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BY EMAIL

April 24, 2015

Ontario Energy Board
P.O. Box 2319
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2300 Yonge Street
Toronto ON M4P 1E4
BoardSec@ontarioenergyboard.ca

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: OEB Staff Submission
Application by Niagara Region Wind Corporation
OEB File No. EB-2014-0298**

In accordance with Procedural Order No. 1, please find attached OEB Staff's submission in the above noted proceeding. The applicant has been copied on this filing.

As a reminder, Niagara Region Wind Corporation's reply submission is due by May 1, 2015.

Yours truly,

Original Signed By

Daniel Kim
Advisor

Encl.



OEB STAFF SUBMISSION

Niagara Region Wind Corporation

EB-2014-0298

April 24, 2015

Introduction

Niagara Region Wind Corporation (NRWC) filed its original application dated September 17, 2014 with the Ontario Energy Board (OEB), under subsection 41(9) of the *Electricity Act, 1998*, c.15, Schedule A (Act) for an order or orders establishing a location for distribution facilities it proposes to locate within certain road allowances owned by the Municipality of West Lincoln (West Lincoln), the Niagara Region, and the Municipality of Wainfleet (Wainfleet). On December 18, 2014, NRWC filed an amended application which noted that NRWC has subsequently entered into road use agreements with West Lincoln and the Niagara Region. NRWC therefore withdrew its application filed on September 17, 2014. The amended application requested an order from the OEB to establish a location of the distribution facilities NRWC proposes to locate within certain road allowances in Wainfleet.

The OEB issued a Notice of Application (Notice) on October 1, 2014. On March 4, 2015, NRWC filed redacted versions of affidavits that were originally filed on January 30, 2015 and February 27, 2015 confirming service of the OEB's Notice. No requests for intervention or letters of comments were received. In Procedural Order No. 1, dated March 18, 2015, the OEB set out the dates for filing interrogatories, responses to interrogatories and submissions.

NRWC is in the process of developing a 230 MW wind power generating facility in the municipalities of West Lincoln, Lincoln, Wainfleet and in Haldimand County (the Project). NRWC was awarded a 20-year power purchase agreement under the former Ontario Power Authority's (OPA) Feed-in Tariff program in February 2011. The Project will be connected to the Independent Electricity System Operator controlled grid by way of a transmission interconnection facility (Transmission Facility). NRWC was granted leave to construct the Transmission Facility by the OEB Decision and Order issued July 3, 2014 (EB-2013-0203). In addition to the Transmission Facility, NRWC will be constructing distribution facilities in order to transport the electricity by the Project to the Transmission Facility. In all, the distribution facilities will consist of 156 km of 34.5

kilovolt (kV) overhead and underground distribution lines. NRWC is proposing to construct 34.5 kV underground distribution lines, approximately 6 km long (the Distribution Facilities), under municipal streets and highways owned by Wainfleet. Detailed listing of the streets within which the distribution system will be located can be found in Schedule A as part of NRWC's responses to OEB staff interrogatories.

Background

In its application, NRWC indicated that Wainfleet would not communicate with NRWC in respect of a road use agreement until NRWC had been granted a Renewable Energy Approval (REA) for the Project. In response to OEB staff interrogatory #4, NRWC indicated that its REA is currently under appeal before the Environmental Review Tribunal and that a decision is expected the third week of May 2015. NRWC noted that it does not anticipate that the location of its Distribution Facilities will be an issue addressed in the appeal of its REA. In response to OEB staff interrogatory #5, NRWC provided confidential copies of communication regarding the exchange of draft RUAs and communication supporting Wainfleet not raising any issues with respect to the location of the Distribution Facilities between NRWC and Wainfleet staff. NRWC also noted that Wainfleet is no longer objecting to the communications with NRWC and that it has exchanged drafts of a road use agreement with Wainfleet.

NRWC indicated that portions of the proposed Distribution Facilities are to be located on unopened road allowances¹ in Wainfleet. OEB staff requested NRWC to provide its position on whether the OEB has jurisdiction under section 41 of the Act on unopened road allowances. In response, NRWC took the position that given the absence of the definition "highway" in the Act, it is an acceptable and established interpretive principle to look to the definition of such terms in other statutes. Unopened road allowances are "highways" for purposes of both the *Municipal Act, 2001* and the *Public Transportation and Highway Improvement Act*. NRWC stated that it is clear and well established law

¹ Sideroad 42, Concession 1 Road and Sideroad 32 are unopened road allowances that are shown as being proposed for the location of proposed distribution facilities in the application. NRWC noted that these road allowances were established in the original Crown survey of the Township of Wainfleet.

that these particular road allowances are “highways” for purposes of the Act, and therefore the OEB has jurisdiction under section 41 of the Act in respect of these unopened road allowances.

Staff Submission

OEB staff will address three aspects, namely, the REA process on the current application, OEB jurisdiction under section 41 and the relationship of unopened road allowances and section 41.

For the reasons set out below, OEB staff is of the view that NRWC's request should be granted.

REA Process

OEB staff submits that it is permissible for the OEB to issue an order under section 41(9) prior to REA approval (and REA appeals) or other approvals. The OEB may choose to attach a condition to its order that requires that the applicant obtain and comply with all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project. OEB staff notes this has been the practice of the OEB in similar cases. For example, in a letter to the Township of Clearview dated December 12, 2014², the OEB stated:

...that the Act does not require that all necessary approvals, such as the Renewable Energy Approval (REA), be obtained prior to the filing of an application under subsection 41(9) or Board decision on the matter. This means that the ERA [*sic*] process and the Board's consideration of the Application may run concurrently...the Board believes that concurrent REA and OEB proceedings are the most efficient process and the ongoing REA proceeding should not prevent the Township (from fulfilling its obligations to express its views regarding the proposed distribution system route in the Application which is a matter with the Board's mandate.

² EB-2014-0226, An application by wpd Fairview Wind Inc. under section 41(9) of the Electricity Act, 1998, correspondence dated December 12, 2014..

The OEB went on to note that "... in order to proceed with construction of the distribution system, the Applicant will need to obtain all legally required permits and other approvals, which would include the REA."

OEB Jurisdiction under Section 41

Subsection 41(1) of the the Act states:

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.

The current application has been initiated under subsection 41(9) of the Act, which states:

The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.

OEB staff notes that the OEB's authority in this proceeding is derived from section 41 of the Act and that subsection 41(9) limits the scope of this proceeding to a determination of the location of the distribution system within the road allowances. OEB staff also notes that since the Distribution Facilities operate under 50 kV and are owned and operated by NRWC, NRWC is considered a distributor under the Act.

Unopened Road Allowances and Section 41

OEB staff agree with the submission of NRWC that the unopened road allowances of Sideroad 42, Concession 1 Road and Sideroad 32 are properly considered as public highways for the purpose of section 41 of the Act. The unopened road allowances on Sideroad 42, Concession 1 Road and Sideroad 32 are Crown surveyed and as such are

held by the municipality for the broader public interest as set out in the *Municipal Act, 2001*:

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

1. All highways that existed on December 31, 2001.
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 Improve 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 or subdivision.

OEB staff submits that subsection 26(4) of the *Municipal Act, 2001* makes it clear that all road allowances in municipalities that are made by Crown surveyors are public highways. As a public highway, OEB staff submits that NRWC may, 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, over, under or on Sideroad 42, Concession 1 Road and Sideroad 32.

OEB staff submits that since no alternative proposal within the road allowances has been put forward, there is no evidence of another proposal for the OEB to consider. Based on the evidence on record, OEB staff has no reason to question the appropriateness of NRWC's proposal for the location of the Distribution Facilities within the road allowances in Wainfleet as described in interrogatory response to OEB staff interrogatory #1, and therefore submits that the OEB should grant NRWC's request.

- All of which is respectfully submitted -