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VIA EMAIL & COURIER

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4
Email: boardsec@ontarioenergyboard.ca

Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

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

Final Written Argument of the Intervenor, Association to Protect Amherst Island

We are counsel to the Association to Protect Amherst Island (“APAI”), which has been granted intervenor status in this proceedings.

Please find enclosed APAI’s final written argument.

Yours truly,



Justin Safayeni
Encl.

c: Jonathan Myers (Torys LLP)
Maia Chase (IESO)
Laurie Kilpatrick (APAI)
Paul Le Vay (Stockwoods LLP)

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Windlectric
Inc. for an Order or Orders pursuant to Section 92 of the
Ontario Energy Board Act, 1998 (as amended) granting leave to
construct transmission facilities in Loyalist Township in the
County of Lennox and Addington, Ontario.

**WRITTEN ARGUMENT OF THE INTERVENOR,
THE ASSOCIATION TO PROTECT AMHERST ISLAND**

PART I - OVERVIEW

1. The intervenor, the Association to Protect Amherst Island (“APAI”), submits that this application for leave to construct should be dismissed on the basis that:

- (a) the Applicant’s form of land agreements fail to meet the statutory prerequisites set out in s. 97 of the *Ontario Energy Board Act, 1998*, S.O. 1998 c. 15, sched. B (the “Act”);
- (b) the Proposed Transmission Facilities¹ do not serve the interests of consumers with respect to price, within the meaning of s. 96(2) of the *Act*;
- (c) the Applicant has not demonstrated project need in respect of the Proposed Transmission Facilities, or the larger Generation Project;
- (d) the Applicant has not established that the Proposed Transmission Facilities serve the interests of consumers with respect to the reliability and quality of electricity service, within the meaning of s. 96(2) of the *Act*;
- (e) the Proposed Transmission Facilities are not consistent with the policies of the Government of Ontario, within the meaning of s. 96(2) of the *Act*; and
- (f) the Applicant has not secured land rights to a vital piece of property, which is required for the Project Substation, and on which the current project design depends.

¹ For ease of reference, APAI will use the same defined terms as set out in the Applicant’s Argument-in-Chief

PART II - SUBMISSIONS

A. Background: APAI's interest and involvement in this application

2. APAI is a non-profit, volunteer-led, community organization of approximately 350 members, the majority of whom are landowners on Amherst Island.

3. On November 17, 2014, APAI requested intervenor status in these proceedings, which was granted by the Board in its Procedural Order No. 1. Since then, APAI participated in these proceedings by providing evidence, answering interrogatories, and asking interrogatories. Although APAI was not represented by counsel throughout most of these proceedings, after it was granted cost eligibility by the Board in its Procedural Order No. 3, APAI retained external counsel for the purpose of assisting with these written closing submissions.

4. As can be seen from the dozens of letters of comment from Amherst Island residents, and the detailed evidence and questions provided by APAI to date, the outcome of this application matters a great deal to Island residents who will be directly impacted by the Proposed Transmission Facilities and the Generation Project. Although APAI recognizes that this Board will only consider certain factors within the scope of its decision-making under in a leave to construct application under s. 92 of the *Act*, APAI submits that the significant consequences of granting leave calls for the Applicant to be strictly held to meeting its burden and satisfying the requirements under the *Act*.

B. The Applicant's forms of land agreements do not comply with the *Act* and the Board's *Filing Requirements*

5. The Applicant's forms of lease and easement agreements do not comply with the Board's requirements. On this basis alone, this leave to construct application must be dismissed.

6. Section 97 of the *Act* states: "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" (emphasis added). Section 4.3.5.5 of the Board's *Filing Requirements*

for Electricity Transmission Applications (as amended July 31, 2014) states that “Appendix ‘A’ sets out the types of clauses which must be included in an agreement” (emphasis added). Appendix ‘A’ of the *Filing Requirements* goes on to specify that Lease or Easement agreements must include (at p 29):

5 *Decommissioning*

A decommission clause should set out that the energy company will be responsible to cover the cost of decommissioning the facilities and restoring any damage done to the easement lands. This clause should also have specific procedures for the decommissioning process.

6. *Independent Legal Advice (“ILA”)*

Provision must be made that both parties have had the option to obtain legal advice. Note in some cases before the Board, the agreement has provided that the ILA for the landowner would be paid for by the utility.

7. The Applicant’s forms of lease and easement agreements (found at Tab E-1-2 of the leave to construct application) do not include any provision pertaining to ILA. Nor do they include any clause setting out the Applicant’s responsibility for, or the process of, decommissioning. The latter omission is particularly concerning given that the form of easement agreements include an abandonment clause that gives the Applicant “the right to abandon the electric transmission facilities, or any part thereof... but nothing contained herein should require the Transferee to [remove the electric transmission facilities]”.² APAI has raised this issue and has not received an adequate explanation.³ Without clear language around decommissioning, this language could be interpreted to relieve the Applicant from its purported responsibilities with respect to decommissioning.

8. Reading s. 97 of the *Act* together with the Board’s *Filing Requirements* leads to only one conclusion: leave to construct cannot be granted in this case unless and until the Applicant’s

² **Windlectric Application for Leave to Construct (“Windlectric LTC”)**, Tab E-1-2, Appendix “C” at p 194 (section 15) and Appendix “D” at p 206 (section 15)

³ See **APAI Letter to Windlectric dated February 12, 2015** (available at: APAI_LETTER_Windlectric_Substation_20150212) ; **APAI Letter to Windlectric dated February 20, 2015** (available at: APAI_IRR-EVD_BOARD_STAFF_RESPONSE LETTER_20150220)

forms of land agreements comply with the Board's requirements by including clauses pertaining to ILA and decommissioning. In these circumstances, the Board does not have any residual discretion under the *Act* to approve an application on terms or conditions. Accordingly, leave to construct must be denied.

C. The Proposed Transmission Facilities do not serve the interests of consumers with respect to price

9. The Applicant asserts that there is no adverse impact on the interests of consumers with respect to prices, since “the costs of the proposed transmission facilities, including their interconnection to the grid, will be borne entirely by the Applicant”.⁴ However, the evidence raises serious doubts as to the Applicant's ability to bear the costs of building and decommissioning the Generation Project (including the Proposed Transmission Facilities) – particularly since the project is not financially viable. In these circumstances, leave to construct ought to be denied on the basis that the Applicant has not established that it is able to protect consumers from the costs associated with the project. In the alternative, leave should only be granted on conditions that will ensure the interests of consumers are adequately protected.

10. As part of the public interest considerations to be taken into account under s. 96(2) of the *Act*, this Board must consider “the interests of consumers with respect to prices”. This includes determining whether the costs associated with the Generation Project (and specifically the Proposed Transmission Facilities that form part of that project) will be borne by the Applicant or be passed on to consumers. Consistent with the Board's approach in other leave to construct applications, it is appropriate to examine the financial viability of the Generation Project in order to assess whether there is likely to be an adverse impact on prices for consumers.⁵

11. In this case, one major reason for doubting the Applicant's assurances is the fact that it has very limited resources and experience: it is a corporation created for the purpose of this project⁶, with no evidence as to its financial assets or staff, and no history of building or

⁴ **Windlectric Argument in Chief dated March 16, 2015 (“Windlectric AIC”)** at para 3(a)

⁵ See, for example, *Re Union Gas Limited*, EB-2008-0024, Decision and Order dated June 16, 2008 at pp 5-6

⁶ **Windlectric Response to APAI Interrogatories**, Interrogatory 9, Question 2 at p 28 of 35

operating similar projects.⁷ Yet building the Generation Project is estimated to cost approximately \$260 million (not including the cost of decommissioning, which is discussed further below).⁸ Although APAI recognizes that the Applicant is a wholly-owned subsidiary of a larger corporation (Algonquin Power Co.), this does not offer adequate assurances that the Applicant will have the resources necessary to cover the costs of building and decommissioning the project – not to mention the costs associated with any accidents or emergencies that may arise during or after construction. Indeed, the corporate arrangement has specifically been structured so that the Applicant, and not its parent company, is liable for all of these costs. In the event the Applicant is unable to pay, it is inevitable that the loss will fall on the residents of Amherst Island, and on the public at large.

12. The costs of decommissioning the Generation Project heighten APAI's concern that the project will have a negative impact on consumer prices. Although the Applicant has not included such provisions in its form of land agreements, it has stated elsewhere that it bears responsibility for the costs of decommissioning the transmission facilities (assuming it still owns them at the time of decommissioning).⁹ However, the Applicant appears to have vastly underestimated these costs. Based on the detailed analysis of Dr. John Harrison, Professor Emeritus of Physics at Queen's University¹⁰, the net cost of decommissioning will be approximately \$70 million (taking into account scrap value), bringing the total project cost up to some \$330 million.¹¹ The Applicant has not challenged Dr. Harrison's analysis in this regard, nor has it provided any evidence to support its view of the decommissioning costs. Given these costs, it is even more unlikely that the Applicant will be in a position to protect consumers' interests with respect to prices.

⁷ *Ibid.*

⁸ **APAI Responses to Board Staff Interrogatories dated February 20, 2015** ("APAI response to Staff Interrogatories"), Appendix 1 at p 33

⁹ **Windlectric AIC** at para 56

¹⁰ For a copy of Dr. Harrison's CV, see **APAI response to Staff Interrogatories** at pp 30-31

¹¹ Peter Large P. Eng. & John Harrison PhD. "**Engineering and Economic Risk Analysis of the Algonquin Power Company Amherst Island Wind Energy Generating System**" **July 2014** dated January 19, 2015 at p 2 (available at: <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/463002/view/>). *Note that given the number of individual pieces of evidence separately filed, APAI has provided hyperlinks to these documents for the Board's convenience.*

13. APAI's concerns are further exacerbated by the fact that the Generation Project is not likely to be financially viable. Dr. Harrison conducted a detailed study of the project's projected profitability and concluded that it would produce an internal rate of return of -4.5%.¹² His assumptions – including the central assumption of the project's capacity factor – are carefully researched and the underlying sources have been provided.¹³ The Applicant has not challenged Dr. Harrison's study or the assumptions underlying his conclusions. The financial viability of the project is even more precarious once one considers the fact that the Applicant's FIT Contract is almost certain to be cancelled due to the length of time required to bring the project online (as discussed further in Part II.C of these submissions, *infra*).

14. Taken together, these three factors – the high costs of the building, maintaining and decommissioning the Generation Project; the Applicant's lack of resources and experience; and the high likelihood that the project will not be financially viable – suggest that the Applicant will not be in a position to cover the costs associated with this project, and that those costs will eventually be borne by residents of Amherst Island and consumers in general.

15. APAI acknowledges that it is not the role of this Board in these proceedings to conduct an in-depth financial assessment of every applicant or every proposed project. But nor can the Board simply take the Applicant at its word in terms of its purported willingness to cover the necessary costs. Rather, the Board must be satisfied, on proper evidence, that the Applicant has the capacity and the resources to meet its commitments. APAI submits that where the evidence points to a real risk that an applicant will be unable to bear the costs of the transmission facilities, as in this case, leave to construct ought to be denied unless or until the applicant is able to address and neutralize that risk. The Applicant has failed to do so here.

16. In the alternative, and at the very least, any leave to construct ought to be conditional on the Applicant providing evidence of a fund, bond, letter of credit, or other similar arrangement that will provide an adequate assurance that sufficient funds will be available to cover the costs of decommissioning the Generation Project (\$70 million).

¹² *Ibid.*

¹³ **APAI response to Staff Interrogatories** at pp 33ff

D. The Applicant has failed to demonstrate project need for the Proposed Transmission Facilities

17. The Applicant suggests that it is not necessary to examine the issue of “project need” too closely since the costs of the Proposed Transmission Facilities are being borne by the Applicant, and that the Applicant’s evidence of its FIT Contract with the OPA is sufficient.¹⁴ As outlined above, APAI does not accept that the Applicant is in a position to bear the significant costs associated with the Generation Project, and submits that there is a real risk of an adverse impact on consumer prices. In these circumstances, the requirement to demonstrate project need is of heightened importance. The FIT Contract is not sufficient evidence of project need. Moreover, given the extraordinary delay facing the Generation Project, the FIT Contract is almost certain to be cancelled.

18. As the Applicant acknowledges, “project need” is a relevant consideration under s. 96(2) of the *Act*.¹⁵ It plays a particularly important role in cases such as the present, where consumers’ interests with respect to price are not adequately protected and thus the risk of additional costs to consumers must be justified. Even if it could be assumed that the Applicant will be able to bear the costs associated with the Generation Project (which is denied), project need is nevertheless a factor to be considered. Indeed, this Board has explained that “even in the instance where there is no adverse impact on ratepayers, the Board would be unlikely to approve a project for which there was no demonstrable need.”¹⁶

19. There is no demonstrable need here. The only evidence relied on by the Applicant to establish project need is the FIT Contract. At its highest, the FIT Contract demonstrates that at the time the agreement was reached in February 2011, the IESO was willing to offer the Applicant a fixed price for electricity under certain conditions. That is not sufficient or compelling evidence of project need. More is required to justify the risk of consumers bearing the significant costs associated with decommissioning the project in the likely event that it does not prove financially viable.

¹⁴ **Windlectric AIC** at para 15

¹⁵ *Ibid.*

¹⁶ *Re Goldcorp*, EB-2011-0106, Decision and Order dated July 20, 2011 at p 7

20. In any event, the FIT Contract cannot be relied upon as evidence of project need as it is almost certain to be cancelled. As the Applicant explains, the standard terms of the FIT Contract allow for Commercial Operation to be achieved within 18 months following the Milestone Date of Commercial Operation of “late February 2014”, meaning that Commercial Operation must be achieved by late August 2015. At that point, the IESO can and will terminate the FIT Contract, and that contract will no longer be valid or enforceable.

21. According to its Argument-in-Chief, the Applicant does not expect construction on the Proposed Transmission Facilities to even commence until February 2016, or that Commercial Operation can be achieved until the end of 2016 – well over a year after the deadline under the FIT Contract.¹⁷

22. The provincial government’s policy is to reject time extensions for FIT contracts.¹⁸ Reflecting this policy, the IESO/OPA has stated that if a Supplier misses their Milestone Date of Commercial Operation by more than 18 months “the IESO has a right to terminate the FIT Contract” and “suppliers should expect the IESO to exercise this right.”¹⁹ The IESO/OPA has demonstrated that it will, in fact, cancel FIT contracts in circumstances where the supplier has failed to meet the contractual in-service date, as it recently did for the Horizon Big Thunder Wind Park in 2014.²⁰

23. The Applicant argues that it can rely on “up to 24 months of Force Majeure” to extend the FIT Contract deadline until “as late as August 2017.” The Applicant contends that “all delays experienced under the REA process or which are anticipated as a result of the APAI’s planned appeal to the Environmental Review Tribunal” fall into the category of Force Majeure.²¹

¹⁷ **Windlectric AIC** at paras 51-53

¹⁸ **Statement of MPP Laurie Scott dated February 18, 2014** (available at: [APAI_IntrEvidence_Admin_20140218](#) Extract from Legislative Assembly of Ontario Hansard 20150119.)

¹⁹ **Letter from J. Butler to APAI dated January 26, 2015** (available at: <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/466929/view/>)

²⁰ **APAI response to Staff Interrogatories** at pp 8-9

²¹ **Windlectric AIC** at paras 52-53

24. APAI submits that the Applicant's position is wrong as a matter of law. As the IESO itself has made clear, the time required to complete the normal permitting and approvals process, including any appeals to the ERT (a process that takes a maximum of six months²²) or judicial reviews associated with the REA, does not constitute Force Majeure.²³ The standard terms of the relevant FIT Contract defines "any inability to obtain... license or approval of any Governmental Authority" as a category of Force Majeure (emphasis added).²⁴ But the time spent within the ordinary permitting and approvals process – particularly if approval is actually obtained at the end of the day – is not included in this definition. Nor would it make sense to consider such time to be a type of Force Majeure: it is a normal and inherent part of the process all suppliers must take into account when setting out their project timelines.

25. As a result, the Applicant cannot rely on a combination of appeals to the ERT and the Force Majeure provisions in arguing that the FIT Contract will remain valid even two years after Milestone Date for Commercial Operation.

26. Even if the Applicant and the IESO are able to reach some sort of "stand down" agreement for the six month process of an ERT appeal²⁵ – and there is no guarantee or evidence that this will occur – the Applicant has provided no explanation (let alone any evidence) as to what might justify Force Majeure for the remainder of the period between August 2015 and December 2016. Given the nature of the factors contributing to construction delay (set out in the chart below), APAI submits that the Applicant will be unable to rely on Force Majeure for anything approaching a 24 month period of delay.

²² A decision must be made within six months of the Director's decision: see s. 145.2.1(6) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 and ss. 58-59 of O. Reg. 359/09

²³ **Letter from J. Butler to APAI dated January 26, 2015** (available at: <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/466929/view/>)

²⁴ Although it was requested as part of APAI's interrogatories, Windlectric did not provide a copy of its FIT Contract. However, the standard FIT Contract terms during the relevant period (February 2011) are available here: <http://fit.powerauthority.on.ca/program-resources/program-archives/version-1>. The Force Majeure provision is found in section 10.3.

²⁵ Although the IESO has indicated the possibility of entering into "stand down agreements" for "day to day relief for the length of the appeal" to the ERT, the IESO has also made clear that this will not occur in every case and that it has no obligation to enter into such agreements under the term of the FIT Contracts: **Letter from J. Butler to APAI dated January 26, 2015** (available at: <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/466929/view/>)

27. Moreover, and in any event, even on the improbable assumption that the Applicant is able to claim the full 24 months of Force Majeure delay (which APAI does not accept), the Applicant will still miss the latest possible deadline for Commercial Operation, which is in August 2017.

28. That is because construction of the Transmission Project and the Generation Project will take at least 24 months to complete. This 24 month timeframe for all construction is consistent with the Applicant's own previous statements in this proceeding²⁶, as well as the report of the Applicant's consultants²⁷, both of which estimate that construction will take between 18-24 months. It follows that even if the Applicant is able to begin construction in February 2016 (as per its Argument-in-Chief) – which APAI does not accept as a reasonable assumption, due to the fact that it requires dock construction²⁸ and access roads²⁹ to be built first – Commercial Operation will not occur until February 2018.

29. The Applicant's assertion to the contrary is based on a construction schedule of nine months for the Transmission Project and eight months for the Generation Project, to be conducted concurrently, such that the entire period of construction leading up to Commercial Operation will take nine months.³⁰ APAI acknowledges that applicants will normally be in the best position to provide information as to a project's construction schedule. But in this case, the Applicant's schedule, on its face, is simply not credible or tenable. Indeed, it is inconsistent with and contradicted by the Applicant's own previous statements in this proceeding and the Applicant's own consultant's report.

30. Moreover, neither the start date, nor the length of the Applicant's schedule take into account the fact that there have been "changes to the project design" of the Generation Project, which will necessitate "a modification of the application documents" in the REA process and

²⁶ **Windlectric Answers to Interrogatories from APAI**, Interrogatory 1, Question 2 (confirming an 18-24 month timeline for "the generating facilities, collector system and transmission facilities")

²⁷ **Stantec Construction Plan Report dated April 2013 (revised December 2013)** at p 2-16 (available at: http://amherstislandwindproject.com/Technical%20Documents%20Final/02_CPR/CPR_Entire-Report.pdf)

²⁸ **Windlectric AIC** at para 53

²⁹ **Stantec Construction Plan Report dated April 2013 (revised December 2013)** at pp 2-16 and 2-17 (available at: http://amherstislandwindproject.com/Technical%20Documents%20Final/02_CPR/CPR_Entire-Report.pdf)

³⁰ **Windlectric AIC** at paras 51-53

likely other regulatory processes as well.³¹ Nor do they account for a number of additional geographic and environmental factors that are bound to directly impact, and lengthen, the construction period.

31. Taking all of the relevant factors into account, APAI estimates that it will take a minimum of 24 months from the start of construction to reach the Commercial Operation date.³² Even under the ‘best case’ scenario for the Applicant – *e.g.* assuming that construction begins as planned in February 2016 despite the new project design; that the Applicant is able to secure the maximum extension possible using the Force Majeure clause; and that the construction only takes 24 months – the Applicant will still be unable to complete the project in time. The expected completion date will be February 2018, which is six months after the latest possible deadline date of August 2017.

32. Far from being based on “unreasonable assumptions” as the Applicant suggests³³, APAI’s conclusion that construction will take at least 24 months is based on a number of important factors that are supported by the evidence and have never been seriously challenged or rebutted. More specifically, the factors that the Applicant has failed to consider, either adequately or at all, in reaching its own construction estimates (including the estimates of 18-24 months set out in its answers to interrogatories and in its consultant’s report) include but are not limited to the following³⁴:

³¹ **Algonquin Power 2014 Q4 Report** at p 27 (available at: <http://investors.algonquinpower.com/Cache/1500069530.PDF?Y=&O=PDF&D=&FID=150>). This may be why the Applicant references a “final project design” in its AIC (see para 38) and LTC (see Tab E-1-1 at p 1 of 12)

³² See **APAI Project Attachment 1** (available at: <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/466936/view/>); **APAI Project Summary** (available at: <http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/466937/view/>)

³³ **AIC** at para 53

³⁴ To be clear, for the purposes of these proceedings, APAI relies on these factors not as stand-alone reasons for denying leave to construct, but as factors that will impact the construction schedule and, in turn, the cancellation of the FIT Contract

Factor contributing to construction restrictions	Area	Period of impact
Habitat of threatened and endangered species. APAI expects that if/when an REA is issued, and assuming the Applicant receives the Overall Benefit Permits (“OBP”) it applied for from the Ministry of Natural Resources and Forestry (“MNRF”), there will be restrictions on the construction activities that can be undertaken during breeding seasons of threatened and endangered species (specifically, the Bobolink, Eastern Meadowlark and Eastern Whip-poor-will.) ³⁵	Land	4-4½ months (April-mid-August), annually ³⁶
Habitat of other species-at-risk. There are additional species for which the Applicant has failed to request an OBP, including the Blanding’s Turtle. APAI has well-documented evidence of the Blanding’s Turtle being sighted on the Island ³⁷ , and intends to have the MNRF reconsider its decision not to require an OBP in respect of the turtle. It should be noted that the Applicant’s own report on the Blanding’s Turtle has been roundly criticized. ³⁸	Land	6 months (May-September), annually ³⁹
Impact on fish species. In 2014, MNRF conducted an environmental assessment for the construction of new end loading dock terminals for Amherst Island and on the mainland, and concluded that construction in the water at the dock sites would be restricted for three months from April to June. ⁴⁰ It is reasonable to expect that similar restrictions will apply to aspects of the Applicant’s construction schedule, including dock building, cable landing areas, and work on the	Lake	3 months (April-June), annually ⁴¹

³⁵ APAI requested such restrictions: see **APAI Letter to Minister of Natural Resources and Forestry (“MNRF”) dated November 29, 2014** at pp 4-8 (available at: [APAI IntrEvidence Admin APAI to MNR 2014.11.30 re Windelectric Failure to Comply Natural Heritage Assessment pg 4-8 20150119](#))

³⁶ This was the length of the restriction in a previous OBP involving the same animals: see **Report from D. Wolfe dated January 25, 2015 re Construction Windows (“Construction Windows Report”)** at pp 1-3 (available at: [APAI EV 2 Construction Windows 20150125](#))

³⁷ Blanding’s Turtle Sightings on Amherst Island, 2013-2014 (available at: [APAI EV 2 Turtle Map 20150125](#))

³⁸ See, for example: **Beaudry, Dr. Frederic, Comments on Amherst Island Wind Project EBR 012-0774**, March 2, 2014 (accessible at: [APAI IRR EVD Board Staff 2014.03.02 Beaudry to Edwards re Blandings Turtle 20150220](#)); Canada, **Re: EBR Registry Number: 012-0774 – Approval for a renewable energy project - EPAs.47.3(1)** Windelectric Inc., Amherst Island Wind Energy Project at pp 11-13 (accessible at: [APAI IRR EVD Board Staff 2013.03.08 Nature Canada and Ontario Nature Comment and Position on AI wind project 20150220](#)); **Cataraqui Conservation Authority Comments on the Proposed Amherst Island Wind Energy Project**, Environmental Registry Posting 012-0774 (available at: [APAI IRR EVD Board Staff 2014.02.27 CRCA AIWEP EBR 012-0774 Comments FINAL 20150220](#))

³⁹ **Construction Windows Report** at pp 1-3 (available at: [APAI EV 2 Construction Windows 20150125](#))

⁴⁰ **Ministry of Natural Resources, Amherst Island Ferry Terminals Study dated January 2014** at pp 19-21 (available at: [APAI IntrEvidence Admin MI Island Dock Study Schedule Fish 20150119](#))

⁴¹ *Ibid.*

Factor contributing to construction restrictions	Area	Period of impact
submarine cable.		
<i>Freezing of the North Channel.</i> The Bay of Quinte (North Channel) freezes over each winter. There is no ice-breaker and the ferry route is kept open with the help of a bubbler system located at the docks. It is very unlikely that the Applicant will be able to keep barges running when the Island is iced in.	Lake	3 months (mid-January to mid-April), annually
<i>Transportation restrictions: ferry.</i> Until construction of the two construction docks is complete, the Applicant will need to use the Amherst Island's only ferry, the side-loading Frontenac II. ⁴² Side loading ferries cannot accommodate oversized construction vehicles or equipment, which is bound to result in additional delays and complications	Lake / dock	Until construction docks are built
<i>Transportation restrictions: roads.</i> There are half-load restrictions on the Island's 67 km road network. These restrictions are real, necessary and enforced as the majority of Island roads are gravel, and very soft. ⁴³	Land	1½ months (March 15-April 30), annually

33. In addition to the causes of delay set out in this table, there will also inevitably be further delays as the Applicant continues to go through the necessary approval and permitting processes, including those from Transport Canada and the Federal Department of Fisheries and Oceans.⁴⁴ These delays may be significant. By way of example only, the REA process may well face lengthy delays as a result of the Applicant's modified project design, or in the event that the Applicant is unable to secure the required land rights for the property associated with the Project Substation (as discussed further in Part II.G, *infra*).

34. Given its inconsistency with the Applicant's own previous reports and estimates, and its failure to take important factors into account, APAI submits that the Applicant's construction schedule, as set out in its Argument-in-Chief, ought to be given little weight. Instead, the evidence – including the Applicant's own previous estimates – amply supports a construction window of at least 24 months before Commercial Operation.

⁴² **Windlectric Response to APAI Interrogatories**, Interrogatory 1, Question 4 at p 4 of 35

⁴³ Filson, Garry, Roads Manager, Amherst Island, Personal Communication with John Moolenbeek, March 2015

⁴⁴ **Windlectric Response to APAI Interrogatories**, Interrogatory 1, Question 7 at pp 4-5

35. Based on the government's clear policy not to allow extensions, the language of the FIT Contract itself (which does not provide for extensions based on time spent in permitting or approval processes), and the length of time it will take the Applicant to achieve Commercial Operation even assuming the maximum extension could and will be granted, APAI submits that the FIT Contract is almost certain to be cancelled by OPA/IESO. Accordingly, the FIT Contract cannot be relied upon to demonstrate project need. The Applicant has not relied upon any other evidence to try and establish project need, which is all the more important in a case like the present where there is a risk of adverse cost consequences for consumers.

E. The Applicant has failed to establish that the Proposed Transmission Facilities will not impact on the reliability or quality of electricity service

36. The Applicant relies on the IESO's SIA report and Hydro One's CIA report to argue that the Proposed Transmission Facilities will not have any material adverse impact on the reliability or quality of electricity service for consumers. However, these reports are now almost three years old. Unlike most other applications, where an applicant submits updated reports to the Board that reflect the latest project plans⁴⁵, the SIA and CIA reports have not been updated or revised by IESO or Hydro One since their release.

37. Pursuant to s. 96(2) of the *Act*, this Board must consider "the interests of consumers with respect to prices and the reliability and quality of electricity service." The Board has previously clarified that this assessment can extend beyond the customers of the project in question and include "consideration of impacts on neighbouring transmission and distribution electricity systems and the customers connected to them."⁴⁶

38. In order to make this assessment, this Board has requested that the Applicant obtain an update and/or further information from the IESO and Hydro One concerning the SIA and CIA

⁴⁵ See, for example, *Re Grand Band Wind LP*, EB-2013-0185, Decision and Order dated August 22, 2013 at p 5

⁴⁶ *Re Grand Renewable Wind LP*, EB-2011-0063, Decision and Order dated December 8, 2011 at p 7

reports.⁴⁷ In response, the Applicant confirms that it has made requests from IESO or Hydro One, but has yet to receive any updated reports.⁴⁸

39. APAI disagrees with the Applicant's position that "no such updates are required" because there have been no "material changes" since the information was provided to the IESO and Hydro One more than three years ago.⁴⁹ The CIA Report does not speak to "material changes", but merely states that "[s]ubsequent changes to the required modifications or the implementation plan may affect the impacts of the proposed connection identified in the Customer Impact Assessment."⁵⁰ In any event, it is clear that there have been changes to the project design⁵¹ and it ought to be for the IESO and Hydro One to determine the materiality and impact of these changes, if any.

40. By way of example only, the transmission line route in the CIA Report (crossing the Island from Stella Bay)⁵² is significantly different from the revised route set out in the leave to construct application (crossing the Island from Kerr Bay, some two kilometers away).⁵³ There have also been a number of new energy projects approved in and around the Amherst Island region since the SIA and CIA reports were concluded.⁵⁴

41. These are matters that the IESO and Hydro One ought to be given an opportunity to consider before leave to construct is granted.

42. Accordingly, APAI submits that leave to construct should not be granted until this Board has reviewed updated SIA and CIA reports from IESO or Hydro One, respectively. Until such

⁴⁷ **Letter from the Board to J. Myers dated March 9, 2015**

⁴⁸ **Windlectric AIC** at para 22

⁴⁹ **Windlectric AIC** at para 21

⁵⁰ **Windlectric LTC**, Tab G-1-2 at p 276

⁵¹ **Algonquin Power 2014 Q4 Report** at p 27 (available at: <http://investors.algonquinpower.com/Cache/1500069530.PDF?Y=&O=PDF&D=&FID=150>). This may be why the Applicant references a "final project design" in its AIC: see para 38

⁵² **Windlectric LTC**, Tab G-1-2 at p 277

⁵³ **Windlectric LTC**, Tab B-2-1 at p 19

⁵⁴ **APAI Response to Board Staff Interrogatories**, Interrogatory 1, Question 8 at p 15 (available at: [APAI IRR-EVD BOARD STAFF RESPONSE LETTER 20150220](#)). See also: <http://www.ontario.ca/environment-and-energy/renewable-energy-projects-listing>

time, the impact of the project on the reliability or quality of electricity service cannot be properly assessed. In the alternative, APAI submits that any approval ought to be conditional on those reports stating that the project will have no adverse impact on the reliability or quality of electricity service.

F. The Generation Project is not consistent with government policy

43. The Applicant argues that the Generation Project (and the Proposed Transmission Facility allowing the project to connect to the IESO grid) will further the government of Ontario's policies with respect to renewable energy because (i) the Applicant has a FIT Contract with the OPA; and (ii) the Generation Project will contribute approximately 75 MW of renewable energy to the province's energy supply mix.⁵⁵

44. Neither of these arguments withstands scrutiny. As outlined above, the FIT Contract is almost certain to be cancelled due to the length of time required to reach the Commercial Operation date. Combined with the fact that project is not likely to be financially viable (even if the FIT Contract is not cancelled), this leads to virtually no chance that the Generation Project will contribute any material amount of renewable energy to the supply mix, let alone 75 MW.

45. Accordingly, APAI submits that the Generation Project is not consistent with government policies. In fact, the government's recent emphasis on the need for energy projects to be completed by the deadlines set out in the FIT Contract suggests the Generation Project is actually inconsistent with government policies.

G. Applicant has not secured land rights for critical Project Substation property

46. The Applicant acknowledges that with respect to the property required for the Project Substation, the relevant landowner has not yet executed the necessary amendment to the lease. However, the Applicant argues that this is no reason to deny leave, and that leave may instead be

⁵⁵ Windlectric AIC at para 25

conditional on acquiring all necessary land rights, including those associated with the property in question.⁵⁶

47. In the circumstances of this case, APAI submits that without an executed amendment, leave to construct ought to be denied. Although APAI acknowledges that the Board does not normally require evidence of executed agreements before granting leave, it submits that a different approach is warranted in this case given (i) the critical importance of securing the property to the overall project; and (ii) the circumstances surrounding the lack of any executed agreement thus far, which suggest that no such agreement will be forthcoming.

48. The Applicant requires the property in question in order to build the Project Substation. The location of the Project Substation is a vital aspect of the overall project design plan for the Proposed Transmission Facilities.⁵⁷ The Applicant's project design has only one proposed site for the Project Substation. If the Applicant is unable to secure the necessary rights to that property, then there will almost certainly have to be significant design changes to the plan if the project is to proceed. That will require a further round of regulatory approvals (including further notification to Hydro One and the IESO) and further delay in the construction schedule. All of these developments are relevant to the factors that this Board considers under s. 96 of the *Act*. As such, this Board should not grant leave to construct without evidence that the Project Substation, and the overall project design, will proceed as currently planned. The Applicant has failed to provide any such evidence in this case.

49. Not only is there no evidence in this case that the critical amendment will be signed, but the sequence of events thus far leads to a reasonable inference that it will not be signed. The amendment has been left unexecuted now for some six months.⁵⁸ This length of time alone suggests that the issue is not simply giving the landowner time to review or consider certain terms, but a more fundamental disagreement over the nature of the proposed amendment.

⁵⁶ **Windlectric AIC** at para 41

⁵⁷ Windlectric acknowledges the importance of the Project Substation location in its application: "The location of the Project Substation was determined based on its proximity to wind turbines associated with the Generation Project, which minimizes the losses on the collection system, as well as to facilitate a relatively short path to the mainland interconnection point": see **Windlectric LTC**, Tab C-1-1 at p 25

⁵⁸ **Windlectric LTC**, Tab E-1-1 at p 1; **Windlectric AIC** at para 38

Moreover, the Applicant has refused to provide a copy of the amendment, despite requests from APAI.⁵⁹ On these issues, it is appropriate to expect a heightened degree of transparency and forthrightness from the Applicant, given that the confidentiality provisions in the land agreements do not allow for the property owner to voice any concerns or intentions with respect to the status of any amendments.

50. APAI submits that the importance of the Project Substation location (and thus of the amendment) is sufficient to justify denying leave to construct, particularly when the circumstances surrounding the lack of an executed amendment suggest that there may never be one, and in circumstances where the contents of that pivotal amendment remain unknown.

51. In the alternative, and at a minimum, APAI submits that any leave should be strictly conditional on the Applicant disclosing the terms of the amendment in issue and securing the amendment for the property in question, failing which leave would be effective and a new application would be required.

H. Applicant must bear costs of burying transmission line

52. The Applicant states that it has “taken steps to coordinate with Hydro One Networks Inc. concerning the two locations where the Transmission Line would cross Hydro One’s existing distribution facilities perpendicularly.”⁶⁰

53. In the event that leave to construct is granted, this arrangement poses a safety hazard. As this Board has recognized, one solution is to bury either the proposed transmission line, or Hydro One’s existing distribution facilities, underground.⁶¹ Loyalist Township has also requested that the proposed Transmission Line be buried⁶², as has APAI.⁶³ The Applicant ought to bear the

⁵⁹ **APAI Letter to Board dated February 12, 2015; APAI Letter to the Board dated January 19, 2015** (available at: APAI_IntEvidence_Cover Letter_20150119 V2)

⁶⁰ **Windlectric LTC**, Tab B-2-1 at p 5

⁶¹ See, for example, *Re Suncor Energy Products Inc.*, EB-2014-0022, Decision and Order dated February 26, 2015 at pp 13-14

⁶² See **Windlectric Municipal Consultation Form** at p 27 (available at: APAI_IRR_EVD_Board_Staff_2013.03.22 Windlectric Municipal Consultation Form_20150220);

costs so as to ensure that it is not passed on to ratepayers. Accordingly, for those locations where the two lines cross, the Applicant ought to be responsible for the cost of burying either Hydro One's existing facilities, or the proposed transmission line, as a condition of any leave to construct, if leave is in fact to be granted.

I. Conclusions

54. As outlined above, APAI submits that leave to construct ought to be denied. However, in the alternative, if leave to construct is granted, APAI submits that it ought to be conditional on:

- (a) drafting and implementing form of land agreements that respect the *Filing Requirements*, including provisions relating to ILC and decommissioning;
- (b) the Applicant establishing a fund, bond, letter of credit or other similar instrument to pay for the costs of decommissioning the Generation Project (\$70 million);
- (c) securing the necessary land rights, including but not limited to those required for the property at issue for the Project Substation⁶⁴;
- (d) updated SIA and CIA reports that do not differ from the conclusions set out in the original reports from 2012;
- (e) REA approval⁶⁵;
- (f) approval of any and all other permits required for construction of the Generation Project⁶⁶;
- (g) the Applicant covering the cost of burying the overhead transmission line on Amherst Island at the locations where it crosses the existing hydro line⁶⁷; and
- (h) construction of the Generation Project being complete within 12 months.

⁶³ **Letter from Loyalist Township to APAI dated December 18, 2014** (available at: http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/460846/view/APAI_ltr_council_20141229.PDF)

⁶⁴ See, for example, *Re Dufferin Wind Power Inc*, EB-2012-0365, Decision and Reasons and Procedural Order No. 4 dated March 19, 2013 at p 10

⁶⁵ See, for example, *Re McLean's Mountain Wind LP*, EB-2011-0394, Decision and Order dated June 28, 2012 at p 7

⁶⁶ See, for example, *Re Grand Renewable Wind LP*, EB-2011-0063, Decision and Order dated December 8, 2011 at p 12

⁶⁷ See, for example, *Re Suncor Energy Products Inc*, EB-2014-0022, Decision and Order dated February 26, 2015 at pp 13-14

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of March, 2015

A handwritten signature in blue ink, appearing to read "P. Le Vay", is positioned above a horizontal line.

Paul H. Le Vay
Justin Safayeni

Stockwoods LLP
Counsel to the Intervenor,
Association to Protect Amherst Island