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RESS, EMAIL & COURIER

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

Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

Re: Windlectric Inc. - Application for Leave to Construct Transmission Facilities (EB-2014-0300) - Form of Hearing

We are counsel to Windlectric Inc. ("Windlectric") in respect of its application for leave to construct transmission facilities (EB-2014-0300). We are writing in response to the February 13, 2015 letter from the Association to Protect Amherst Island (the "APAI") concerning the form of hearing in this proceeding.

Background

A Notice of Application was published and served on directly affected persons on November 6, 2014. The Notice advised that Windlectric had requested a written hearing and invited submissions as to whether and why an oral hearing may be needed, which submissions were due by November 17, 2014. One letter of comment and one observer status request letter included requests for an oral hearing. Windlectric responded to those requests by letter dated November 20, 2014.

The APAI filed a late intervention request on November 25, 2014. As part of that request, the APAI also made a late request for an oral hearing on the basis that "there is a significant body of evidence" to be considered. In Procedural Order No. 1, issued on November 26, 2014, the Board noted the APAI's request but did not order that an oral hearing be held.

On December 15, 2014, the APAI filed another letter in which it reiterated its request and set out its further reasons for seeking an oral hearing. This letter was not in response to a request from the Board for submissions on this issue but, rather, was unsolicited. On January 7, 2015, Windlectric responded to this further request from the APAI, as well as to other requests made in various letters of comment and observer request letters. In Procedural Order No. 2, issued on January 8, 2015, the Board indicated that it expects to decide whether to hold a written or oral hearing following completion of the interrogatory phase of the proceeding. Although the interrogatory phase was expected to close with the filing of APAI's interrogatory responses on February 12, 2015, the Board extended this deadline at APAI's request to February 20, 2015.

During the additional week that the APAI was granted for the purposes of completing its interrogatory responses, the APAI nevertheless found the time to file two additional letters on February 12 and 13, 2015. The APAI's February 13, 2015 letter is a further unsolicited letter reiterating its request for an oral hearing and setting out additional reasons in support of its request.

In the event the Board intends to make its determination on the form of hearing in its next procedural order, we wish to respond to the APAI's February 13, 2015 letter on behalf of the Applicant.

Windlectric's Prior Submissions on Form of Hearing

Windlectric reiterates the submissions on the form of hearing made in its November 20, 2014 and January 7, 2015 letters to the Board. In summary, those submissions were that:

- the Board typically conducts leave to construct proceedings in writing
- the Board should not give any weight to late requests for an oral hearing or related submissions, including the APAI's letter of December 15, 2014;
- the Board should not give any weight to requests for an oral hearing from persons that filed letters of comment or requests for observer status as those persons are not parties to the proceeding and would have no right to participate in an oral hearing if one were held;
- the Board should not give any weight to the APAI's further request for an oral hearing dated December 15, 2014 because it would not be appropriate for the Board to permit the APAI to have a second opportunity to make submissions on the same issue; and
- none of the requests for an oral hearing, from the APAI or other persons, offer any reasons that are sufficient to demonstrate that an oral hearing is warranted, having regard to the scope of the proceeding and the test that the Board has previously applied in determining this issue in the context of other leave to construct proceedings.

APAI's Most Recent Submissions on Form of Hearing

In its February 13, 2015 letter (the "Letter"), the APAI raises four new arguments as to why an oral hearing is warranted. In particular, the APAI argues (a) that the issues it raises are relevant to the Board's broad statutory objectives, which it must consider in determining the application; (b) that an oral hearing will permit it to introduce and explain additional factual evidence from certain individuals and organizations; (c) that an oral hearing is needed to ensure that principles of procedural fairness and natural justice are upheld; and (d) that even if an oral hearing is not held the Board should provide an opportunity for APAI members to provide oral comments on the record. Each of these new arguments is addressed below.

(a) Application of the Board's Statutory Objectives

On page 2 of the Letter, the APAI attempts to address Windlectric's contention that APAI's arguments and evidence largely relate to matters outside the scope of the Board's jurisdiction in the proceeding. The APAI argues that although the two main considerations that the Board must assess are those set out in s. 96(2) of the *Ontario Energy Board Act* (the "Act"), the Board must also apply its broad statutory objectives and will therefore be "guided by the objective of

facilitating the rational expansion of transmission and distribution systems". With respect, the APAI's position on the scope of the test to be applied by the Board is not correct.

First, we note that the specific objective cited by the APAI of facilitating the "rational expansion of transmission and distribution systems" is found in section 2 of the Act, which relates to the Board's objectives with respect to gas. The Board's objectives with respect to electricity are, instead, set out in section 1 of the Act.

Second, the relevant test for the Board in the context of an application for leave to construct under s. 92 of the Act is set out in s. 96 of the Act. Section 96 provides that the Board shall apply a public interest test. However, the scope of the public interest test to be applied by the Board is limited by subsection 96(2), which provides that "in an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line . . . is in the public interest: (1) the interests of consumers with respect to prices and the reliability and quality of electricity service; and (2) where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources" (emphasis added).

The Board recently considered the scope of the test under ss. 96(2) in the context of an expropriation proceeding. At p. 8 of its February 7, 2014 Procedural Order No. 3 and Decision on Issues in EB-2013-0268, the Board clarified the difference in the scope of the public interest test in a leave to construct proceeding relative to the scope of the public interest test on an expropriation proceeding pursuant to s. 99 of the Act. The Board stated:

> In both section 92 and in section 99 the Board must apply a public interest test in deciding a leave to construct application, and subsequently, an expropriation of lands. However, public interest is specifically defined for the purposes of section 92 by subsection 96(2) and that definition is a restrictive one. The Board is constrained in applying a public interest test for the purposes of deciding whether to grant a leave to construct order pursuant to section 92. (emphasis added)

As such, the Act specifically requires the Board to consider only the factors set out in s. 96(2). Contrary to the APAI's suggestion, the Board is not permitted to apply or consider the broader statutory objectives relating to electricity as set out in s. 1 of the Act. While the APAI's arguments and evidence may relate to certain of the Board's broad statutory objectives, this does not make them relevant to the proceeding. Rather, relevance must be considered only in relation to the limited scope of the public interest test defined in s. 96(2) of the Act. In this light, the issues raised and the materials filed by the APAI are largely out of scope.

(b) Additional Factual Evidence

The APAI argues that an oral hearing will allow it to introduce and explain additional factual evidence, including from (i) Dr. John Harrison on the economic viability of the project and its impact on the cost, reliability and quality of electricity service; (ii) Denise Wolfe on the inconsistency of the project with the laws and policies of the Government of Ontario, including in particular the Green Energy Act and the Species at Risk Act; and (iii) Dr. Ross McKitrick on the impact of the project on electricity prices in Ontario. In addition, the APAI indicates that it may seek to introduce evidence from representatives of Hydro One Networks Inc. ("HONI") and/or the Independent Electricity System Operator (the "IESO") concerning the cost and market impact of the project.

Dr. Harrison is Vice President of the APAI and, in his personal capacity, also filed a letter of comment on December 12, 2014. Section 12A.02 of the Board's *Rules of Practice and Procedure* (the "Rules") provides that an expert is required to assist the Board impartially by giving evidence that is fair and objective. Given Dr. Harrison's role with the APAI and the views he expressed in his letter of comment, Dr. Harrison would not be in a position to provide expert evidence in this proceeding. Moreover, the APAI indicates that the focus for Dr. Harrison's evidence would be in respect of the economic viability of the project. The only project that is the subject of the application that is before the Board is Windlectric's transmission project, the cost of which will be entirely Windlectric's responsibility. Arguments relating to the economic viability of the related generation facilities are outside the scope of the proceeding. As (i) the cost of the transmission project will not impact uniform transmission rates in Ontario, (ii) the proposed transmission facilities will only be used to convey power from Windlectric's generation facilities to the provincial grid and (iii) the Applicant has both a final System Impact Assessment and a final Customer Impact Assessment, it is unlikely that the Board requires any further evidence from Dr. Harrison to reach a decision.

Denise Wolfe is a member of the Board of Directors of the APAI. While her professional qualifications are unclear, it appears based on the materials filed that the focus of her work has been in relation biodiversity and species at risk. Given Ms. Wolfe's role with the APAI, Ms. Wolfe would not be in a position to provide impartial expert evidence in this proceeding. Moreover, the APAI indicates that the focus of Ms. Wolfe's evidence would be on the inconsistency of the project with the laws and policies of the Government of Ontario, including in particular the *Green Energy Act* and the *Species at Risk Act*. This area of inquiry would not be of sufficient probative value to the Board to warrant an oral hearing. Under s. 96(2) of the Act, the Board's concern is whether the proposed transmission facilities promote the use of renewable energy sources consistent with provincial government policies. Given that the transmission facilities would enable connection of a wind generation facility that has a contract under the Feed-in Tariff program established pursuant to the *Green Energy Act*, further evidence on this issue would be of questionable value. Moreover, issues relating to the Applicant's ability to comply with other regulatory requirements, such as with respect to environmental or species protection matters, are outside the Board's jurisdiction and are normally addressed by making leave to construct conditional on compliance with other laws and regulatory requirements.

Dr. McKitrick is the co-author of a report which was provided as an attachment to a letter of comment from William Barrett. The APAI re-filed a copy of Mr. Barrett's letter of comment, together with the report, on January 19, 2015. As the APAI filed no narrative to support its filing, it is not clear as to how the APAI intends to rely on the report. However, we note from the title of the report ("What Goes Up . . . Ontario's Soaring Electricity Prices and How to Get Them Down") and from the Letter that the focus of Dr. McKitrick's evidence would be on the impact of the Windlectric project on electricity prices in Ontario. As noted above, the project that is the subject of the application that is before the Board is Windlectric's transmission project, the cost of which will be borne entirely by the Applicant and will not impact transmission rates in Ontario. Windlectric's generation facilities are not relevant to the proceeding. The price of electricity is also not relevant to the proceeding. As indicated by the Board at p. 4 of its May 6, 2014 Decision and Order in EB-2013-0361, "in considering the interests of consumers with respect to prices under subsection 96(2) of the Act the Board limits its review to the direct price impact of the Transmission Facilities. Accordingly, the issue raised in a letter of comment concerning the impact of renewable generation on electricity prices in general, and the impact of the Government of Ontario's renewable energy policy on electricity prices, are not within the scope of this proceeding."

With respect to the APAI's indication that it may seek to introduce evidence from representatives of HONI and/or the IESO concerning the cost and market impact of the project, we note that the APAI has not filed any written evidence from HONI or the IESO to date so it would not be appropriate to introduce new evidence from them at an oral hearing. We further note that the issues of "cost and market impacts of the Windlectric project" have not been clearly articulated and appear to be related to the generation facilities or otherwise outside the scope of the proceeding. As such, it does not appear that the Board requires such evidence to reach a decision.

(c) Procedural Fairness and Natural Justice

The APAI argues that an oral hearing is needed to ensure that principles of procedural fairness and natural justice are upheld. Windlectric strongly disagrees.

Rule 32 provides that the Board may in any proceeding hold an oral, electronic or written hearing, subject to the *Statutory Powers Procedures Act* (the "SPPA") and the statute under which the proceeding arises. The OEB Act does not require the Board to hold an oral hearing to consider an application under s. 92. Section 5.1 of the SPPA provides that the Board may hold a written hearing in a proceeding unless a party satisfies the Board that there is good reason for not doing so.[1] As such, the matter is within the Board's discretion. In considering whether there is good reason for holding an oral hearing, the Board must make its determination having regard to the scope of its jurisdiction in the proceeding.

A number of years following the *Baker* decision referenced in the Letter, the Board directed a review of its decision-making processes, including in particular its hearing practices and procedures, to consider how those practices and procedures could be improved while respecting the need for transparency, openness and the duty of fairness as established in *Baker* and other jurisprudence. The review was prepared by the Board's General Counsel at the time, with assistance from two esteemed experts in the area of administrative law, and resulted in a report entitled "A Report with Respect to Decision-Making Processes at the OEB (September 2006)".[2] The Board's practices and procedures, as considered in the report, are consistent with the duty of fairness and principles of natural justice.

The Board's written hearing process is robust and well established. It provides all parties with the opportunity to file written evidence, to ask questions or seek clarification on the written evidence filed by all other parties through the interrogatory process, to have access to all materials that will be considered by the Board in making its decision and to file written submissions. These steps provide interested and affected persons with the opportunity to express their views and to participate in the decision-making process in a meaningful way. Having regard to the scope of the proceeding, the nature of the decision being made, the statutory scheme and the procedural approaches available to the Board, it is entirely appropriate for the Board to conduct the proceeding in writing using its established practices and procedures.

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[1] It is notable that s. 5.1 of the SPPA requires that a "party" must satisfy the Board that there is good reason for not holding a written hearing. This is consistent with Windlectric's argument, in its January 7, 2015 letter, that the Board should not give weight to the requests for an oral hearing from persons who filed letters of comment or observer request letters as those persons are not parties to the proceeding.

[2] http://www.ontarioenergyboard.ca/documents/abouttheoeb/corpinfo_reports/decision_making_processes_report_270906.pdf

(d) Opportunity for Oral Comments

On p. 4 of the Letter, the APAI argues that either at an oral hearing, or if no oral hearing is held, certain of its representatives or members should be given an opportunity to provide oral comments on the record in accordance with Rule 23.05. Rule 23.04 provides that the Board may make arrangements to receive oral comment on the record. Rule 23.05 provides that a person who makes an oral comment shall not do so under oath or affirmation and shall not be subject to cross-examination, unless the Board directs otherwise.

In the Applicant's view, there is no compelling reason for the Board to provide an opportunity for oral comments from APAI representatives or members. The Board has already received approximately 25 letters of comment, as well as approximately 30 observer status request letters, some of which contain additional comments. Many of these letters have been submitted by APAI representatives and members. Given the timing and language in the letters, it appears that they were prepared with a high level of coordination by APAI. In addition, there is a high degree of repetition among the letters in the comments that have been submitted, which indicates that it is unlikely that any new material issues would be raised in further comments. Moreover, as the APAI is an intervenor in the proceeding, which status gives it the ability to participate actively in representing the interests of its organization and its constituent members, it would be procedurally inefficient and of limited value if the Board were to also provide an opportunity for individual members of the APAI to file or make oral comments. Rule 23.01 provides that comments may be filed by persons who do not wish to be a party in a proceeding. To allow a person to file or make oral comments and to also have their interests represented by an organization in which they are a member would be duplicative and a poor use of Board resources.

For the foregoing reasons, and the reasons set out in its letters of November 20, 2014 and January 7, 2015, Windlectric remains of the view that an oral hearing would not be of sufficient probative value to warrant its conduct and that the Board does not require additional factual evidence, relevant to its jurisdiction, to reach a decision.

Yours truly,

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cc: Mr. A. Tsopelas, Windlectric Inc.
Intervenors