslander and Hewitt* (1979), 96 DLR (3d) 668 at 670 per Hewak J. (Man. Q.B.).

to landowners the Board may determine the appropriate content or structure of the form of an agreement to be offered. Section 97 does not give the Board any power to make a substantive determination of any matters in dispute between the negotiating parties.

Where negotiations between a project proponent and the landowner do not bear fruit the Legislature has provided that the proponent may subsequently seek to expropriate the interests in land that it requires pursuant to section 99 of the Act.

Section 41 of the Electricity Act

Section 41 of the *Electricity Act* grants a transmitter or distributor a statutory right to enter upon a road allowance and to construct a transmission or distribution line without seeking the approval of a municipality⁵. The use of a municipal road allowance for the purpose of locating electricity transmission and distribution lines has a public benefit in that it will reduce the need to acquire private lands for such a purpose, and it may assist in land development by creating corridors for the construction of necessary infrastructure.

While the consent of the municipality is not required⁶ the project proponent may only undertake construction activities during reasonable hours⁷ and must make good any damage that it causes as a result of its activities⁸. No expropriation compensation is payable by a project proponent to a municipality for its use of the road allowance⁹. In effect, section 41 of the *Electricity Act* provides a form of statutory appropriation of the road allowance for a compatible public use. It is a statutory alternative to expropriation where a proponent of an electrical transmission or distribution line wishes to avail itself of the use of a municipal road allowance.

The legislation further provides that the project proponent and the municipality should attempt to agree on the precise location of the project proponent's facilities within the

⁵ *Electricity Act* s. 41(1)

⁶ *Ibid.*, s. 41(5)

⁷ *Ibid.*, s. 41(3)

⁸ *Ibid.*, s.41(7)

⁹ *Ibid.*, s.41(8)

municipal road allowance¹⁰ but if agreement is not possible the matter may be submitted to the Board for a determination of the precise location of the transmission or distribution line through the road allowance¹¹. Significantly, however, the Board does not have the authority to determine the location of a transmission or distribution line within a road allowance under the *Electricity Act* if the project proponent is required to obtain a leave to construct order pursuant to section 92 of the Act¹². In that event any jurisdiction that the Board may have with respect to the location of the line must arise from within the Act itself.

The exclusion (by virtue of subsection 10) of subsection 41(9) of the *Electricity Act*, in circumstances where the Board is seized of an application under section 92 of the Act, suggests that the Legislature intended the two statutes to be read together in this context.

A road allowance constitutes “lands” as that word is ordinarily interpreted. However, the fact that the Legislature has specifically addressed road allowances in section 41 of the *Electricity Act* excludes road allowances from the meaning of the word “lands” in section 97 of the Act, based on the interpretative principle that a specific provision will prevail over a more general provision. Therefore, the Applicant is not required to submit a proposed road use agreement to the Board for approval pursuant to section 97 of the Act.

Subsection 41(10) of the *Electricity Act* removes the power of the Board to determine the location of a line under the *Electricity Act* but it does not detract from the powers conferred upon a transmitter or distributor under the other provisions of section 41. The holder of a leave to construct order issued by the Board possesses at least an executory right to construct and own a transmission or distribution system for the purposes of section 41 of the *Electricity Act* and therefore may rely upon the rights conferred in subsections 41 (1)-(8) of the *Electricity Act*.

¹⁰ Ibid s.41(9)

¹¹ Ibid

¹² Ibid, s.41(10)

The remaining issue is the question of how to determine the precise location of a line in circumstances where section 92 of the Act applies.

The Approved Route or Location

An approved route or location is necessary in order to define with precision the facilities that will be the subject of the Board's leave to construct authority. The route will require an origin and a terminus, and must identify the lands and landowners who will need to be approached by an Applicant for a negotiated agreement for the use of private lands. Without an approved route there could be legal uncertainty concerning the precise definition of the work that is the subject of the Board's order, and uncertainty could also arise over the precise description of the lands that will be affected by the proposed project.

The power of the Board to approve the route or location of a proposed transmission or distribution line arises as a necessary incident to its powers under section 92 of the Act to approve a leave to construct order. Section 94 of the Act supports the exercise of such powers by specifically requiring that a general location map be filed by the Applicant with sufficient detail to describe the municipalities, highways, railways, utility lines and navigable waterways that the line will traverse.

The Board may approve a proposed route or location of an electrical transmission or distribution line pursuant to section 92 of the Act either explicitly or by implication. Regardless of the manner in which it does so, the Board will be constrained in approving the route or location as an exercise of public interest discretion by the limitations contained in subsection 96(2) of the Act. Thus, the Board in approving the route or location will be limited to considering matters relating to the price, reliability, or quality of electricity services (or to the promotion of government policy in relation to renewable energy). Matters outside of those specific public interest criteria cannot be considered by the Board. However, such other matters may fall under the jurisdiction of the Minister of the Environment under the *Environmental Assessment Act*.

The process described above is, in fact, how the Board has addressed such issues in the past. In *Dufferin Wind Power Inc.* EB-2012-0365 dated July 5, 2013 the Board

considered conflicting evidence concerning the route of a proposed transmission line. The Board stated:

[The Township of] Melancthon requested that the Board impose conditions relating to visual impacts, other route options, and greater avoidance of wetlands. Ms. Bryenton and Mr. Lyon each raised concerns with various aspects of the routing of the project. However, these matters form part of the REA process and are outside of the jurisdiction of the Board. The Applicant's routing evidence was not impugned by contrary evidence that the Board can consider under section 92 of the Act. (Emphasis added)

The words “the approved route or location” in section 97 means the route or location of the line as determined by the Board in the process of approving a leave to construct application. The discretion of the Board arises as a necessary incident to its powers under section 92 of the Act, and may be exercised explicitly, or by necessary implication, in approving a leave to construct application.

Where the Board is called upon to give effect to the concerns of the municipality in relation to the route or location of a proposed transmission or distribution line under section 92 of the Act the Board may consider the municipality's concerns only to the extent that those concerns raise an issue that is cognizable by the Board under subsection 96(2) of the Act. All other matters relating to route or location would fall to be determined by the Minister of the Environment under the *Environmental Assessment Act*, or the common law.

Conclusion

An applicant holding a FIT contract which seeks leave to construct authority from the Board pursuant to section 92 of the Act must file an application that discloses the proposed route or location of the transmission or distribution line. Where private lands are potentially affected the project proponent must submit proposed land agreements for approval as to form by the Board pursuant to section 97 of the Act. The proponent may subsequently negotiate with private landowners to acquire the land rights that it needs for the fulfillment of the project. In the case of municipal road allowances, an

Applicant is not required to submit a road use or other agreement to the Board under section 97 where it proposes to rely subsequently upon the statutory rights conferred by section 41 of the *Electricity Act*.

Both private landowners and municipalities can make appropriate representations to the Board with respect to the route or location of a proposed line and the Board may consider such representations to the extent that they are relevant to the public interest, as defined in subsection 96(2) of the Act, in deciding whether to grant a leave to construct order pursuant to section 92 of the Act. Issues pertaining to the route or location that fall outside of the scope of the Board's jurisdiction may fall within the jurisdiction of the Minister of the Environment under the environmental assessment process.

***Minority Reasons of Ellen Fry, Board Member,
with respect to Threshold Question 1***

I concur in the Board's decision on the first threshold question, for the following reasons.

Section 97 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.

The term "owner of land" is not defined in the Act. The Township is the owner of its road allowances and therefore based on the normal meaning of this term, it is an "owner of land" within the meaning of section 97 of the Act. Since a portion of the Transmission Facilities are proposed to be located on the Township's road allowances, it is clear that the road allowances would be "affected by the approved route or location".

This means that, if section 97 is read on a standalone basis, the Board does not have jurisdiction to grant the Applicant leave to construct under section 97 unless it approves a form of agreement offered by the Applicant to the Township.

Section 41 of the *Electricity Act* also applies to this situation if read on a standalone basis.

Subsection 41(1) provides that:

A transmitter...may over, under or on any public street or highway, construct or install such structures, equipment or other facilities as it considers necessary for the purpose of its transmission...system, including poles and lines.

Subsections 41(2)-(8) provide for a number of associated rights and obligations, including the right under subsection 41(5) to construct etc. without the consent of the landowner and the right under subsection 41(8) to do so without paying any compensation to the landowner. These rights and obligations are established directly by the legislation and therefore do not need to be established by agreement.

Subsection 2(1) of the *Electricity Act* defines “transmitter” as “a person who owns or operates a transmission system”, and “transmission system” as “a system for transmitting electricity...[that] includes any structures, equipment or other things used for that purpose”.

The Applicant will own and operate the Transmission Facilities and therefore is a “transmitter” within the meaning of section 41. “Public street or highway” is not defined by the *Electricity Act*, but it is clear that the road allowance owned by the Township is a public street or highway within the normal meaning of this term.

Accordingly, both section 92-97 of the Act and section 41 of the *Electricity Act* apply to this situation when read on a standalone basis. The question is whether both of them are intended to apply at the same time, or whether one is intended to override the other.

Subsection 41(1) of the *Electricity Act* assists in determining this question. Subsection 41(1) provides that “Subsection (9) does not apply if Section 92 of [the Act] applies”.

In the absence of subsection 41(10), it would be reasonable to conclude that in this situation section 41 of the *Electricity Act*, rather than sections 92-97 of the Act is intended to apply, because section 41 addresses the situation in more specific terms.

However, subsection 41(10) indicates that the Legislature made a decision on how the interplay between section 41 of the *Electricity Act* and sections 92-97 of the Act would work. Subsection 41(10) indicates that where both section 41 and sections 92-97 could apply, the result is to make subsection 41(9) inoperative. If the Legislature had intended either that sections 92-97 would not apply, or that none of section 41 would apply, it would have been expected to say so in subsection 41(10).

Accordingly, the Board needs to give effect to both section 97 and subsections 41(1)-(8) at the same time. The question is how to do so. Based on the plain wording of the sections, the Board considers that there are two important elements:

- 1) The Board cannot approve the Applicant's leave to construct application unless it approves a form of agreement offered by the Applicant to the Township as owner of the road allowances; and
- 2) The form of agreement that is approved must be consistent with the rights and obligations established by subsections 41(1)-(8)

It is for the Applicant to decide what form of agreement it requests the Board to approve. Although subsections 41(1)-(8) establish a code of basic rights and obligations that apply to the situation, the Applicant could decide to submit for the Board's approval a form of agreement that contains additional terms.

The Applicant's submission in this proceeding indicate that in effect the Applicant is offering to the Township and submitting for the Board's approval a form of agreement that contains only the terms contained in subsections 41(1)-(8).

The Board does not consider that it would serve any useful purpose to require the Applicant to offer and submit an actual document embodying the form of agreement, given that this would be an empty agreement.

***Minority Reasons of Ellen Fry, Board Member,
with respect to Threshold Question 2***

I concur in the Board's decision on the second threshold question, for the following reasons.

All of the parties submit that approval of a route is part of the Board's mandate in an application under section 92. Both the Applicant and Board staff submit that the Board's mandate is to assess the proposed route in terms of the criteria in section 96. Board staff also submits that the Board's process in a section 92 application and the process under the Ministry of the Environment's *Environmental Assessment Act* "should not be significantly out of step as 'the leave to construct would be significantly affected if the Environmental Assessment Terms of Reference did not include the same route.'"

The Board agrees with the parties that the Board's mandate is to assess the route proposed by the Applicant in terms of the criteria in section 96. The Board recognizes that there could be practical difficulties for the Applicant and delay in the approval process if the route submitted for Board approval differed from the route submitted to the Ministry of the Environment. However, the Board considers that any resulting requirement for coordination of the timing of the Board and Ministry processes is for the Applicant to deal with it as it considers appropriate. The Board's responsibility is to consider the route in the section 92 application as it is presented by the Applicant.

An approved route is necessary in order to define the facilities that will be the subject of the Board's approval under section 92, if approval is granted. Without an approved route there would be uncertainty concerning what facilities the Board was approving and also concerning what owners of land would be affected by the proposed route as contemplated by section 97.

Section 94 requires the Applicant to provide information to the Board to enable the Board to fulfill this requirement by showing the route for which it is seeking approval:

An applicant...shall file with the application a map showing the general location of the proposed work and the municipalities, highways, railways, utility lines and

navigable waters through, under, over, upon or across which the proposed work is to pass.

Accordingly, the Board considers that the Board has the implicit power to approve the route as a necessary incident to its powers under section 92. Because this is an element of the exercise of the Board's powers under section 92, the Board must follow the criteria in section 96 in considering the route.

Form of Hearing

In its Notice of Application the Board indicated that it intended to proceed by way of a written hearing unless any party satisfied the Board that there was a good reason for not proceeding by way of a written hearing. In Procedural Order No. 1 the Board indicated that it will decide whether an oral hearing is required once it has considered the submissions on the preliminary issues. Several parties have requested an oral hearing. The Applicant has objected to these requests. The Board has determined that it will consider this matter at the completion of the discovery phase of this proceeding.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

The Board Orders that:

1. Board staff and intervenors who wish information and material from the Applicant that is in addition to the pre-filed evidence filed with the Board, and that is relevant to the hearing, shall request it by written interrogatories filed with the Board and delivered to the Applicant on or before **February 18, 2014**. Where possible, the questions should specifically reference the pre-filed evidence.
2. The Applicant shall file with the Board and deliver to all intervenors a complete response to each of the interrogatories by **February 28, 2014**.
3. Board staff and intervenors shall, on or before **March 6, 2014**, indicate if it is their intention to file evidence.

All filings to the Board must quote the file number, EB-2013-0203, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

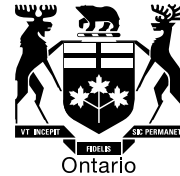
DATED at Toronto, February 04, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

TAB 2



EB-2013-0233

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

AND IN THE MATTER OF an application by East Durham
Wind, Inc. for an Order or Orders pursuant to subsection
41(9) of the *Electricity Act 1998*, S.O. 1998, c. 15, Schedule
A, as amended, establishing the location of East Durham
Wind Inc.'s distribution facilities within certain road
allowances owned by the Municipality of West Grey.

BEFORE: Emad Elsayed
Presiding Member

Ellen Fry
Member

DECISION AND ORDER

November 7, 2013

DECISION

The location of East Durham's distribution system on road allowances owned by the Municipality of West Grey ("the Municipality") is approved as described in this Decision and Order.

BACKGROUND

East Durham Wind, Inc., ("East Durham") filed an application dated June 14, 2013 with the Ontario Energy Board (the "Board"), under subsection 41(9) of the *Electricity Act, 1998, S.O. 1998, c. 15, Schedule A*, (the "Act") for an order or orders of the Board establishing the location of approximately 9.1 kilometers of East Durham's proposed distribution system within certain public streets, highways and right-of-ways owned by the Municipality in Grey County, Ontario.

The Board issued a Notice of Application and Written Hearing on July 9, 2013. The Municipality and Karen and Syd Parkin (the "Parkins") requested and were granted intervenor status. The Board also received letters of comment from a number of local residents.

The Parkins submitted evidence. The Parkins and Board staff submitted interrogatories on East Durham's evidence. No party filed interrogatories on the evidence submitted by the Parkins. East Durham provided responses to all interrogatories.

East Durham filed its argument-in-chief on September 4, 2013. The Board received submissions from the Municipality and the Parkins. East Durham filed its reply submission on September 19, 2013.

On October 2, 2013, the Board issued a letter requiring East Durham to provide a more complete response to Board staff interrogatory no. 2(ii) by providing the analysis and supporting documentation that underpins its determination that it is appropriate to locate its facilities 1-4 meters from abutting property lines. The letter also asked East Durham to confirm the accuracy of a map provided as part of East Durham's argument-in-chief.

East Durham submitted its response on both matters on October 4, 2013. The Parkins submitted their comments on Oct 7, 2013.

THE APPLICATION

East Durham has entered into a Feed-in-Tariff contract with the Ontario Power Authority and is in the process of developing a wind generation facility, called the East Durham Wind Energy Centre (the “Project”) in the Municipality. The Project will have a total generation capacity of up to 23 MW and includes generation and distribution assets.

As part of the Project, East Durham is proposing to construct an underground distribution system to transmit power generated by the wind turbines to the distribution system of Hydro One Networks Inc. (“Hydro One”) for delivery ultimately to the IESO-controlled grid. Specifically, East Durham is proposing to construct 28.3 kilometers of underground 34.5 kV distribution lines on private and public lands, which will convey power from each of the turbines to a transformer substation. From that point, an overhead 44 kV line will convey the electricity to Hydro One’s distribution system. The components of East Durham’s proposed distribution system are collectively referred to in this Decision and Order as the “Distribution System”.

East Durham proposes to locate approximately 9.1 kilometers of the underground portion of the Distribution System on road allowances that are owned by the Municipality. The road allowances at issue are referred to in this Decision and Order as the “Road Allowances”.

Subsections 41(1) and 41(9) of the Act provide as follows:

41. (1) 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.

41. (9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.

East Durham submits that it is a “distributor” within the meaning of subsection 2(1) of the Act. Accordingly, East Durham submits that it has the right to install facilities for the purpose of the Distribution System under “any public street or highway” pursuant to subsection 41(1) of the Act.

East Durham submits that it has been unsuccessful in its attempts to agree with the Municipality on the location of the portion of the Distribution System that would be on the Road Allowances. The Municipality does not dispute this. East Durham also submits that neither the Municipality nor any other party in this proceeding has proposed an alternate location. This is not disputed. Accordingly, East Durham is applying to the Board under subsection 41(9) for a determination of the location of the portion of the Distribution System that would be installed under the Road Allowances as described below.

- The Distribution System shall generally be located in the Road Allowances listed on Exhibit B, Tab 6, Schedule 1, Appendix A, as shown in the drawings included in Exhibit B, Tab 6, Schedule 1, Appendix B (and updated in section 2.0 of East Durham's argument-in-chief and in response to the Board's letter dated October 2, 2013).
- Where practicable, and where it meets all applicable engineering, environmental and health and safety standards, the Distribution System lines shall be located 1-4 meters from the abutting property line.
- Where practicable, and where they meet all applicable engineering, environmental and health and safety standards, the diagrams shown at Exhibit B, Tab 6, Schedule 1, Appendices C and D shall be followed in constructing the Distribution System within the Road Allowances.¹

The submissions of the Municipality and the Parkins regarding the various issues are described under Board Findings. Board staff declined to file a submission.

SCOPE OF THE BOARD'S JURISDICTION

As indicated above, the Board's authority in this proceeding is derived from section 41 of the Act.

Subsection 41(9) limits the scope of this proceeding to a determination of the location of the applicable portion of the Distribution System within the Road Allowances.

As indicated above, the Board received a number of letters of comment from local residents. These letters dealt with the location of the Project's wind turbines and their

¹ Pre-filed evidence of East Durham, Ex B/Tab 6/Schedule 1

impact on property values, health, and aesthetics. They also dealt with the Ontario Government's renewable energy policy in general and broad environmental issues.

Given the scope of subsection 41(9), it is not the Board's role in this proceeding to decide whether the Project should be approved, consider issues relating to wind turbines or renewable energy policy generally, or consider alternatives to the Project such as routes for the Distribution System that are outside of the Road Allowances. Accordingly, the concerns in the letters of comment described above are not within the scope of this proceeding.

BOARD FINDINGS

Is The Applicant a Distributor?

The Municipality submitted that the application should be denied because East Durham is not a "distributor" within the meaning of section 41. It submitted that this is the case because East Durham does not own or operate a distribution system and that, until it receives its Renewable Energy Approval ("REA") from the Ministry of the Environment ("MOE"), it will not have the authority to do so. Distinguishing this case from the Board's Decision in the Plateau case², the Municipality submitted that Plateau, at the time of its application, had received MOE approval to construct and operate its "renewable energy generation facilities" which also authorized Plateau to construct, own and operate a distribution system.

In response, East Durham submitted that the Act does not require all necessary approvals to be in place prior to being able to access the rights afforded to a distributor under section 41.

Concerning the Plateau case, East Durham submitted that whether or not Plateau had certain approvals in place at the time of its section 41 application was not cited as a basis for the Decision. East Durham also referred to the Board's more recent Wainfleet Decision³. In that case, according to East Durham, the Board granted the section 41 application prior to Wainfleet having received the REA for its project. East Durham further submitted that the Board's Decision and Order in that case was not made conditional on receipt of the REA.

² EB-2010-0253

³ EB-2013-0031

The Board agrees with East Durham that the Act does not require that all necessary approvals, such as the REA, be obtained prior to granting an application under subsection 41(9). Accordingly, the Board does not consider that there is any relevant basis to distinguish this application from the applications in the Plateau and Wainfleet cases, in which the applicants were considered to be “distributors”. The Board notes, however, that in order to proceed with construction of the Distribution System, East Durham will need to obtain all legally required permits and other approvals.

Proposed Location of the Distribution System

East Durham has provided maps that identify the starting and ending points of the various segments of the Distribution System within Road Allowances. Further, the table at section 2.0 of East Durham's argument-in-chief provides the length and location (i.e. western side of the Road Allowance) of each segment. Concerning the proposed setback of the Distribution System as indicated above, East Durham has proposed that, where practicable, and where it meets all applicable engineering, environmental and health and safety standards, the Distribution System lines shall be located 1-4metres from the abutting property line.

The Municipality submitted that East Durham's application should be denied because East Durham had not provided the “location” of the proposed lines within the Road Allowances. The Municipality submitted that what East Durham provided was not actual locations but merely “guidelines” for determining locations. Although the Municipality acknowledged that East Durham had refined its general description of the proposed locations in its argument-in-chief, it maintained that these locations were not sufficiently precise. The Municipality submitted that it is not its duty to propose locations, and that it should be East Durham who must propose locations.

East Durham submitted that it has proposed a “narrow corridor” which provides the best balance of environmental, social, technical and economic considerations. East Durham also submitted that, given that the Board will be determining the location of the Distribution System in this proceeding prior to the start of construction, the approved location must allow for some reasonable flexibility to ensure that East Durham can address any engineering, environmental, health and safety or other practical challenges that may arise during construction.

East Durham also submitted that in its view section 41 does not require the identification of a “precise” or “exact” location. Section 41, according to East Durham, only states that the “location” shall be agreed upon by the transmitter or distributor and the owner. East Durham argued that this wording makes it a mutual obligation on the distributor and the owner of the Road Allowance. East Durham also submitted that the Municipality, by its own admission, had refused to provide feedback to help refine the proposed locations. East Durham submitted that if the Municipality had provided comments regarding the location and any existing infrastructure in the area, it would have enabled East Durham to further refine the proposed locations.

The Board issued a letter to East Durham, dated October 2, 2013, requesting additional information to support East Durham’s proposed 1-4 meter location parameter. East Durham responded, by letter dated October 4, 2013. East Durham provided examples of municipalities and counties in the vicinity of the Municipality that have adopted policies regarding the location of underground infrastructure that are consistent with the considerations described by East Durham. This included a policy issued by the County of Grey, in which the Municipality is located, titled, Policy for Utility Place on Grey County Rights of Ways.

East Durham also submitted that, as part of its REA application, it undertook various studies in the project area, such as the Natural Heritage Assessment, the Water Assessment, and Archeological Assessment and consulted all stakeholders in keeping with the requirements in Ontario Regulation 359/09. Following these studies and others, East Durham states that its initial proposal was refined and revisions were incorporated where appropriate, to ensure that the proposed location represents the best balance of environmental, social, technical and economic considerations.

The Parkins submitted that the additional information filed by East Durham did not support the request for a 1-4 meter corridor. The Parkins submitted that the requirement for a 1.5 meter setback in the Municipality of Lambton Shores was for overhead utility lines and not underground lines. The Parkins, submitted that although in their view the Municipality would likely not agree, a 1 meter setback from street line would be acceptable to them. The Parkins recommendation was based on the Municipality of Lambton Shores’ Infrastructure Design Guidelines and Construction Standards, dated January 2002.

While section 41 requires that the Board determine a “location” under the road allowance, the Board agrees with East Durham that this wording does not require a precise location. The Board considers that the mapping and location information provided by East Durham is sufficient to determine the location for the purpose of this application.

The Board accepts the evidence of East Durham that it is appropriate to locate the Distribution System lines 1-4 meters from the abutting property line. The Board considers, however, that this location could probably have been refined further if there had been more communication between East Durham and the Municipality. The Board encourages East Durham and the Municipality to consult during construction to address any issues or concerns about the precise location that may arise. As indicated below, the Board has made provision in its decision for any agreement reached as a result of such consultation.

Stray Voltage

The Municipality and the Parkins have raised concerns about the possibility that the Distribution System will cause stray voltage problems. The Parkins filed a copy of a Private Member’s Bill concerning stray voltage and the Ontario *Green Energy Act*. East Durham argued that wind turbines do not cause stray voltage. East Durham further argued that Hydro One oversees stray voltage issues and has developed a protocol to proactively test for stray voltage and mitigate any concerns at no cost to the landowner. East Durham stated that it will assist any concerned landowner in the Project area in this process with Hydro One.

East Durham also argued there is no nexus between the evidence filed by the Parkins concerning stray voltage generally and the issue before the Board in this proceeding (i.e. where portions of the Distribution System should be located within the Road Allowances). East Durham submitted that the Parkins have not filed any evidence suggesting that East Durham’s Distribution System in particular will cause stray voltage or that, if so, the proposed location of a portion of the Distribution System in the Road Allowances is such that stray voltage would cause an adverse impact.

The Board agrees with East Durham that the evidence does not indicate that the portion of the Distribution System proposed to be located in the Road Allowances would necessarily cause stray voltage, or if so, that the proposed location in the Road Allowances would cause an adverse impact due to stray voltage. The Board also notes

that section 4.7 and Appendix H of the Board's *Distribution System Code* sets out the investigation procedures related to stray voltage.

THE BOARD ORDERS THAT:

1. The location of East Durham's Distribution System on Road Allowances owned by the Municipality is approved as follows:
 - a. The Distribution System shall be located in the Road Allowances listed on Exhibit B, Tab 6, Schedule 1, Appendix A, as shown in the drawings included in Exhibit B, Tab 6, Schedule 1, Appendix B (and updated in section 2.0 of East Durham's argument-in-chief and in response to the Board's letter dated October 2, 2013).
 - b. The Distribution System lines shall be located 1-4 meters from the abutting property line unless otherwise agreed between East Durham and the Municipality.
 - c. The diagrams shown at Exhibit B, Tab 6, Schedule 1, Appendices C and D shall be followed in constructing the Distribution System within the Road Allowances.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

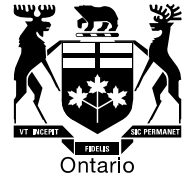
DATED at Toronto, November 7, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

TAB 3



EB-2010-0253

IN THE MATTER OF the *Electricity Act, 1998* as amended
(the “*Electricity Act*”);

AND IN THE MATTER OF an application by Plateau Wind
Inc. for an order or orders pursuant to section 41(9) of the
Electricity Act establishing the location of Plateau Wind
Inc.’s distribution facilities within certain road allowances
owned by the Municipality of Grey Highlands.

BEFORE: Paul Sommerville
Presiding Member

Paula Conboy
Member

DECISION AND ORDER

INTRODUCTION

- [1] Plateau Wind Inc. (“Plateau” or the “Applicant”) filed an application dated July 30, 2010 (the “Application”) with the Ontario Energy Board (the “Board”) under subsection 41(9) of the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A, as amended (the “*Electricity Act*”) for an order or orders of the Board establishing the location of Plateau’s proposed distribution facilities within road allowances owned by the Municipality of Grey Highlands (“Grey Highlands”). The Board assigned File No. EB-2010-0253 to the application.
- [2] Plateau is in the business of developing wind energy generation projects and the associated distribution facilities in Ontario. Plateau is the corporate entity created to hold and operate the generation and distribution assets of the Plateau Wind Energy Project in Grey County and Dufferin County, Ontario.

- [3] Plateau plans to develop the Plateau Wind Energy Project (the “Project”) which will involve eighteen GE 1.5 megawatt (“MW”) wind turbine generators, together having a nominal nameplate capacity of 27 MW. Twelve of the wind turbine generators are relevant to this Application, eleven of which will be located in Grey Highlands and one of which will be located in Melancthon Township (collectively referred to as the “Turbines”). In total, the Turbines will have a nominal nameplate capacity of 18 MW. Plateau has entered into a feed-in tariff contract with the Ontario Power Authority for the Project.
- [4] As part of the Project, Plateau plans to construct 44 kilovolt (“kV”) overhead and underground electrical distribution facilities to transport the electricity generated from the Turbines to the existing local distribution system of Hydro One Networks Inc. (“HONI”) and ultimately to the IESO-controlled grid. Plateau would like to locate certain portions of the electrical distribution facilities (the “Distribution Facilities”) within road allowances owned by Grey Highlands (the “Road Allowances”).
- [5] Because Plateau and Grey Highlands have not been able to reach an agreement with respect to the location of the Distribution Facilities, Plateau requested that the Board issue an order or orders, pursuant to section 41(9) of the *Electricity Act*, determining the location of Plateau’s Distribution Facilities within the Road Allowances.
- [6] In support of the Application, Plateau filed a brief of documents which included descriptions of Plateau’s proposed Distribution Facilities, list of municipal road allowances proposed for location of the Distribution Facilities, maps showing the road allowances, a copy of the proposed road use agreement and other relevant project documents (collectively the “pre-filed evidence”).

THE PROCEEDING

- [7] The Board has proceeded with this application by way of a written hearing. The procedural steps followed are outlined below:

- | | |
|--|-------------------|
| - Application filed | July 30, 2010 |
| - Notice of Application Issued | August 19, 2010 |
| - The Board issued its Procedural Order No. 1 | October 29, 2010 |
| - Plateau filed its submission | November 8, 2010 |
| - Grey Highlands and Board staff filed their submissions | November 29, 2010 |
| - Plateau filed its reply submission | December 6, 2010 |

Grey Highlands was granted intervenor status and ten parties were granted observer status in this proceeding.

THE LEGISLATION

[8] The Board's authority in this proceeding is derived from section 41 of the *Electricity Act* which states as follows:

Subsection 41. (1)

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. 1998, c. 15, Sched. A, s. 41 (1).

Subsection 41. (9)

The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board. 1998, c. 15, Sched. A, s. 41 (9).

SCOPE OF PROCEEDING

[9] The above-noted legislation limits the Board's role in this proceeding to a determination of the location of Plateau's proposed Distribution Facilities within the Road Allowances. Given the legislative restriction on the Board's jurisdiction, it is not the Board's role in this proceeding to approve or deny the Project or the Distribution Facilities, to consider the merits, prudence or any environmental, health or economic impacts associated with it or to consider alternatives to the project such as routes for the Distribution Facilities that are outside of the prescribed Road Allowances. Also, it is not within the Board's jurisdiction in this proceeding to consider any aspect of Plateau's proposed wind generation facilities.

EVIDENCE AND SUBMISSIONS

Plateau's Evidence and Submissions

Some key elements of Plateau's evidence and submissions are outlined below:

- [10] During 2008-2009, Plateau carried out an Environmental Assessment for the Project. The final Environmental Assessment report and a Notice of Completion were made publicly available for review and comment from June 12, 2009 to July 11, 2009. On April 14, 2010, Plateau publicly filed its Statement of Completion of the Environmental Assessment after the Ministry of the Environment rejected all requests to elevate the Project to an environmental review/individual environmental assessment.
- [11] Plateau submitted that a balance of environmental, social, technical and economic considerations impacted Plateau's decision on the location of the Turbines and therefore on the location of the Distribution Facilities. An excerpt from the Pre-Filed Evidence which lists the Road Allowances is attached to this Decision and Order as Appendix "A".
- [12] Plateau submitted that the only outstanding issue with respect to Plateau's use of the Road Allowances is the location of the Distribution Facilities within the Road Allowances. In this regard, Plateau undertook to negotiate a standard road use agreement with Grey Highlands.
- [13] According to Plateau's evidence, as a result of the above-noted negotiations, Plateau, the Municipal Staff of Grey Highlands (the "Municipal Staff") and Grey Highlands' legal counsel reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances (the "Proposed Road Use Agreement").
- [14] In negotiating the Proposed Road Use Agreement, Plateau asserted that it addressed the concerns of the Municipal Staff regarding the routing of the Distribution Facilities. In addition, under the Proposed Road Use Agreement, Plateau indicated that it planned to confer certain monetary and non-monetary benefits on and provide numerous protections to Grey Highlands.
- [15] The evidence indicates that on May 17, 2010, the Municipal Staff issued Report PL.10.34 recommending a form of the Proposed Road Use Agreement to the Grey Highlands Committee of the Whole.
- [16] The evidence further indicates that in a letter dated June 24, 2010 to the Grey Highlands Mayor and Members of Council, the Grey Highlands Chief Administrative Officer recommended that the Proposed Road Use Agreement be approved by Grey Highlands Council (the "CAO Recommendation").

- [17] On June 28, 2010, the Grey Highlands Council rejected the CAO Recommendation. As a result, because Plateau and Grey Highlands could not reach an agreement with respect to the location of the distribution facilities, Plateau filed the Application with the Board for an order or orders, pursuant to section 41(9) of the *Electricity Act*, establishing the location of Plateau's Distribution Facilities within the Road Allowances.
- [18] Plateau stated that it has chosen to route certain power lines, poles and other facilities associated with the Distribution System within the Road Allowances pursuant to the statutory right of distributors under section 41(1) of the *Electricity Act*.
- [19] Plateau submitted that the Distribution Facilities as well as other 44 kV electrical facilities which transport the electricity generated from the Turbines to the existing 44 kV local distribution system of HONI, and ultimately to the IESO-controlled grid, is a "distribution system" and that Plateau is a "distributor" as defined in the *Electricity Act*¹. As such, Plateau submitted that it is a distributor and is entitled to the rights of distributors under section 41 of the *Electricity Act*, including the right, under the circumstances, to bring this Application pursuant to Section 41(9) of the *Electricity Act*.
- [20] Plateau submitted that section 4.0.1(1) (d) of O. Reg. 161/99 under the *Ontario Energy Board Act* exempts from the licensing requirements those distributors that distribute electricity for a price no greater than that required to recover all reasonable costs with respect to a distribution system owned or operated by a distributor that is also a generator and that distributes electricity solely for conveying it to the IESO-controlled grid.
- [21] Plateau also submitted that because of the limited scope of section 41(9) and because the two parties have been unable to reach an agreement on the location of the Distribution Facilities within the Road allowances, the only issue before the Board is determining that location.

¹ The *Electricity Act* definitions are as follows:
"distribute", with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less;
"distribution system" means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose;
"distributor" means a person who owns or operates a distribution system.

[22] An excerpt from Plateau's submissions which describes the proposed location of the Distribution Facilities within the Road Allowances is attached as Appendix "B" to this Decision and Order.

Grey Highlands' Submissions

Some key elements of Grey Highlands' submissions are outlined below:

[23] Grey Highlands stated that the Project is a "renewable energy generation facility" as that term is defined under the Electricity Act and Ontario Regulation 160/99 and, as such, it is afforded no rights under section 41 of the *Electricity Act*. Accordingly, Grey Highlands submits that the Board has no authority or jurisdiction to make a determination under subsection 41(9) of the *Electricity Act* as the Applicant is neither a transmitter nor distributor of electricity.

[24] Grey Highlands submitted that the rights bestowed under section 41 of the *Electricity Act* represent a special privilege granted to transmitters and distributors and "Where special privileges are granted under statutory authority, the legislation granting such special privilege must be strictly construed."²

[25] Grey Highlands submitted that, based on section 2 (1) of the *Electricity Act* and sections 1(4) and 1(5) of Ontario Regulation 160/99, any distribution line or lines under 50 kilometres in length that convey electricity from a renewable energy generation facility to a distribution system are not components of a distribution system, but rather are components of the "renewable energy generation facility". Grey Highlands further submitted that :

- a number or combination of distribution lines are not a "distribution system" as defined in the *Electricity Act* if they are components of a "renewable energy generation facility";
- the defined terms "distribution system", "generation facility", "renewable energy generation facility" and "transmission system" are all mutually exclusive.

² Paragraph 7 of Grey Highlands' submission dated November 25, 2010.

- [26] Furthermore, Grey Highlands stated that Section 57 of the *Ontario Energy Board Act* requires all transmitters, distributors and generators to hold a licence issued under authority of that Act.
- [27] Grey Highlands asserted that, if the distribution lines associated with a "renewable energy generation facility" constituted a "distribution system" as defined in the *Electricity Act*, Plateau would be required to be licensed as a distributor under section 57 of the *Ontario Energy Board Act*.
- [28] Grey Highlands further asserted that the Applicant's submission concerning the applicability of subsection 4.0.1(1) (d) of Ontario Regulation 161/99 is erroneous because the Applicant is not in the business of generating electricity and supplying it to the ISEO-controlled grid on a "non-profit basis".
- [29] In its submission Grey Highlands also stated that:
- based on Section 26 of the *Electricity Act*, if the Applicant is a distributor then the Applicant is required to provide access to the distribution lines to "consumers" and the Applicant's evidence does not indicate or identify that consumers will have access to the distribution lines;
 - the Applicant's own description of its proposal indicates that it will deliver electricity to the HONI distribution system and not consumers; and
 - the Applicant does not have a Conditions of Service³ document because it has no intentions of distributing electricity to consumers and because it is not a "distributor".

Board Staff Submissions

Some key elements of Board staff's submissions are outlined below:

- [30] Board staff submitted that, in its view, based on the *Electricity Act* definitions of "distribute", "distribution system" and "distributor", the distribution component of the Applicant's proposed facilities does qualify as a distribution system and that the Applicant is a distributor and therefore has standing to bring an application under section 41 of the *Electricity Act*.

³ A document required under Section 2.4.1 of the Distribution System Code.

[31] Board staff further submitted that Plateau's Distribution System would be exempt, under Section 4.0.1 (d) of Ontario Regulation 161/99, from the licence requirement of section 57(a) of the *OEB Act* because the Distribution System would transport electricity from its generation facilities to the Hydro One distribution system and ultimately to the IESO-controlled grid, and no other use of the Distribution System has been identified by Plateau.

Plateau's Reply Submissions

Some key elements of Plateau's reply submission are outlined below:

[32] Plateau disagrees with Grey Highlands submission that no aspect of the Project meets the definition of "distributor" under the *Electricity Act* and that Plateau therefore cannot take advantage of the rights afforded to distributors under the section 41 of the *Electricity Act*. Plateau repeated that it clearly was a distributor, as that term is defined in the *Electricity Act* and that; consequently, as a distributor, it is entitled to the rights afforded to distributors under section 41 of the *Electricity Act*.

[33] Plateau reiterated its submissions in chief that, under section 4.0.1(1) (d) of Ontario Regulation 161/99, it is exempt from the distribution licensing requirement in section 57(a) of the *OEB Act*. It added that it is irrelevant that it will profit from the sale of generated electricity since section 4.0.1(1)(d) only requires that the generated electricity be **distributed** at a price no greater than that required to recover all reasonable costs in order for the licensing exemption to apply.

[34] Plateau stated that it disagrees with Grey Highlands' assertion that being a "distribution system", "generation facility", "renewable energy generation facility" and "transmission system" are all mutually exclusive terms. Plateau further stated that there is nothing in Section 57 of the *OEB Act* that suggests that there is such mutual exclusivity.

[35] Plateau further states that the wording of section 4.01(1) (d) of Ontario Regulation 161/99 clearly demonstrates that a person can be both a distributor and a generator and that the exemption applies to a "distributor" that is also a "generator" and distributes electricity solely for the purpose of conveying it to the IESO controlled grid.

- [36] Plateau submitted that the enactment of the *Green Energy and Green Economy Act, 2009* (the “*Green Energy Act*”) amended section 1(1) of the *OEB Act* to require the Board, in carrying out its responsibilities under the *OEB Act* or any other legislation in relation to electricity, to be guided by the objective of promoting “the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.” Plateau further stated that the Board must therefore be guided by this objective, among others, in deciding the Application.
- [37] Plateau submitted that the sections in the *Power Corporation Act* and the *Public Utilities Act* that Grey Highlands referenced have been repealed and pertain to a former regulatory regime that is no longer in place.

BOARD FINDINGS

- [38] Given the Board’s limited jurisdiction in this proceeding, there are two decisions that need to be made. The first is a determination of whether Plateau is a “distributor” for the purposes of Section 41 of the *Electricity Act*. If so, the second determination is where should the location of Plateau’s distribution facilities within Grey Highlands’ road allowances be, given that the parties are not able to reach an agreement.
- [39] The Board agrees with Plateau’s and Board staff’s submissions to the effect that the Distribution Facilities, as well as other 44 kV electrical facilities which transport the electricity generated from the Turbines to the existing 44 kV local distribution system of HONI and ultimately to the IESO-controlled grid, are a “distribution system” as defined in the *Electricity Act*.
- [40] The Board disagrees with Grey Highlands’ submission that the defined terms “distribution system”, “generation facility”, “renewable energy generation facility” and “transmission system” are all mutually exclusive since there is nothing in the applicable legislation that would support such an interpretation. Indeed, when the words of the Statute and the Regulation are given their plain meaning, it is evident to the Board that the Legislature intended them to operate precisely as Plateau suggests they should. As the owner of the distribution system that is intended to transport the generated electricity to the IESO, Plateau is a distributor, but one

which has the benefit of the licensing exemption contained in Ontario Regulation 161/99.

- [41] The Board accepts Plateau's and Board staff's submissions that, as the owner or operator of the distribution system, Plateau is a distributor as defined in the *Electricity Act*.
- [42] Accordingly, the Board finds that, as a distributor, Plateau is entitled to bring an application under section 41 of the *Electricity Act* and is entitled to the relief the Board may grant on such an application.
- [43] Since the evidence indicates that Plateau and Grey Highlands could not agree on the location of Plateau's distribution facilities within Grey Highlands' road allowances, it is the Board's role to determine the location of the Distribution Facilities in accordance with section 41 (9) of the *Electricity Act*.
- [44] The Board notes Plateau's evidence that, during the course of negotiations between Plateau and the Municipal Staff regarding a road use agreement, the two parties had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances (the "Proposed Road Use Agreement") and that the Proposed Road Use Agreement was subsequently rejected by the Grey Highlands Council without apparent explanation.
- [45] The Board also notes that Grey Highlands' submissions focused on Plateau's status as a distributor, its rights under section 41 of the *Electricity Act* and the Board's authority or jurisdiction to make a determination under subsection 41(9) of the *Electricity Act*, but made no submissions regarding any alternative or preferred location for the Distribution Facilities within the Road Allowances.
- [46] In terms of determining the location of the Distribution Facilities, the Board has therefore considered the only evidence provided in this proceeding with respect to proposed location for the Distribution Facilities and that evidence has been provided by Plateau.
- [47] In the absence of any competing proposal, the Board accepts Plateau's proposed location of the Distribution Facilities within the Road allowances in Grey Highlands.
- [48] Furthermore, the Board agrees with Plateau's and Board staff's submissions that Plateau is exempt from the requirement for a distributor licence under Section

4.0.1 (d) of Ontario Regulation 161/99. Contrary to the assertion of Grey Highlands, the fact that Plateau does not require a licence does not imply that they are not a distributor. In the Board's view the Regulation giving rise to the exemption could not be clearer. It specifically contemplates that the "distributor" can be a generator, and that the exemption applies to such a distributor when it distributes electricity "solely for the purpose of conveying it into the IESO-controlled grid." This language really renders the Municipality's argument on this point untenable.

[49] The Board notes that there were a number of interested parties that were granted observer status and took an active role in terms of providing comments regarding various aspects of the Project. Some of the observer comments regarding Plateau's status as a distributor are addressed in the above findings. Other observer concerns were related to health effects, aesthetic impact of the Project and the Turbines as well as the impact on property values. These concerns are not within the scope of this proceeding (see paragraph [9] above) and were not considered by the Board in arriving at this decision.

THE BOARD ORDERS THAT:

- The location of Plateau's Distribution Facilities within the Road Allowances shall be as described in Appendix "A" and Appendix "B" to this Decision and Order except for any changes that are mutually agreed to between Plateau Wind Inc. and the Municipality of Grey Highlands.

DATED at Toronto, January 12, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX "A"

TO

DECISION AND ORDER

BOARD FILE NO. EB-2010-0253

DATED: January 12, 2011

EXCERPT FROM PRE-FILED EVIDENCE

(Exhibit B, Tab 3, Schedule 1, Page 6)

**LIST OF MUNICIPAL ROAD ALLOWANCES WITHIN WHICH THE
DISTRIBUTION SYSTEM WILL BE LOCATED**

1. 210 Sideroad Road (also known as Melancthon-Artermesia Townline), between Provincial Highway No. 10 and East Back Line.
PIN: 37265-0133(LT)
2. East Back Line from 210 Sideroad Road to Melancthon Artemisia Townline.
PIN: 37265-0136(LT) and 37265-0134(LT)
3. Melancthon Artemisia Townline from East Back Line to Road 41A.
PIN: 34151-0029(LT)
4. Melancthon Osprey Townline from Road 41A to the access road to Turbine #3.
PIN: 37260-0052(LT)
5. Road 41A, from the Melancthon Artemisia Townline to South Line B Road.
PIN: 37260-0199(LT)
6. South Line 'B' Road from Road 41 A to Grey County Road 2.
PIN: 37260-0198(LT)
7. Centre Line A Road from County Road 2 westerly to Turbine #6 entrance.
PIN: 37260-0125(LT)
8. Centre Line A Road from County Road 2 easterly to Turbines #10 and #12 road entrance.
PIN: 37260-0125(LT)

APPENDIX "B"

TO

DECISION AND ORDER

BOARD FILE NO. EB-2010-0253

DATED: January 12, 2011

EXCERPT FROM PLATEAU'S WRITTEN

SUBMISSIONS DATED NOVEMBER 8, 2010

(Tab 2, Pages 7-9)

1 located over, on or near traveled or untraveled sections of the Road Allowances. The
2 hearing does not concern which Road Allowances that Plateau has chosen to use.

3 **3.0 PROPOSED LOCATION OF THE DISTRIBUTION SYSTEM WITHIN**
4 **THE ROAD ALLOWANCES**

5 Plateau proposes that the location of the Distribution System within the Road Allowances
6 should be as follows:

- 7 • The Distribution System facilities shall generally be located 1.0-1.5 metres from
8 the abutting property line, provided this location is reasonable and meets all
9 applicable safety standards.⁹ A cross-sectional drawing included at Appendix C
10 shows the approximate location of where Plateau proposes to position the poles
11 and other Distribution System facilities within the Road Allowances. As
12 discussed below, this proposal accords with the terms of the proposed road use
13 agreement between Plateau and Grey Highlands.¹⁰
- 14 • Where practicable and with certain exceptions, the Distribution System facilities
15 that Plateau will construct, maintain or install shall not be located under the
16 existing or contemplated traveled portion of any of the Road Allowances.¹¹
17 Rather, Plateau will locate these facilities adjacent to such existing or
18 contemplated traveled portion of such Road Allowances. As discussed below, this
19 proposal accords with the terms of the proposed road use agreement between
20 Plateau and Grey Highlands.¹²

21 In addition to proposing this location for the Distribution System within the Road
22 Allowances, Plateau requests that the Board, pursuant to its authority under section 23(1)
23 of the OEB Act, include the following conditions in its Order:

⁹ For example, once the detailed engineering process is completed, Plateau may be required to slightly deviate from the 1.0-1.5 metre setback to minimize the need for tree cutting, road crossings and guy anchors on private properties, as well as to accommodate the flow of the ditch drainage.

¹⁰ See Exhibit B, Tab 4, Schedule 1, Page 3 of the Application.

¹¹ Exemptions include certain underground road crossings that allow the Distribution System to follow the existing HONI poles in order to minimize the need to place poles on both sides of the Road Allowances.

¹² See Exhibit B, Tab 4, Schedule 1, Page 3 of the Application.

- 1 • Plateau shall acknowledge that the rights to use the Road Allowances are not
2 exclusive rights. In addition, Grey Highland is not precluded from entering into
3 the Road Allowances for its own municipal purposes, and Grey Highlands has no
4 obligation to notify Plateau of such entry provided it does not adversely affect the
5 Distribution System.
- 6 • In constructing or decommissioning the Distribution System within the Road
7 Allowances (the "Work"), Plateau shall use all due care and diligence to prevent,
8 among other things, any unnecessary or unavoidable interference with the
9 travelled portion of any Road Allowance or with any traffic thereon.
- 10 • Prior to the commencement of any Work, Plateau shall file plans with Grey
11 Highlands and/or the Saugeen Valley Conservation Authority detailing the Work.
12 Plateau will undertake the Work in accordance with those plans.¹³
- 13 • Within 30 days of the completion of any construction Work, Plateau shall deposit
14 with Grey Highlands as-constructed plans detailing the location and specifications
15 of any installed infrastructure, including any distribution lines and poles.
- 16 • Plateau shall undertake and complete any Work requiring a permit from Grey
17 Highlands within the time specified in such permit, provided such time is
18 reasonable. Plateau shall also complete such Work so as not to cause unnecessary
19 nuisance or damage to Grey Highlands or any other user of the Road Allowance
20 where the Work is conducted.
- 21 • Prior to the commencement of any Work, Plateau shall obtain any necessary
22 approval of any federal, provincial, county or municipal government or agency.
23 Plateau shall also notify any other person or body operating any equipment,
24 installations, utilities or other facilities within the Road Allowances about the
25 details of the Work, including where it is to be conducted.
- 26 • In the event that it becomes necessary to break, remove, or otherwise pierce the
27 existing surface of any of the Road Allowances to undertake the Work, Plateau
28 shall, in so far as is practical, at its own expense, repair, reinstate, restore, or
29 remediate such surface to the same or better condition than existed prior to the
30 commencement of such Work.¹⁴
- 31 • Subject to section 41 of the OEB Act, if Plateau wishes to relocate any of the
32 Distribution System facilities previously installed, placed or constructed in the

¹³ This condition is in accordance with Section 41 (7) of the Electricity Act, which states: "If a transmitter or distributor exercises a power or entry under this section, it shall, (a) provide reasonable notice of the entry to the owner or other person having authority over the street or highway"

¹⁴ This condition is in accordance with Section 41 (7) of the Electricity Act, which states: "If a transmitter or distributor exercises a power or entry under this section, it shall, ... (b) in so far as is practicable, restore the street or highway to its original condition; and (c) provide compensation for any damages caused by the entry."

1 Road Allowances, it shall notify Grey Highlands in writing of its intent to do so,
2 and Grey Highlands shall not unreasonably withhold its consent to such
3 relocation.

4 Notably, none of these requested terms or conditions vary from those already enshrined
5 in the standard road use agreement (the "Proposed Road Use Agreement") that Plateau
6 negotiated with the Municipal Staff of Grey Highlands (the "Municipal Staff") and Grey
7 Highlands' legal counsel.¹⁵ In the negotiations, the parties reached a mutually acceptable
8 agreement with respect to the location, construction, operation and maintenance of the
9 Distribution System within the Road Allowances.¹⁶ In particular, under the Proposed
10 Road Use Agreement, Grey Highlands would have affirmed Plateau's statutory right to
11 use the Road Allowances for the Distribution System and agreed to the location of the
12 Distribution System. In exchange, Plateau would have conferred certain benefits on and
13 provided numerous protections to Grey Highlands. A copy of the Proposed Road Use
14 Agreement is attached at Appendix D.

15 In addition, none of the requested terms and conditions vary substantially from the terms
16 and conditions contained in the agreement between Plateau and Melancthon, which
17 Melancthon Council has already approved, regarding the location of seven turbines and
18 the associated distribution facilities in its jurisdiction.¹⁷ One of these turbines is the
19 Turbine in Melancthon that is part of the Plateau I and II siting area, and some of the
20 distribution facilities will be located on the Melancthon side of some of the Road
21 Allowances that are jointly owned by Melancthon and Grey Highlands.

¹⁵ For a summary of those terms and conditions, see Exhibit B, Tab 4, Schedule 1, Pages 4-7 of the Application.

¹⁶ See Exhibit B, Tab 4, Schedule 1, Pages 1-2 of the Application.

¹⁷ See Exhibit B, Tab 4, Schedule 1, Pages 2-3 of the Application.

TAB 4



EB-2013-0031

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

AND IN THE MATTER OF an application by Wainfleet Wind Energy Inc. for an Order or Orders pursuant to subsection 41(9) of the *Electricity Act 1998*, S.O. 1998, c. 15, Schedule A, as amended, establishing the location of Wainfleet Wind Energy Inc.'s distribution facilities within certain public right-of-way and street owned by the Township of Wainfleet, Regional Municipality of Niagara.

BEFORE: Paula Conboy
Presiding Member

Peter Noonan
Member

DECISION AND ORDER

June 27, 2013

BACKGROUND

Wainfleet Wind Energy Inc. (“Wainfleet Wind” or the “Applicant”) filed an application dated February 4, 2013, with the Ontario Energy Board (the “Board”) under subsection 41(9) of the *Electricity Act, 1998, S.O. 1998, c. 15, Schedule A*, as amended (the “*Electricity Act*”) for an order or orders of the Board establishing the location of Wainfleet Wind’s proposed distribution facilities within certain road allowances owned by the Township of Wainfleet (the “Township”).

The Board issued a Notice of Application (“Notice”) on March 13, 2013.¹

Following the publication of Notice, Ms. Katherine Pilon applied for intervenor status and requested an oral hearing. The Applicant objected to her intervention request on the basis that her proposed intervention was directed at issues outside the scope of subsection 41(9) of the *Electricity Act*. The Board deliberated, and subsequently denied Ms. Pilon’s request to intervene upon the grounds that her proposed intervention dealt with matters that are outside the Board’s jurisdiction under subsection 41(9) of the *Electricity Act*. However, the Board allowed Ms. Pilon to file materials in this proceeding as letters of comment. No other person applied to the Board for intervenor status.

The Board decided to proceed by way of a written hearing process in this matter. Procedural Order No. 1 was issued on April 26, 2013 to set out the process for the conduct of the written hearing.

SCOPE OF PROCEEDING

As stated in the Board’s Notice, the scope of this proceeding is limited to determining the location of the Applicant’s Distribution System within the road allowances owned by the Township.

THE APPLICATION

Wainfleet Wind is an Ontario corporation which carries on the business of developing renewable wind energy generation projects. It has partnered with Rankin Construction Inc., a local contractor which carries on the business of building renewable

¹ The original Notice was issued on March 6, 2013 and a revised Notice was issued on March 13, 2013.

infrastructure. Wainfleet is a distributor of electricity within the meaning of the *Electricity Act*.

The Applicant has entered into a contract with the Ontario Power Authority (“OPA”) and is in the process of developing a 9 MW wind power generating facility with five wind turbines, located in the Township and the Niagara Region.

As part of the project, the Applicant is proposing to construct a 27.6kV underground system (“Distribution System”) that will collect power from the turbines and deliver it to a switching station, proposed to be located on private lands along the unopened road allowance of Sideroad 22 (also known as “Brawn Road”) in the Township. The Applicant proposes to install the Distribution System underground under private and public lands in the Township and elsewhere in the Niagara Region. This Application is made only in reference to the public lands within the authority of the Township. Wainfleet Wind states that its proposed Distribution System is necessary to transmit electricity from the wind turbines to the distribution system, in order to comply with its contractual commitments to the OPA.

The Applicant asserts that it has been unsuccessful in negotiations with the Township to obtain an agreement for the location of the underground Distribution System, including high voltage cables, associated ducts, and a communications cable along and across Concession 1 Road and across the unopened Sideroad 22 road allowance at the location of a municipal drain within the Township. Pursuant to subsection 41(9) of the *Electricity Act*, the Applicant requests that this Board determine the location of structures, equipment and other facilities to be installed under or on Concession 1 Road and unopened Sideroad 22.

In particular, the Applicant requests that the Board determine the location of an underground diagonal crossing of unopened Sideroad 22. The Applicant also intends to carry the Distribution System underground across private lands until the Distribution System intersects Concession 1 Road. The Applicant therefore requests that the Board determine the location of a concrete encased duct bank or directional bore crossing for a perpendicular crossing of Concession 1 Road. Finally, the Applicant requests that the Board determine the location of the Distribution System to be constructed underground within the road allowance of Concession 1 Road to its point of intersection with Station Road, a municipal road under the jurisdiction of the Regional Municipality of Niagara. The project for which the Applicant seeks the approval of this Board is described at

Exhibit B/Tab 2/Schedule 1 and shown on applicable engineering drawings² at Exhibit B/Tab 3/Schedule 1/Appendix A, of the application.

Wainfleet Wind states that the proposed cable installations of the Distribution System are designed to meet or exceed the requirements of the Ontario Electrical Safety Code Standard C22.3-#7, Underground Systems and permanent buried cable markers will be installed at either end of the road crossings as recommended by the Canadian Standards Association. Additional details are provided in the construction notes contained in applicable drawings.

THE RECORD

The record consists of the application, letters of comment submitted by members of the public, interrogatories of Board staff, the Applicant's response to Board staff interrogatories, and the submissions of Board staff and the Applicant.

Although the Township did not apply for intervenor status the Board granted leave to the Township to intervene in this proceeding. However, the Township did not take the opportunity to participate or make any submissions on the issues before the Board. Accordingly, the Applicant is the only formal party in this case.

The Board received a number of letters of comment from Ms. Katherine Pilon. The letters of comment filed by Ms. Pilon relate to her opposition to the wind generation project rather than to the issues pertinent to the decision that the Board must make under subsection 41(9) of the *Electricity Act*. Accordingly, the Board has not relied on any of the letters of comment except for a portion of Ms. Pilon's submissions of April 27 and April 30, 2013 in which she, like the Applicant, provided some additional information on the public utility of Station Road as background information about the project.

Pursuant to Procedural Order No. 1, Board staff submitted interrogatories to Wainfleet Wind. The Applicant provided satisfactory responses to all of the Board staff interrogatories.

On May 27, 2013, Board staff filed a written submission. Board staff observed that the Township staff were consulted about the proposed location of Distribution System and

² For the purpose of this application, the applicable drawings are: Drawing #'s: 123901C1.0, 123901C1.1 to 123901C1.4, 123901C1.14 and 123901C1.15

that the Township has not provided the Applicant with any concerns about the proposed location. The Board staff submission noted that: "In the absence of information to the contrary, the route selected appears to staff to be the most efficient and least invasive."

On June 3, 2013, Wainfleet Wind filed its reply submissions. Wainfleet Wind submitted that its application establishing the location of the Distribution System on road allowances owned by the Township should be approved.

Additionally, Wainfleet Wind also requested that the Board consider an award of costs against the Township. Wainfleet Wind noted that it was forced to bring this application because it was unable to reach an agreement with the Township and that the Township's conduct has inflicted unnecessary costs and inconvenience on Wainfleet Wind. The Applicant submitted that the Board should exercise its discretion to award costs against the Township in favour of Wainfleet Wind in the amount of \$3,500.00 plus the Board's cost of the Application. Wainfleet Wind stated that its request for costs only covers the publishing costs that it incurred as a necessary part of this application.

BOARD FINDINGS

The Applicant is the only formal party in this case. The Township received notice of this application but chose not to seek intervenor status or participate in the proceeding even after the Board, of its own motion, granted leave to the Township to intervene. Ms. Katherine Pilon filed several letters of comment but her concerns were directed at the wind generation facility project which is outside of the scope of this application. None of her comments were specific to the Applicant's request to locate the Distribution System within the Township's road allowances. The application by Wainfleet Wind pursuant to subsection 41(9) of the *Electricity Act* is essentially unopposed.

The Applicant has established that it is a distributor of electricity and that it has a statutory right to place its Distribution System within a municipal road allowance pursuant to subsection 41(1) of the *Electricity Act*. The Board finds that the Applicant and the Township have been unable to agree upon the location of the Distribution System within the road allowances that are the subject of this application. The Board notes that satisfactory responses have been made by the Applicant to the interrogatories posed by Board staff. The engineering drawings for the location of the distribution line and related structures have been considered and the Board finds that they are satisfactory. Therefore, the Board finds that the Applicant has satisfied the

burden of proof under the *Electricity Act* to demonstrate that the proposed location of its Distribution System in the municipal road allowances is appropriate and the application is approved.

In order to ensure that adequate regulatory oversight is provided for this project the Board has decided that the following conditions to its approval will be imposed on the Applicant:

- 1) The Applicant shall advise the Board's designated representative of any proposed material change in the location of the facilities as described in the Plans and Profiles as set out at ExB/T2/S1 and Ex B/T3/S1/Appendix A of the application and shall not make a material change in the Plans and Profiles without prior approval of the Board or its designated representative.
- 2) The Applicant shall designate a person as Project Manager and shall provide the name of the individual to the Board's designated representative. The Project Manager will be responsible for the fulfillment of the Conditions of Approval on the construction site.
- 3) The Board's designated representative for the purpose of this Condition of Approval shall be the Manager, Electricity Facilities and Infrastructure Applications.

As to the question of costs, the Board has decided that this is not an appropriate case in which to award costs. The Township chose not to become a formal party to the Board's proceeding, as it was entitled to, and therefore did not add any delay or cost for the Applicant in this proceeding. Clearly, the Applicant is frustrated by its dealings with the Township and the Board is aware that other legal proceedings have taken place between the Applicant and the Township. However, the Board cannot take cognizance of those matters for the purposes of determining costs in this proceeding. We note that the Applicant requested in its Reply that the question of costs not delay the Board's decision, which would clearly be the result if the Board established a process to determine whether a non-party in the context of this case could, and should, be subjected to an award of costs. All things considered, the Board declines to make a cost order in this case.

THE BOARD ORDERS THAT:

1. The location of Wainfleet Wind's Distribution System on road allowances owned by the Township, as described in the application at Exhibit B/Tab 2/Schedule 1 and in the applicable drawings at Exhibit B/Tab 3/Schedule 1/Appendix A and subject to the Conditions of Approval set out in this Decision and Order is approved.
2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Wainfleet Wind shall pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

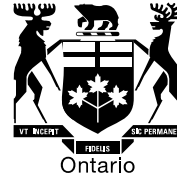
ISSUED AT Toronto on June 27, 2013

ONTARIO ENERGY BOARD

Original Signed by

Kirsten Walli
Board Secretary

TAB 5



EB-2007-0050

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement project between the Bruce Power Facility and Milton Switching Station, all in the Province of Ontario;

AND IN THE MATTER OF Notices of Motion brought by Bordner Ladner Gervais on behalf of Powerline Connections, Fallis, Fallis and McMillan on behalf of a number of landowners, and Pollution Probe.

BEFORE: Pamela Nowina
Presiding Member and Vice-Chair

Cynthia Chaplin
Member

Bill Rupert
Member

DECISION AND ORDER ON MOTION
The Leave to Construct Application

The Application

Hydro One Networks Inc. (the “Applicant” or “Hydro One”) has filed an Application (the “Leave to Construct Application”) with the Ontario Energy Board (the “Board”) dated March 29, 2007 under section 92 of the Act. The Applicant is seeking an Order of the Board to construct approximately 180 kilometres of double-circuit 500 kilovolt (“kV”) electricity transmission line adjacent to the existing transmission corridor (500 kV and/or 230 kV) extending from the Bruce Power Facility in Kincardine Township to Hydro One’s Milton Switching Station in the Town of Milton (the “Bruce-Milton Transmission

Reinforcement Project”). The Applicant also proposes to make modifications at the Milton, Bruce A and Bruce B transmission stations to accommodate the new transmission lines. The Board has assigned File No. EB-2007-0050 to this Application.

The proposed Bruce-Milton Transmission Reinforcement Project will require widening the existing transmission corridor by approximately 53 – 61 metres to accommodate construction of a double-circuit 500 kV electricity transmission line.

A Notice of Application for the Leave to Construct Application was published in various newspapers and was served on all directly affected landowners. Procedural Order No. 1 (“PO No. 1”) was issued on June 5, 2007. It established June 12, 2007 for the filings of motion records for those seeking an early ruling of the Board. Responses to the Motions were to be filed by June 19, 2007. PO No. 1 also set out timelines for Motions Day, Issues Conference, Issues Day, Intervenor Evidence, Interrogatories and an Oral Hearing. A draft Issues List proposed by Board Staff was attached to PO No. 1.

The Motions Proceeding

Three Notices of Motion were filed: one by Powerline Connections, a group of directly affected landowners represented by Bordner Ladner Gervais; one by a number of directly affected landowners in Bruce, Grey and Wellington Counties (“Landowners”) represented by Fallis, Fallis and McMillan; and one by Pollution Probe (together, the “Motions”).

Responses to the Motions were filed by Board Staff, the Association of Power Producers of Ontario (“APPrO”), Hydro One, the Power Workers Union (“PWU”) the Independent Electricity System Operator (“IESO”), and the Ontario Power Authority (“OPA”).

A Motions Day was held on June 25, 2007 and oral submissions were made by Powerline Connections, the Landowners, Pollution Probe, Hydro One, Board Staff, APPrO, OPA, IESO, the Ontario Federation of Agriculture (“OFA”), PWU, and Energy Probe Research Foundation (“Energy Probe”).

Motions were also filed in respect of Hydro One’s Access to Land Application under section 98 of the *OEB Act*. Those motions are dealt with in a separate decision.

The Motions addressed requests on four issues:

- To stay or adjourn the proceeding
- Procedural matters
- Additional information
- Costs

We will address each in turn.

Requests to Stay or Adjourn the Proceedings

Powerline Connections and the Landowners both requested a stay or adjournment of the Leave to Construct Application. Powerline Connections argued that section 12.2(2) of the *Environmental Assessment Act* (“EA Act”) prohibits the Board from issuing any authorizations at this time. It further submitted that there has been no public consultation, nor have the Terms of Reference for the Environmental Assessment (“TOR”) been set. In Powerline Connections’ view, the Board’s entire process would be wasted if the Environmental Assessment (“EA”) ultimately defines a different route, because the EA process requires the assessment of alternatives, but only one route is being included in the Leave to Construct Application. Powerline Connections further noted that the Integrated Power System Plan (“IPSP”) (being prepared by the Ontario Power Authority) has not been completed and filed with the Ontario Energy Board and that analysis would be relevant to this proceeding. For all these reasons, Powerline Connections submitted that the application should await completion of the EA, or, at a minimum, completion of the Terms of Reference. Without this, the application is deficient and premature in Powerline Connections’ view. The Landowners and the OFA supported these submissions.

Pollution Probe also supported the Motion to stay or adjourn the proceeding and offered two grounds: the economics do not support the project; and the primary purpose for which it is being proposed is not being met. Pollution Probe proposed that the proceeding be stayed until such time as the TOR is produced and until additional evidence on the economics and the purpose of the project is developed.

Hydro One opposed the Motions to stay or adjourn the proceeding. Hydro One submitted that there is no conflict with section 12.2(2) of the *EA Act* for two reasons: section 12.2(1) makes provision for the types of activities which Hydro One plans to undertake; and the Board can and does typically issue leave to construct orders which are conditional on receiving all other required approvals and permits before beginning construction.

Regarding the EA process, the TOR completion and the timing of IPSP, Hydro One's position was that its approach to the sequencing of events was appropriate and that it would result in unnecessary delay to be required to complete the EA in advance of the leave to construct proceeding.

Hydro One also opposed Pollution Probe's reasons for adjourning the proceeding. Hydro One submitted that the evidence on project economics and project need are fundamental to the Board's consideration of the application and are issues to be considered in the course of the proceeding and do not form grounds for a stay.

APPRO made similar submissions, and expressed concern that a delay to the proceedings would have a potential adverse impact on generators. In APPRO's view, the IPSP is not required in order to proceed with the leave to construct application and the EA need not be completed prior to the Board granting leave to construct. The OPA also opposed the Motions to stay or adjourn the leave to construct application. The OPA stated that this project is not part of the IPSP and that the OPA already put on the record that the project is of critical importance and as such should precede the IPSP review.

Board Findings

The Board will not stay or adjourn the leave to construct proceeding.

Section 12.2(2) of the *EA Act* states:

No person shall issue a document evidencing that an authorization required at law to proceed with the undertaking has been given until the proponent receives approval under this act to proceed with the undertaking.

Both the Leave to Construct and the EA approval are required before the project may proceed, but neither process is completely dependent upon the other. There is the potential for conflicting results, but that potential arises no matter which process goes first. Therefore, the proponent and the agencies involved must manage these applications in an appropriate manner. As Hydro One pointed out, the Board's leave to construct orders are conditional on all necessary permits and authorizations being acquired, including a completed EA. In this way, the Board ensures that it is not in contravention of the *EA Act* but allows for the timely consideration of applications before it.

The Board, however, is of the view that the two processes should not be significantly out of step. For example, the leave to construct would be significantly affected if the EA Terms of Reference did not include the same route. Therefore, the Board will proceed with the Leave to Construct application, but we will reassess the matter in advance of the oral phase of the hearing if the Terms of Reference are still not approved at that time.

With respect to Pollution Probe's submissions, the Board finds that the issues raised are relevant to the hearing of the application, but do not represent grounds for a stay or adjournment.

Requests Related to Procedural Matters

Powerline Connections and the Landowners requested extensions to the time between procedural events so that counsel can communicate with and receive instructions from their clients. Specifically, Powerline Connections suggested the proceeding be extended by six months. The OFA and Pollution Probe supported this request. Hydro One suggested that the overall schedule could be extended by 1 to 2 months.

Pollution Probe also proposed that a Technical Conference be held. The OFA and Energy Probe supported the inclusion of a Technical Conference in the proceeding. Hydro One supported the addition of a Technical Conference to the proceeding provided that such an event was properly scoped and provided that it could be managed within a reasonable time frame.

Powerline Connections requested that the oral hearing be held at a location convenient to its members, namely Milton or Orangeville. The Landowners suggested Dufferin or Grey Counties, as those were the most convenient to those landowners.

The Landowners further submitted that the expropriation proceeding cannot commence without a more precise location of the transmission line in relation to lands and land rights required be determined. The Landowners also argued that the Board should consider candidate lands within a broader corridor. Hydro One argued that this was not appropriately part of a leave to construct proceeding and that the environmental and socio-economic impacts of the project would be addressed in the EA process.

APPrO pointed out that the *OEB Act* makes separate provision for leave to construct applications under section 92, expropriation proceedings under section 99, and access to land applications under section 98.

Board Findings

The Board will adjust the schedule to allow for additional time. Hydro One did not oppose an extension to the schedule, and the additional time will facilitate landowner communications. However, the Board finds that an extension of six months is excessive in the circumstances. Specific dates will be established by way of procedural order (to be issued shortly) and it is expected that the oral hearing will take place in mid-January. While this is somewhat later than suggested by Hydro One, the Board sees no merit in beginning the oral proceeding in the period directly before the December holiday season. The Board will hold part of the oral hearing in a location along the proposed route, and the location will be set out in the procedural order.

The Board notes that there was no opposition to including a technical conference, and one will be included in the revised schedule.

The Board will not consider alternative locations for the route, in terms of the impact on individual landowners, as part of the leave to construct application. Section 96(2) establishes the scope for a leave to construct application quite explicitly:

In an application under section 92, the Board shall only consider the interest of consumers with respect to prices and the reliability and quality of electricity service 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.

Therefore, while the Board considers alternatives to the project, those alternatives are assessed in the context of the specific factors listed in Section 96(2). These factors do not include the impact on individual landowners, except to the extent that the impact could materially effect the price (economics), reliability or quality of service to consumers generally as described in section 96(2). The environmental and socio-economic impacts of alternative routes are considered in the EA process. Individual land rights are considered in the context of a proceeding under the expropriations process.

Requests for Additional Information

The Landowners requested the following additional information:

- photo-based mapping at a sufficient level of detail that landowners may easily examine the location of the proposed line in relation to the existing line and in relation to their properties and buildings;

- additional maps showing property lines, property ownership and physical structures along the right-of-way and in a broader band around the right-of-way centre line;
- additional study of the proposed transmission route in the Hanover area;
- a list of Hydro One's expert witnesses and statements or their qualifications, one month in advance of their appearance.

Board Findings

The Board finds that the request for more detailed photo-based mapping is a reasonable one. Hydro One is directed to file photo-based mapping showing the existing line and structures along the proposed route. Hydro One will not be required to extend the mapping to a broader corridor because that would be beyond the scope of the Board's consideration of the application, as expressed above.

The Board's practice is that any expert testimony be accompanied by a list of the expert witnesses and their qualifications. The Board expects Hydro One to follow this practice and that this will address the Landowners' concern.

Pursuant to the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), the Board cannot release the names and addresses of landowners along the proposed route, unless these landowners have indicated to the Board that they wish to participate in the hearing. As this information is personal information under FIPPA, the Board will not require Hydro One to release the requested information.

The Board notes that the issues regarding the proposed route through Hanover may be explored through the interrogatory phase of the proceeding. The Board will not make any order regarding that issue at this time.

Requests for Interim Cost Awards

Pollution Probe requested that an award of costs be made for its proposed expert witness and that the award be made in advance of the work being completed. Pollution Probe submitted that the Board could still conduct its normal assessment process. Energy Probe supported Pollution Probe's request for interim funding for expert witness participation.

The Landowners also requested that the Board consider awarding interim costs.

Hydro One opposed what it characterized as advance funding or the provision of financial commitments for intervenor expert witnesses.

Board Findings

The Board will not guarantee in advance that Pollution Probe will be able to recover the costs for its expert. This would be contrary to Board practice and the principles of costs awards, which contemplate an after-the-fact assessment of the party's contribution. The Board does understand that cost awards can be a lengthy process and that this places a significant burden on participants in a lengthy proceeding. Therefore, for this proceeding, the Board will institute a staged cost awards process. We will accept cost claims upon completion of the following milestones: the filing of intervenor evidence (for all costs up until that point); the completion of the oral proceeding; and the completion of argument. The claims may include the costs of counsel, consultants and expert witnesses.

THE BOARD ORDERS THAT:

1. The motions for a stay or adjournment of the proceeding are denied.
2. The schedule for the proceeding will be extended and will include a Technical Conference and an oral hearing at a location along the proposed route. Details regarding the schedule and the oral hearing will be contained in a future Procedural Order.
3. Hydro One will file and serve on all parties photo-based maps which indicate the location of existing lines and structures along the proposed route.

DATED at Toronto, July 4, 2007
ONTARIO ENERGY BOARD

Original Signed By

Peter H. O'Dell
Assistant Board Secretary