

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

AND IN THE MATTER OF an application by wpd Sumac Ridge 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 Kawartha Lakes, Ontario, as set out in this application.

**SUBMISSION OF THE CORPORATION OF THE CITY OF KAWARTHA LAKES
(PROCEDURAL ORDER 4)**

This submission is made on behalf of the Corporation of the City of Kawartha Lakes (Kawartha) in response to the invitation by Ontario Energy Board (the OEB) for it to take intervenor status for the purpose of responding to the Board's question as to whether or not section 41 of the *Electricity Act, 1998*, S.O. 1998, c.15, Schedule A (the Act) applies to Gray Road and Wild Turkey Road. The issue of whether section 41 of the Act applies to those portions of Gray Road and Wild Turkey Road as set out in the application is fundamental to determining whether the OEB has jurisdiction to hear the application.

Gray Road and Wild Turkey Road have been described by the applicant as "unopened" or "unassumed" road allowances for the purpose of the application to the OEB. Thus, the issue above seems to turn on the question as to whether or not section 41 of the Act applies to "unopened" and "unassumed" road allowances. Taken another way, the issue above would turn on the question as to whether or not "unopened" or "unassumed" road allowances are "public street[s]" or "highway[s]" as contemplated by section 41 of the Act.

The relevant subsections of the Act state:

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

(2) The transmitter or distributor may inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities constructed or installed under subsection (1) or a predecessor of subsection (1).

Entry

(3) The transmitter or distributor may enter the street or highway at any reasonable time to exercise the powers referred to in subsections (1) and (2).

No consent required

(5) The exercise of powers under subsections (1), (2) and (3) does not require the consent of the owner of or any other person having an interest in the street or highway”

Subsections 41(3) & (5) of the Act provide that an electricity distributor’s rights to entry onto a municipal street or highway without municipal consent extend only to the rights to entry for the purpose of constructing, inspecting, maintaining, repairing, altering, removing or replacing any structure, equipment or facilities necessary for the purpose of its transmission or distribution system, including poles and lines.

The right of entry does not extend to the right of entry for constructing, inspecting, maintaining, repairing, altering, removing or replacing any structure, equipment or facilities necessary for the purpose of its generation system, including the wind turbines.

Nor does the right of entry extend to the right to construct road upgrades (i.e. widening, grading, resurfacing) necessary for either purpose.

Uncertainty as to Whether Wild Turkey Road is a Public Street or Highway

The Act does not define public street or highway. However, the *Municipal Act*, 2001 S.O. 2001, c. 25 (the “*Municipal Act*”) lists the following as highways:

26. The following are highways unless they have been closed:

1. All highways that existed on December 31, 2002.
2. All highways established by by-law of a municipality on or after January 1, 2003.
3. All highways transferred to a municipality under the Public Transportation and Highway Improvement Act.

4. All road allowances made by the Crown surveyors that are located in municipalities.

5. All road allowances, highways, streets and lanes shown on a registered plan of subdivision.

Up until recently, Kawartha was of the understanding that both Gray Road and Wild Turkey Road were unopened road allowances within its jurisdiction. However, Kawartha's jurisdiction over Wild Turkey Road was brought into question in the context of a related hearing before the Environmental Review Tribunal, where evidence was raised that Wild Turkey Road may be what is called a forced or trespass road, rather than a municipal road allowance. Further research by Kawartha has not cleared up this issue and also raised uncertainty as to the actual legal location of Wild Turkey Road, as opposed to what appears on the ground. To this day, Kawartha is uncertain as to the ownership, jurisdiction over Wild Turkey Road and its legal location.¹

Kawartha's Position on the Underground Line

If the Board determines it has jurisdiction under s. 41 of the *Electricity Act*, it is important to note that Kawartha has never objected to the location of the proposed underground line 20 metres long beneath Wild Turkey Road to Turbine 5. Nor has Kawartha objected to the location of the proposed aboveground line 1,750 metres above Gray Road to Highway 35. Rather, Kawartha has been concerned that a lack of justification, in the nature of a hydrogeological report (Wild Turkey Road being in an area of high aquifer vulnerability), and a lack of information, in the nature of detailed engineering information concerning proposed upgrades to these roads, renders it unable to determine the implications of the proposed location for the transmission lines.²

OEB Staff has submitted to the OEB in this matter that environmental issues are not within the scope of the OEB. Rather, according to OEB Staff, these issues are dealt with at another stage. Given that this is the case, when the OEB is determining the appropriate location for distribution facilities, it will not consider environmental issues.

However, section 41(7) of the Act provides:

¹ See attached Affidavit of Diane McFarlane, executed on March 9, 2015, prepared for a related proceeding currently before the Ontario Divisional Court.

² See attached Affidavit of Ron Taylor, executed March 9, 2015, prepared for a related proceeding currently before the Ontario Divisional Court.

“If a transmitter or distributor exercises a power of entry under this section, it shall,

(a) provide reasonable notice of the entry to the owner or other person having authority over the street or highway;

(b) in so far as is practicable, restore the street or highway to its original condition; and

(c) provide compensation for any damages caused by the entry.”

When dealing with unopened road allowances that are in a natural and unimproved condition, which characterization applies to both Gray Road and Wild Turkey Road, it is advisable that the OEB consider the implication of paragraph 41(7)(b). It is unavoidable that, when dealing with unopened road allowances, environmental issues will arise in the context of restoration under this provision. Moreover, when dealing with unopened road allowances that traverse environmentally sensitive locations, such as Wild Turkey Road, which is located within the Oak Ridges Moraine and in the vicinity of endangered species, the issue of compensation for damages caused by the entry necessarily engages environmental concepts.

On the other hand, when dealing with opened road allowances, these issues do not arise. Section 41 of the Act on the face of the legislation applies to both opened roads and unopened road allowances. However, the necessary engagement of environmental considerations in scenarios involving unopened road allowances indicate either that section 41 of the Act contemplates only opened roads or that the OEB is to take into account environmental considerations when applying section 41(7)(b) & (c) of the Act and considering the most appropriate .

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd day of April, 2015.



Robyn C. Carlson
City Solicitor
City of Kawartha Lakes