



**EB-2014-0298**

**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 Niagara Region  
Wind Corporation for an order or orders pursuant to section  
41(9) of the *Electricity Act, 1998* S.O. 1998, c.15, Schedule  
B, establishing a location for the applicant's distribution  
facilities on public road allowances owned by the  
Corporation of the Municipality of Wainfleet, as set out in this  
application.

**BEFORE:** Emad Elsayed  
Presiding Member

Ken Quesnelle  
Member and Vice Chair

## **DECISION AND ORDER**

**June 4, 2015**

### **DECISION**

The location of Niagara Region Wind Corporation's (NRWC) Distribution Facilities on road allowances owned by the Municipality of Wainfleet (Wainfleet) is approved as described in this Decision and Order.

## INTRODUCTION

The Applicant, NRWC, is a wind generation developer that intends to build, own and operate a wind generation facility in the municipalities of West Lincoln, Lincoln, Wainfleet and Haldimand County that will produce 230 MW of renewable energy (the Project) which it will deliver to the provincial electricity grid pursuant to a Feed-in-Tariff (FIT) contract with the former Ontario Power Authority (now the Independent Electricity System Operator or IESO). In order to deliver the electricity to Ontario's electricity grid, NRWC needs to install 34.5 kV underground collector lines, approximately 6 km long (Distribution Facilities), under municipal streets and highways owned by Wainfleet.

NRWC filed its original application dated September 17, 2014 with the OEB (the Application), under subsection 41(9) of the *Electricity Act, 1998*, S.O. 1998, c.15, Schedule B (the 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, the Niagara Region, and Wainfleet. On December 18, 2014, NRWC filed an amended application which noted that it had subsequently entered into road use agreements with the municipality of West Lincoln and the Niagara Region. NRWC therefore withdrew its application filed on September 17, 2014 and filed an amended application on December 18, 2014 (Amended Application). The Amended Application requested an order of the OEB to establish the location of the Distribution Facilities that NRWC proposes to locate within certain road allowances owned by Wainfleet as described in the Amended Application and in NRWC's response to OEB staff interrogatory #1a (the Road Allowances).

NRWC submits that it is a "distributor" within the meaning of subsection 2(1) of the Act and therefore has the right to install the Distribution Facilities under "any public street or highway" pursuant to subsection 41(1) of the Act.

Neither Wainfleet nor any other party in this proceeding has proposed an alternate location for the Distribution Facilities.

On May 21, 2015, NRWC filed a letter with the OEB requesting that the Application be amended such that the Applicant is FWRN LP, a newly formed limited partnership. NRWC indicated that the Project was transferred to FWRN LP as part of a reorganization and change of control but that the transfer would have no impact on the construction or operation of the Distribution Facilities.

## **PROCEDURAL STEPS**

The OEB issued a Notice of Application (Notice) and Letter of Direction to NRWC on October 1, 2014. On March 4, 2015 NRWC filed redacted versions of the affidavits that were originally filed on January 30, 2015 and February 27, 2015 confirming service of the OEB's Notice.

In Procedural Order No.1 dated March 18, 2015, the OEB made provision for a written hearing and the timeline for the proceeding. No requests for intervention were received. One letter of comment was received.

In accordance with Procedural Order No. 1, OEB staff submitted interrogatories to NRWC and on April 2, 2015, NRWC provided responses to the interrogatories.

OEB staff filed its written submission on April 24, 2015 with a view that NRWC's request should be granted. On May 1, 2015, NRWC filed its reply submission and concluded that no submissions have been made or evidence filed in this proceeding to suggest that the location of the proposed Distribution Facilities is not appropriate and that its request for an order under section 41 should be granted.

## **SCOPE OF THE BOARD'S JURISDICTION**

As indicated above, the OEB's authority in this proceeding is derived from section 41 of the Act.

Subsection 41(9) limits the scope of this proceeding to a determination of the location of the applicable portion of the Distribution Facilities within the Road Allowances when there is disagreement between the applicant and the affected municipality.

Given the scope of subsection 41(9), it is not the OEB's role in this proceeding to decide whether the NRWC's Project should be approved, to consider issues relating to wind turbines or renewable energy policy generally, or to consider alternatives to the location proposed by NRWC such as routes for the Distribution Facilities that are outside of the Road Allowances.

## **OEB FINDINGS**

The OEB has identified five main issues for consideration in rendering its decision. These are addressed under the following headings.

**1. Is NRWC a Distributor for the purposes of the Electricity Act?**

The OEB agrees with NRWC that its proposed 156 km of distribution lines which will transport electricity to the transmission system constitute a distribution system as that term is defined under section 2(1) of the *Electricity Act*. Consequently, NRWC is a distributor under the *Electricity Act*, including for the purposes of section 41 of the Act, and may install structures, equipment and other facilities over, under or on any public street or highway.

**2. Is the proposed location of the Distribution Facilities satisfactory to the OEB?**

In response to OEB staff interrogatory #1, NRWC provided a list setting out the Road Allowances required for its Distribution Facilities in Wainfleet. As indicated by NRWC, no submissions have been made to suggest that the location of the proposed Distribution Facilities is not appropriate. OEB staff also noted that no alternative proposals have been put forward in respect of the location of the Distribution Facilities.

Given the lack of any evidence to the contrary, the OEB concludes that the proposed location of the Distribution Facilities is satisfactory. However, in rendering its decision to approve the proposed location, the OEB would add that this approval includes any subsequent refinements that are mutually agreed to by NRWC and Wainfleet.

**3. Was Wainfleet adequately consulted prior to the filing of this Application?**

In its application, NRWC indicated that it sought to begin work on a Road Use Agreement (RUA) with Wainfleet in April 2013, and that Wainfleet would not communicate with NRWC until NRWC was granted a Renewable Energy Approval (REA) for the Project. However, NRWC filed a copy of a letter dated September 16, 2014<sup>1</sup> which it sent to Wainfleet confirming NRWC's proposal for a RUA and setting out the location of the Distribution Facilities. According to NRWC, since that letter, NRWC has been in communication with Wainfleet and Wainfleet was no longer objecting to any communications with NRWC regarding a RUA.

Also, in response to OEB staff interrogatory #5, NRWC provided, on a confidential basis, copies of communication regarding the exchange of a draft RUA as well as communication supporting NRWC's assertion that Wainfleet did not raise any issues with respect to the location of the Distribution Facilities in correspondence between NRWC and Wainfleet staff.

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<sup>1</sup> NRWC Amended Application, December 18, 2014, Appendix 1.

Given this evidence, and the lack of any direct input from Wainfleet as described in item (4) below, the OEB finds that NRW has attempted to engage Wainfleet to seek agreement regarding the location of the Distribution Facilities prior to filing its application with the OEB.

**4. Did Wainfleet actively participate in this proceeding?**

Wainfleet did not seek intervenor status in this proceeding and, therefore, was not an active participant. However, the OEB issued a response to a letter of comment noting that because Wainfleet is the owner of the Road Allowances where NRW proposes to locate the Distribution Facilities, it would be accepted as a party to the proceeding and be permitted to file evidence regardless of whether it formally requests intervenor status.

Given that Wainfleet did not seek intervenor status in this proceeding and did not file any evidence, the OEB can only base its decision on the evidence before it.

**5. Are the proposed unopened road allowances considered as public highways for the purpose of section 41 of the Act?**

In its interrogatory #3, OEB staff asked NRW for its view on whether the OEB has jurisdiction over unopened road allowances on Sideroad 42, Concession 1 Road and Sideroad 32 (the Unopened Road Allowances) under section 41 of the *Electricity Act*. NRW replied that the OEB does have jurisdiction and explained that because the terms “highway” and “street” are not defined in the *Electricity Act*, it is an acceptable and established interpretive principle to look to the definition of such term in other statutes. The main source of statutory law defining roads and highways in Ontario is the *Municipal Act*<sup>2</sup>, (Ontario) which in section 1(1) defines a “highway” as “a common and public highway and includes any bridge, trestle, viaduct or other structure forming part of the highway and, except as otherwise provided, includes a portion of a highway.”

Section 26 of the *Municipal Act* also defines “highways” as:

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*.

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<sup>2</sup> *Municipal Act, 2001*, S.O. 2001, Chapter 25 (*Municipal 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. 2001, c. 25, s. 26.

NRWC submitted that, under the *Municipal Act* in effect on December 31, 2002, common and public highways included allowances for roads made by Crown surveyors. The Unopened Road Allowances in which NRWC plans to locate its Distribution Facilities in Wainfleet are all road allowances that were established in the original Crown survey of Wainfleet. Thus, with such unopened road allowances being “highways” for purposes of the *Municipal Act* NRWC states that it is clear and well established law that these particular road allowances are “highways” for the purposes of the *Electricity Act*, and therefore the OEB has jurisdiction under section 41 of the *Electricity Act* in respect of the Unopened Road Allowances.

OEB staff submission agreed with NRWC’s submission on this issue.

No evidence was presented to the OEB that contradicts the interpretation provided by NRWC and supported by OEB staff. The OEB, therefore, concludes that the Unopened Road Allowances in which NRWC proposes to locate the Distribution Facilities are to be considered as public highways for the purpose of section 41 of the Act.

**6. *Whether the OEB should grant the request to amend the Application by changing the name of the Applicant***

As indicated in its May 21, 2015 letter to the OEB, NRWC transferred the Project, including the FIT contract, on April 29, 2015 to FRWN LP, which was followed by NRWC transferring 74.99% of the issued and outstanding limited partner units of FWRN LP and 100% of the shares of the sole general partner of FWRN LP to a wholly-owned subsidiary of Enercon Canada Inc. (Enercon Subco), a Nova Scotia company. NRWC stated that the reorganization and change of control will have no impact on the construction or operation of the Distribution Facilities and that FWRN LP will be responsible for meeting any conditions of approval set out in an OEB order.

The OEB grants the request to amend the Applicant name to FWRN LP, provided that it meets all other applicable requirements of the OEB, such as applying for a licence as a FIT generator or applying to amend any existing licence held by NRWC. Furthermore, if the IESO’s consent or approval is required for any transfer of the FIT contract to another entity, the OEB expects that NRWC and FWRN LP will obtain such consent or approval.

**THE OEB ORDERS THAT:**

1. The Application is amended such that the Applicant is identified as "FWRN LP".
2. The location of the Distribution Facilities on the Road Allowances, including the Unopened Road Allowances, owned by Wainfleet is approved as follows:
  - a. The Distribution Facilities shall be located in the Road Allowances, including the Unopened Road Allowances, shown in Schedule A of the Amended Application and listed in response to Board staff Interrogatory #1a.
3. FWRN LP (or the former Applicant, NRW, if required) shall obtain and comply with all necessary approvals, permits, licenses, certificates and easement rights required to construct, operate and maintain the Project and the Distribution Facilities.
4. This approval includes any subsequent refinements regarding the location of the Distribution Facilities within the Road Allowances which are mutually agreed to by FWRN LP and Wainfleet.

**ISSUED** at Toronto, June 4, 2015

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary