



EB-2014-0300

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
Windlectric Inc. for an Order or Orders pursuant to
sections 92, 97 and 101 of the Act granting leave to
construct transmission facilities in Loyalist Township
in the County of Lennox and Addington.

PROCEDURAL ORDER NO. 3

February 24, 2015

On September 22, 2014, Windlectric Inc. (Windlectric) filed an application with the Ontario Energy Board (OEB) under sections 92, 97 and 101 of the Act for leave to construct approximately 5.9 kilometers of transmission line and associated facilities to connect its proposed Amherst Island wind generation project to an existing Hydro One Networks Inc. transmission line.

Evidence and Interrogatory Schedules

On January 8, 2015, the OEB issued Procedural Order No. 2 in which it set out the deadlines for the submissions of intervenor evidence (January 19, 2015), interrogatories (January 29, 2015) on this evidence and responses to interrogatories (February 12, 2015). Windlectric and OEB staff submitted interrogatories on APAI's evidence on January 29, 2015, covering evidence filed to and including January 26, 2015.

On February 8, 2015, APAI filed a letter requesting an extension of time to file interrogatory responses. The OEB accepted the request and extended the deadline to February 20, 2015.

APAI asked the OEB in correspondence dated January 19, 2015 to permit it to add to its evidence after the January 19 deadline. APAI filed a substantial amount of additional evidence on January 25, 26, 28 and 29 and February 2nd. In a letter to the OEB dated February 9, 2015 Windlectric objected to this late filing. The OEB accepts on the record of the proceeding the evidence filed by APAI to and including February 2, 2015, approximately 2 weeks after the January 19 deadline. The OEB will not accept on the record any further evidence from APAI.

The OEB will permit Windlectric and OEB staff to file interrogatories on APAI's evidence filed after January 26, 2015 in accordance with the schedule below.

Cost Eligibility Request by APAI

In a letter to the OEB dated January 21, 2015, APAI requested eligibility for costs. Windlectric indicated that it does not object to APAI's request for cost eligibility if such approval would not delay the proceeding.

The OEB hereby approves APAI's request for cost eligibility. The OEB notes that the types of costs that are normally eligible for recovery are described in the OEB's *Practice Direction on Cost Awards*¹. For example, costs for counsel and consultants are generally recoverable, but costs for time spent directly by an intervenor are generally not recoverable.

Confidential Documentation

In its correspondence to the OEB of January 19, 2015, APAI requested access to landowner agreements that would have been filed in confidence. APAI indicated that it had a particular interest in "the nature of the landowner's concerns with respect to the project substation" and referenced Windlectric's response to OEB staff interrogatory # 2.

The OEB notes that the response to OEB staff interrogatory # 2 does not contain any information filed in confidence and also that Windlectric filed forms of land agreement

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<http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Applications+Before+the+Board/Intervenor+Cost+Awards>

that are not confidential².

The only material for which Windlectric has claimed confidentiality is personal information of directly affected landowners, contained in the Landowner Line List³, which was filed in confidence in its entirety on September 19, 2014. On February 11, 2015, Windlectric filed, in accordance with Section 4.3 of the OEB's *Practice Direction on Confidential Filings*, a redacted version of the Landowner Line List.

The OEB notes that where confidential material is filed, parties may, access the confidential material as set out in Section 6.1 of the OEB's *Practice Direction on Confidential Filings*⁴. Relevant portions of the *Practice Direction* are reproduced in Appendix A.

The redactions contained in Windlectric's documentation of February 11, 2015 shall remain confidential as they contain personal information which must, as outlined in Section 4.3 of the OEB's *Practice Direction on Confidential Filings*, stay off the record in accordance with the Freedom of Information and Protection of Privacy Act (FIPPA).

Form of Hearing

APAI has requested that the OEB hold an oral hearing. A number of persons who are not intervenors but have filed letters of comment have also made this request.

APAI essentially submits that the OEB should hold an oral hearing so that existing evidence can be better understood and tested and APAI can provide new evidence; because the OEB decision will impact a broad range of individuals and to give APAI what it views as meaningful participation.

APAI has requested that if the OEB decides not to hold an oral hearing, certain APAI members be permitted to provide oral comments on the record. APAI submits that this is contemplated under Rule 23.05 of the OEB *Rules of Practice and Procedure*.

² Appendices A, B, C, and D of Exhibit E, Tab 1, Schedule 2 of the Windlectric evidence.

³ Appendix A of Exhibit E, Tab 1, Schedule 1 of the Windlectric evidence.

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<http://www.ontarioenergyboard.ca/OEB/Industry/Rules+and+Requirements/Rules+Codes+Guidelines+and+Forms#electricity>

Windlectric essentially submits that there should not be an oral hearing because most requests for an oral hearing were filed after the deadline or by persons who are not intervenors; because a written hearing is consistent with OEB past practice; and because the evidence APAI proposes to introduce at an oral hearing is either outside the scope of this proceeding or of little probative value.

Windlectric submits that if the OEB decides not to hold an oral hearing, it should deny APAI's request to make oral comments. It submits that this would not add any new information, and that Rule 23.05 is only intended for persons who are not parties to the proceeding.

In deciding whether to hold an oral hearing, the OEB is governed by the rules of natural justice and procedural fairness, which require that a party be allowed to know the case against it and to state its case. It is also governed by subsection 5.1(2) of the *Statutory Powers Procedures Act*⁵, which provides that a tribunal "shall not hold a written hearing if a party satisfies the tribunal that there is good reason for not doing so".

Within these parameters, the OEB must decide whether a written or oral hearing is appropriate. The OEB does not consider that its past practice in similar proceedings is determinative. The question the OEB must consider is what type of hearing is appropriate in the specific circumstances of this proceeding.

To this point, the written evidence and interrogatory processes in this proceeding have given APAI a full opportunity to participate in a way that enables it to know the case against it and state its own case. The OEB notes that it has granted extra time latitude requested by APAI with this requirement in mind. The OEB also notes that the material filed by APAI has provided a thorough explanation of its view of the impact of its decision on the range of individuals affected.

Considering the evidence that has been filed in this case, the OEB does not consider that an oral hearing is required in order to understand the evidence better, fill in any gaps in the evidence, or test the evidence through cross-examination. The OEB notes that most of the evidence submitted by APAI concerns matters outside the OEB

⁵ http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s22_e.htm

mandate in this proceeding as established by sections 92 and 96 of the Act. The same is true of most of the new evidence that APAI proposes to introduce in an oral hearing.

Taking the above factors into account, APAI has not satisfied the OEB that there is a good reason for not holding a written hearing. Accordingly, the proceeding will go forward as a written hearing. In this process, written argument by the parties will enable APAI to continue to have a full opportunity to know the case against it and state its own case.

It is disappointing that on several occasions APAI submitted arguments concerning the type of hearing after the OEB deadline. However, given the overriding importance of holding a fair hearing, the OEB has considered both the late arguments by APAI and the subsequent responses by Windlectric in coming to its decision.

The OEB agrees with Windlectric that submissions on this issue by persons who are not intervenors are not relevant, since the OEB decision will not have any impact on their ability to participate in the proceeding.

The OEB agrees with Windlectric that Rule 23.05 is intended for persons who are not parties to the proceeding, not for representatives of intervenors. Rule 23 is entitled “Public Comment” and Rule 23.01 makes it clear that the intent of Rule 23 is to establish a framework for persons who are not parties. Rule 23.05 is part of this framework. The OEB therefore denies the request by APAI for persons to make oral comments.

Agreements Offered to Landowners

APAI has raised issues concerning the agreements offered by Windlectric to landowners, asking when in the proceeding these issues would be addressed. The parties will have the opportunity to address these issues in their final arguments, taking into account the parameters in the OEB filing guidelines⁶.

The OEB considers it necessary to make provision for the following matters.

⁶ Filing Requirements for Transmission and Distribution Applications, Chapter 4, Section 4.3.5, Exhibit E, Land Matters
<http://www.ontarioenergyboard.ca/OEB/Industry/Rules+and+Requirements/Rules+Codes+Guidelines+and+Forms#electricity>

THE OEB ORDERS THAT:

1. Any party seeking information or material concerning the evidence filed by APAI on and after January 26, 2015, shall request it by way of written interrogatories filed with the OEB and served on all other parties, on or before **February 27, 2015**.
2. APAI shall file with the OEB complete written responses to all interrogatories and copy them to all parties, on or before **March 9, 2015**.
3. Windlectric shall file its argument-in-chief, if any, with the OEB and deliver it to all parties on or before **March 16, 2015**.
4. Intervenor and OEB staff shall file any argument with the OEB, and copy all parties, on or before **March 27, 2015**.
5. Windlectric shall file any reply submission with the OEB and copy all parties on or before **April 3, 2015**.

All filings to the OEB must quote the file number, EB-2014-0300 and be made electronically in searchable / unrestricted PDF format through the OEB's web portal at www.pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD 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 OEB Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Leïla Azaïez at Leila.Azaiez@ontarioenergyboard.ca.

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 24, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

Relevant Portions of the Board's *Practice Direction on Confidential Filings*

6. ARRANGEMENTS AS TO CONFIDENTIALITY

Where the Board has agreed to a request for confidentiality, the confidential information will not be placed on the public record. Representatives of parties to the proceeding will generally be given access to the confidential information provided that suitable arrangements as to confidentiality are made, although the Board may limit access to confidential information to those parties that the Board has determined require access to the confidential information in order to present their cases. This Part sets out the principal arrangements that the Board will use in allowing limited and conditional access to confidential information by representatives of parties.

The processes set out in this Part require that parties file a Declaration and Undertaking with the Board. Parties to a proceeding will be notified when the Board has accepted a Declaration and Undertaking from a person. Parties should not independently serve a Declaration and Undertaking on other parties.

The Board considers violations of a Declaration and Undertaking given to the Board under this Part to be a matter of very serious concern. Such violations can be, and will continue to be, subject to sanctions imposed by the Board. In appropriate cases, the Board may also refuse to accept further Declaration and Undertakings from persons whose future compliance with a Declaration and Undertaking is in question.

6.1 Declaration and Undertaking

6.1.1. The Board may determine that confidential information should, in whole or in part, be disclosed to one or more persons that have signed the form of Declaration and Undertaking attached to this Practice Direction. The Declaration and Undertaking is a binding commitment by the person: (i) not to disclose the confidential information except as permitted by the Board; (ii) to treat the confidential information in confidence; (iii) to return or destroy the confidential information following completion of the proceeding; and (iv) in the case of confidential information in electronic media, to expunge the confidential information from all electronic apparatus and data storage media under the person's direction or control, and to continue to abide by the terms of the Declaration and Undertaking in relation to such confidential information to the extent that it subsists in an electronic form and cannot reasonably be expunged in a manner that ensures that it cannot be retrieved. A signed Declaration and Undertaking must be filed with the Board and will be placed on the public record.

6.1.2. Subject to section 6.1.4, the Board will, except where there are compelling reasons for not doing so, accept a Declaration and Undertaking from the following:

- (a) counsel for a party; and
- (b) an expert or consultant for a party.

As a general rule, such counsel, expert or consultant cannot be a director or employee of a party.

6.1.3. Subject to section 6.1.4, the Board may accept a Declaration and Undertaking from other persons in appropriate cases. In such a case, a modified version of the form of Declaration and Undertaking will be made available to such person.

6.1.4 The Board shall notify the party that filed the confidential information that would be the subject-matter of a Declaration and Undertaking of the persons from whom a Declaration and Undertaking will be accepted. The party shall have an opportunity to object to the acceptance of a Declaration and Undertaking from such person in the manner and within the time specified by the Board. The person to whom the objection relates shall have an opportunity to reply to the objection in the manner and within the time specified by the Board. The Board will then decide whether it will accept a Declaration and Undertaking from such person and may, as a condition of acceptance of the Declaration and Undertaking, impose such further conditions in relation to that person's access to the confidential information as the Board considers appropriate. Where the Board accepts a Declaration and Undertaking from a person, the Board will notify the other parties to the proceeding or direct that the other parties be notified accordingly. A person should not serve a Declaration and Undertaking on other parties unless directed by the Board to do so. A party is not required to serve confidential information on a person until such time as the party has been notified that the Board has accepted a Declaration and Undertaking from that person.

6.1.5. Where the Board determines that confidential information should be disclosed to one or more persons that have signed a Declaration and Undertaking, the Board may act as the conduit for the service of confidential information on such persons. In such cases, the confidential information need only be filed with the Board Secretary (in the appropriate number of copies), and the Board Secretary will attend to the distribution of the confidential information to persons that have signed a Declaration and Undertaking.

6.1.6. In accordance with the terms of the Declaration and Undertaking, confidential information must either be destroyed or expunged (as applicable) or returned to the Board Secretary for destruction promptly following the end of the proceeding for destruction. A person that chooses to destroy or expunge confidential information must file with the Board Secretary the form of Certification of Destruction attached to this Practice Direction.