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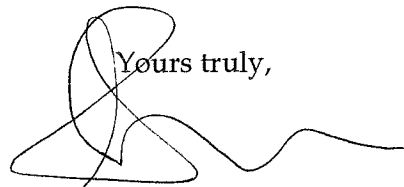
Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Yonge-Eglinton Centre
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

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

Pursuant to Procedural Order No. 2, enclosed please find two copies of the Applicant's Reply to the Township of Clearview's submissions.

Yours truly,

A handwritten signature in black ink, appearing to read 'Ingrid Minott', with a long, wavy horizontal line extending to the right.

Ingrid Minott

IM/dl
Encl.

TORONTO

MONTREAL

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 REPLY TO CLEARVIEW TOWNSHIP'S SUBMISSIONS**

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 section 41(9) of the *Electricity Act, 1998* establishing the location of
6 certain distribution facilities within road allowances owned by the Township of Clearview
7 (the "**Township**").

8 On December 18, 2014, pursuant to Procedural Order No. 2 dated December 2, 2014, the
9 Township filed written submissions in respect of the Application. These submissions are
10 filed pursuant to Procedural Order No. 2 in reply to the Township's submissions.

11 **SUBMISSIONS**

12 The Township has submitted late and improper evidence that form the basis of its closing
13 submissions in complete disregard for the process established by the Board in Procedural
14 Order No. 1. The evidence submitted by the Township is incomplete and untested and
15 should not be taken into account by the Board.

16 In Procedural Order No. 1, the Board directed the Township to serve its proposal for the
17 location of the "wpd Fairview Wind Incorporated distribution lines and related facilities
18 within the municipal road allowances and all supporting evidence related to that proposal"
19 on or before November 4, 2014, which would then be subject to scrutiny by the Applicant
20 and Board Staff. The Township made a calculated strategic decision not to file evidence. The

Township should not now be permitted to rely on improper evidence when it failed to comply with Procedural Order No. 1.

While the Applicant disputes the admissibility of the evidence filed by the Township with its submissions, in the event that the Board determines that the production of the evidence at this late stage is acceptable, the Applicant's submits that the Township's submissions and the evidence it relies on should not be accepted by the Board for the reasons that follow.

The Applicant's Status as a Distributor

The Township incorrectly asserts that the Applicant is not a distributor within the meaning of the *Electricity Act, 1998* because the Applicant does not have a Feed-in Tariff ("FIT") Contract with the Ontario Power Authority and because the Applicant does not currently own or operate a distribution or transmitter system independent of that proposed through the REA process.

The question of what constitutes a distribution system for the purposes of the *Electricity Act, 1998* has been settled by the Board. In *Grey Highlands*, the Board stated:

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*."

...

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 exception contained in Ontario Regulation 161/99.

...

Contrary to the assertion of Grey Highlands, the fact that Plateau does not require a license 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

1 contemplated that the “distributor” can be a generator, and
2 the exemption applies to such a distributor when it distributes
3 electricity “solely for the purpose of conveying it into the
4 IESO-controlled grid.”¹

5 In *East Durham*, an applicant sought to rely on its rights under section 41 of the *Electricity*
6 *Act, 1998* even though it had not yet received REA approval to develop the proposed
7 renewable wind energy facility and corresponding distribution facilities. A similar
8 argument was made that the applicant was not a distributor because it did not own or
9 operate a distribution system, but the Board firmly rejected this argument and stated:

10 The Act does not require that all necessary approvals, such as
11 the REA, be obtained prior to granting an application under
12 subsection 41(9). Accordingly, the Board does not consider
13 that there is any relevant basis to distinguish this application
14 for the application in the Plateau and Wainfleet cases, in which
15 the applicants were considered to be “distributors.”²

16 The Applicant intends to develop a renewable wind energy facility and corresponding
17 distribution facilities consisting of, among other things, a 44 kV underground collector line
18 to transport the electricity generated from the Turbines “to the existing 44 kV local
19 distribution system of HONI and ultimately to the IESO controlled grid.” As in *East*
20 *Durham*, the fact that the Applicant has not yet received REA approval does not preclude the
21 Applicant from qualifying as a distributor under the *Electricity Act, 1998*, as suggested by
22 the Township.

23 The Township’s assertions regarding the FIT Contract are both irrelevant and incorrect. The
24 Township has not identified any applicable legislation or regulation that identifies the
25 existence of a FIT Contract as a relevant consideration in defining a distributor for the
26 purposes of the *Electricity Act, 1998*. In any event, the Applicant is the entity that actually
27 holds the FIT Contract for the Fairview Wind Project. The FIT Contract was transferred to
28 the Applicant in 2013 (a copy of the transfer is attached as Appendix “A”). This incorrect

¹ *Plateau Wind Inc.*, Decision and Order dated January 12, 2011, EB-2010-0253, paras. 39-40 and 48 [“Grey Highlands”]

² *East Durham Wind, Inc.*, Decision and Order dated November 7, 2013, EB-2013-0233, pp. 4-5 [“East Durham”]

1 allegation by the Township demonstrates the risks inherent in relying upon incomplete and
2 untested evidence.

3 **The Applicant's Repeated Requests to Meet**

4 The Township suggests that it refused the Applicant's requests for meetings because it was
5 unaware that the Applicant's attempt to consult with the Township related to matters that
6 were "entirely separate from the ongoing issues with respect to municipal consultation
7 through the REA process." The Township further asserts that "at no time did the applicant
8 indicate that the delay in discussions would initiate a separate process with respect to an
9 OEB application."

10 The Township's position has no merit for the following three reasons.

11 First, it is the Township's obligation to educate itself about the regulatory process and what
12 rights the Applicant enjoyed under section 41 of the *Electricity Act, 1998* if the Township
13 refused to engage in discussions. The Township's failure to education itself is no excuse.

14 Second, the Township would have been better informed about the process if the Township
15 had met with the Applicant on any of the number of occasions that the Applicant attempted
16 to consult with the Township. It is unreasonable for the Township to expect that the
17 Applicant would inform it about the process and alternatives that may be available to the
18 Applicant when the Township refused to have any discussions with the Applicant.

19 Third, even after the Township became aware of the possibility of this Application, the
20 Township made no effort to meet with the Applicant or inform the Applicant of its concerns
21 regarding the location of the Fairgrounds Collector Line within the road allowance. In
22 particular, throughout these proceedings, the Township has provided no evidence
23 identifying any substantive concerns regarding the location of the Fairgrounds Collector
24 Line.

The Relevance of the REA Process

The Township continues to erroneously assert that the Applicant failed to meet the regulatory requirements of the REA process and is seeking to by-pass those requirements by commencing this Application under section 41(9).

The Township's assertions in this regard are without merit. Contrary to the Township's assertions, the Applicant has completed all the regulatory requirements for the REA process and in fact, the Applicant's REA application has been deemed complete. In any event, to the extent that there may be deficiencies in the Applicant's REA application, the proper regulatory body to whom the Township should raise these concerns is the Ministry of the Environment ("MOE"). These concerns are outside the Board's jurisdiction under section 41(9) of the *Electricity Act, 1998*.

Furthermore, the Township has already raised similar concerns with the MOE as indicated in the correspondence included at tab 5 of the Township's submissions. In particular, in emails dated December 5, 2013, Mr. Wynia expressed concerns to the MOE regarding what he deemed to be the lack of consultation with the Township and the alleged failure of the Applicant to complete Part A of the municipal consultation form. The Applicant's REA application was deemed complete by the MOE notwithstanding the concerns raised by the Township.

The Existence of Disagreement with the Municipality

Despite the abundance of evidence to the contrary, the Township argues that there is no disagreement between the Applicant and the Township and asserts that in order to rely on section 41(9), the Applicant should be required to demonstrate that the Township was "completely obstructive and unreasonable" with respect to the negotiation of a road use agreement.

Contrary to the Township's assertions, "completely obstructive and unreasonable" is not the test for whether an applicant can request that the Board invoke its authority to determine

1 the location of distribution facilities within the road allowance under section 41(9) of the
2 *Electricity Act, 1998*. As stated by the Board, the legislation provides that:

3 [T]he project proponent and the municipality should attempt
4 to agree on the precise location of the project proponent's
5 facilities within the municipal road allowance but if agreement
6 is not possible the matter may be submitted to the Board for a
7 determination of the precise location of the transmission or
8 distribution line through the road allowance.³

9 In any event, the evidence indicates that the Township has been completely obstructive in
10 this case, refusing to meet with the Applicant on multiple occasions. As Board Staff
11 observed in its submissions, "the evidence indicates that [the Applicant] made several
12 attempts to engage with the Township in order to complete a Road Use Agreement with
13 respect to locating its Distribution Facilities on the road allowances on Fairgrounds Road
14 owned by the Township."

15 The parties were unable to negotiate an agreement because of the Township's refusal to
16 engage in discussions with the Applicant. As demonstrated by wpd Fairview's work with
17 the County, which was acknowledged by the Township in its submissions, consultation
18 with the Applicant could have avoided the need for this Application.

19 **Urgency is Not a Statutory Requirement**

20 The Township submits that wpd Fairview should bear the onus of demonstrating the
21 urgency of this Application. However, urgency is not a consideration under section 41 of the
22 *Electricity Act, 1998* and the statute does not require an applicant to demonstrate that an
23 Application is urgent in order to rely on its statutory rights.

³ *Niagara Region Wind Corporation*, Decision on Threshold Questions and Procedural Order No. 2 dated February 4, 2014, EB-2013-0203, pp. 9-10

Concerns Expressed by the Municipality and Clarification of Municipal Concerns

The Township states that the fact that it did not respond to the Applicant's meeting requests cannot lead to the conclusion that the Township does not have concerns regarding the location of the Fairgrounds Collector Line. However, the meetings requested by the Applicant were, in fact, the appropriate time for the Township to raise any concerns it has or had about the location of the Fairgrounds Collector Line.

Further, when given the opportunity to do so, the Township failed to file any evidence in this proceeding that would suggest that it has substantive concerns regarding the location of the Fairgrounds Collector Line. Although the Township has filed improper evidence with its submissions, none of this evidence relates to the location of the Fairground Collector Line within the road allowance.

The Township absurdly asserts that wpd Fairview had an obligation to file interrogatories to identify the Township's concerns. It should go without saying that it is the Township's obligation to file evidence that identifies and substantiates any legitimate concerns it might have regarding the location of the Fairgrounds Collector Line. The Township was provided with ample opportunity to enter evidence and chose not to do so on multiple occasions. For example, Board Staff asked several interrogatories of the Township and the Township did not file any evidence or provide any meaningful answers to these interrogatories.

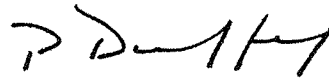
CONCLUSION

The Applicant requests that the Board issue an order or orders under section 41(9) of the *Electricity Act, 1998* establishing the location of the Fairgrounds Collector Line within the road allowance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, Ontario, this 23th day of December, 2014

wpd Fairview Wind Incorporated
by its counsel
Stikeman Elliott LLP

A handwritten signature in black ink, appearing to read 'P. Duffy', written over a horizontal line.

Patrick Duffy
Ingrid Minott

Appendix A



120 Adelaide Street West
Suite 1800
Toronto, Ontario M5H 1T1
T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

FIT CONTRACT ASSUMPTION AND ACKNOWLEDGEMENT AGREEMENT FOR PRE-COD ASSIGNMENT TO AFFILIATE

THIS ASSUMPTION AND ACKNOWLEDGEMENT AGREEMENT (this "Agreement")
is made as of

the 22 day of August, 2013.

BETWEEN:

wpd Canada Corp.
a corporation formed under the laws of Ontario.

(the "Supplier");

- and -

wpd Fairview Wind Incorporated,
a corporation formed under the laws of New Brunswick

(the "Assignee");

- and -

ONTARIO POWER AUTHORITY, a statutory
corporation without share capital incorporated under the
laws of the Province of Ontario

(the "OPA");

WHEREAS the Supplier and the OPA entered into a Feed-In Tariff Contract dated May 3, 2010, designated as FIT# F-000672-WIN-130-601 (the "**Contract**");

AND WHEREAS the Supplier wishes to assign the Contract (the "**Assignment**") to the Assignee pursuant to Section 15.5 (c) of Schedule 1 of the Contract, which Assignment is effective as of the date hereof;

NOW THEREFORE THIS AGREEMENT WITNESSES that, in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged) the parties hereto covenant and agree as follows:

1. Defined Terms

All capitalized terms not defined herein, or other terms used herein, and defined in Appendix 1 – Standard Definitions of the Contract shall have the respective meanings ascribed thereto in Appendix 1 – Standard Definitions of the Contract, and "including" shall mean "including without limitation".


2. Representations and Warranties

The Supplier and the Assignee hereby jointly and severally represent and warrant to and agree and covenant with the OPA, at the date hereof, acknowledging that the OPA is relying on such representations as a condition of entering into this Agreement and as a condition precedent to Section 3 hereof, that:

- (a) the recitals preceding Section 1 in this Agreement and the chart reflecting the corporate organization of the Supplier and the Assignee, attached as Schedule A to this Agreement, are true and correct;
- (b) the information provided to the OPA in relation to the Assignment, the Assignee and the Supplier is true, accurate and complete in all material respects, and does not contain any misleading information, or omit any information which would render the information or documents submitted to the OPA misleading;
- (c) the Supplier and the Assignee each have complied with all Laws and Regulations in respect of the Assignment;
- (d) no Supplier Event of Default that has not been remedied has occurred;
- (e) except for Section 6.1(f) of Schedule 1 of the Contract, the representations set out in Section 6.1 of Schedule 1 of the Contract are restated by the Assignee and the Supplier with effect as of the date hereof, provided references to "Supplier" and "Agreement" therein shall be deemed to be references to the Assignee and this Agreement, respectively, and other than in respect of the Assignment, the representations set out in Section 6.1(f) of Schedule 1 of the Contract are restated by the Supplier and the Assignee with effect as of the date hereof;
- (f) the Assignee is an Affiliate of the Supplier;
- (g) the Facility has not achieved Commercial Operation;
- (h) the Assignee has acquired the Facility to the extent applicable, taking into account the state of construction and development of the Facility at the time of the Assignment and, in particular, all existing agreements and rights, including leases, options, priority permits and Aboriginal Community permits, related to the Facility or the lands pertaining to the Facility have been assigned to the Assignee;
- (i) there are no actual or potential actions, causes of action, suits, debts, dues, accounts, bonds, claims or demands whatsoever of the Supplier, the Assignee, or any Affiliate of the Supplier or the Assignee, against or in respect of the OPA, by reason of, or in any way arising out of any FIT Contract, including but not limited to the Contract, any Application or the FIT Rules, or any other contract or obligations as between the Supplier, the Assignee, or any Affiliate of the Supplier or the Assignee, and the OPA (collectively, "Claims"), and none of the Supplier, the Assignee, or any Affiliate of the Supplier or the Assignee is aware, after due inquiry, of any, actual or potential Claims, or any act, event, circumstance or thing

which, with notice or the passage of time or lapse of cure period, would give rise to a Claim, that it or its successors, heirs, executors, estate trustees, administrators or assigns, had, have or may have;

- (j) the Supplier and the Assignee have paid the legal expenses of the OPA in connection with preparation and review of this Agreement and related matters in respect of which the Supplier or the Assignee has received an invoice from counsel to the OPA and such counsel has received such payment;
- (k) there is no Secured Lender or Secured Lender Security Agreement in respect of the Contract or, if there is, each Secured Lender has executed this Agreement and consented hereto as provided below;

- 
- (m) the Assignee has complied with Article 5 of Schedule 1 of the Contract and has, where required by the Contract, provided the OPA with Completion and Performance Security to replace the Completion and Performance Security provided by the Supplier.

3. Conditions Precedent

As conditions precedent to Section 5 hereof, as at the date hereof:

- (a) the representations and warranties contained in Section 2 hereof shall be true and accurate; and
- (b) the Assignee and the Supplier shall have complied with the security requirements contained in Section 7 of this Agreement.

4. Agreements

- (a) The Assignee agrees to assume all of the Supplier's obligations under the Contract and be bound by the terms thereof as at the date hereof.
- (b) This Agreement shall not be deemed to waive or modify in any respect any rights of the OPA under the Contract except as expressly provided for in this Agreement.

5. Acknowledgment of the OPA

Subject to the terms of this Agreement, the OPA hereby acknowledges that, as at the date hereof:

- (a) the Supplier and the Assignee have complied with the requirements of Section 15.5(c) of Schedule 1 of the Contract in respect of the Assignment; and

- (b) upon completion of the Assignment in accordance with this Agreement, the Supplier shall be relieved of all its duties, obligations and liabilities under the Contract.

6. Contracts in Full Force and Effect

The parties hereto confirm that the Contract remains in full force and effect in accordance with its terms and that this Agreement shall not be deemed to waive or modify in any respect any rights of the OPA under the Contract or the FIT Rules, and shall not constitute or be deemed to constitute a waiver of any Supplier Event of Default or other default of the Supplier, nor shall it constitute an acknowledgement that there has been or will be compliance by the Supplier with the Contract, except as expressly provided in this Agreement, including, without limitation, the following circumstances:

- (a) no assignment of any Contract or any Application shall be made or permitted to be made pursuant to this Agreement other than the Assignment; and
- (b) the OPA has not, whether by virtue of the recitals hereto or otherwise, waived any restriction on, consented to or otherwise passed on the validity of any assignment of the Contract other than the Assignment.

7. Completion and Performance Security

In respect of the requirement to provide Completion and Performance Security to the OPA under Article 5 of Schedule 1 of the Contract, either:

- (a) in the case of Completion and Performance Security in the form of a letter of credit, the Assignee, in the place and stead of the Supplier, shall have provided the OPA with replacement Completion and Performance Security, or
- (b) in the case of Completion and Performance Security in the form of a bank draft or certified cheque, as of the date hereof,
 - (i) each of the Supplier and the Assignee directs and authorizes the OPA to use the Completion and Performance Security previously provided to the OPA by the Supplier, in accordance with Section 5.1 of Schedule 1 of the Contract, as the Completion and Performance Security for the Contract following the Assignment and in respect of the Assignee, and this direction shall be the OPA's good and sufficient authority for doing so; and
 - (ii) the Supplier releases all its rights in and to the Completion and Performance Security previously delivered to the OPA in respect of the Contract, including its right to return of the Completion and Performance Security under Sections 5.1(c), 5.2(c) and 5.4(c) of Schedule 1 of the Contract and, for clarity, the Supplier acknowledges and agrees that if such Completion and Performance Security is returned by the OPA it will be returned to the Assignee.

8. Confidentiality

This Agreement constitutes Confidential Information and shall be subject to Article 7 of Schedule 1 of the Contract.

9. Execution and Delivery

This Agreement may be executed by the parties hereto in counterparts and may be executed and delivered by facsimile and all such counterparts and facsimiles shall together constitute one and the same agreement.

10. Other

- (a) The Supplier and the Assignee jointly and severally shall bear the external legal fees incurred by the OPA in connection with the preparation and review of this Agreement and related matters, including the review of any supporting documentation. The OPA may deduct or set-off an amount equal to such costs from or against amounts payable by the OPA to the Supplier, the Assignee, or to any Affiliate of the Supplier or Assignee at any time and from time to time under any FIT Contract or other contract to which the Supplier, the Assignee, or any such Affiliate thereof, is a party.
- (b) Except where the context requires otherwise, the provisions contained in Sections 1.2, 1.3, 1.4, 1.5, 1.6, 1.8, 1.9, 1.10, 1.11, 1.12, 14.6, 15.1, 15.2, 15.4, 15.13 and 15.14 of Schedule 1 of the Contract apply in the construction and interpretation of this Agreement, provided references therein to the "Agreement" shall be construed and deemed to be references to this Agreement.
- (c) Breach of any representation, warranty, covenant or other provision hereof shall be deemed to be a Supplier Event of Default under the Contract, provided that no cure period shall be applicable thereto, and pursuant to which the OPA may *inter alia* pursue any remedy available to it under Section 9.2 of Schedule 1 of the Contract including, without limitation, drawing on the Completion and Performance Security.

11. Notices

All notices to the Supplier and the OPA shall be addressed to each of them as provided in the Contract. All notices to the Assignee shall be addressed to it as follows:

wpd Fairview Wind Incorporated

ATTN: Ian MacRae [Assignee Primary Contact]
Tel: 905-813-8400 extension 111 [Assignee Primary Contact Telephone]
Fax: 905-813-7487 [Assignee Primary Contact Fax (if applicable)]
E-mail: ian@wpd-canada.ca [Assignee Primary Contact Email]

ATTN: Khlaire Parré [Assignee Secondary Contact]
Tel: 905-813-8400 extension 112 [Assignee Secondary Contact Telephone]
Fax: 905-813-7487 [Assignee Secondary Contact Fax (if applicable)]
E-mail: khlaire@wpd-canada.ca [Assignee Secondary Contact Email]

12. Governing Law

This Agreement shall be governed by and interpreted in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day first written above.

NOTE: If the Supplier is a corporation.

wpd Canada Corp.

By:



Name: Ian MacRae


Title: President

**I have the authority to bind the
corporation.**

NOTE: If the Assignee is a corporation.

wpd Fairview Wind Incorporated

By:

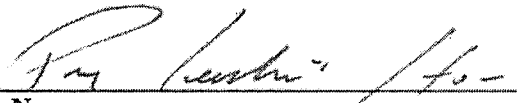


Name: Ian MacRae

Title: President

**I have the authority to bind the
corporation.**

ONTARIO POWER AUTHORITY

By: 
Name:

Title: **Michael Killeavy**
Director, Contract Management
Electricity Resources

**I have the authority to bind the
corporation.**

[*if* applicable: The undersigned, as Security
Agent, hereby consents to the foregoing as of the
day first written above.]

[SECURED LENDER – *if none, leave blank*]

By: _____
Name:

Title:

**I have the authority to bind the
corporation.**