



# **Ontario Energy Board Commission de l'énergie de l'Ontario**

## **DECISION AND ORDER**

**EB-2016-0196**

## **FWRN LP AND NR CAPITAL GENERAL PARTNERSHIP**

**Application for Leave to Construct amending the relief granted in  
EB-2013-0203**

**Before: Christine Long  
Presiding Member and Vice Chair**

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**August 17, 2016**

## 1 INTRODUCTION AND SUMMARY

FWRN LP and NR Capital General Partnership (the Applicants) filed an application on June 17, 2016 for leave to construct under sections 92 and 96(2) of the *Ontario Energy Board Act, 1998* (OEB Act). The Applicants seek approval for two modifications to the transmission line route that is being constructed in Haldimand County and Niagara Region pursuant to the leave to construct order (LTC Order) issued by the Ontario Energy Board (OEB) on July 3, 2014 in proceeding EB-2013-0203. The transmission line (Transmission Line) and related facilities (collectively, the Transmission Facilities) will connect the Niagara Region Wind Farm, a 230 MW renewable energy generation facility (Generation Facility) to the IESO-controlled grid.

The first proposed modification to the Transmission Line route is to bypass Highway 3 to accommodate the interests of the Ministry of Transportation (MTO) by routing it approximately 335 meters across private property. This adjustment to the route, referred to as the “Highway 3 Bypass”, avoids running the Transmission Line along the highway.

The second proposed modification is an approximately 2.4 kilometer change to accommodate the interests of the Township of West Lincoln. Known as the “Smithville Bypass”, this change shifts the Transmission Line to other roads in the near vicinity of the originally approved route in order to avoid construction through a new urban development area in the community of Smithville.

The proposed bypasses will shorten the 44 km Transmission Line by approximately 500 meters. The affected municipalities are the townships of West Lincoln, Lincoln, and Wainfleet. At the time of filing, the Applicants stated that the Transmission Facilities were approximately 85% completed.

The Applicants requested that the application be considered without a hearing pursuant to section 21(4) (b) of the OEB Act, and on an expedited basis in accordance with rules 2.01 and 7.01 the OEB’s *Rules of Practice and Procedure*. The Applicants state their reasons for this request as being the advanced stage of construction of the Transmission Facilities, and because of timelines under their Feed in Tariff (FIT) contract with the IESO.

The OEB received several letters in support of the application. The OEB also received two submissions from landowners whose properties are adjacent to the amended route. The landowners' comments deal with a range of issues and concerns, including the

adequacy of the Applicants' notice of the proposed changes, as well as other potential effects of the proposed Transmission Line.

The OEB acts in the public interest, and in accordance with the laws that define its mandate. The Decision considers only those issues that are within the scope of what the OEB can evaluate when an applicant seeks leave to construct electricity transmission facilities. The OEB's jurisdiction in this leave to construct proceeding is, in accordance with section 92, limited to the consideration of the impact of the Transmission Facilities on the interests of consumers with respect to the price, quality and reliability of electricity service, and the promotion of the use of renewable energy generation sources and limited, with regard to land issues, to affected landowners as set out in section 97.

For the reasons set out in the Decision, the OEB will grant the application.

## 2 PROCESS

### 2.1 BACKGROUND

#### *i. The Original Leave to Construct Order (EB-2013-0203)*

Leave to construct the Transmission Facilities was granted to the Niagara Region Wind Corporation (NRWC) by the OEB on July 3, 2014 under sections 92 and 96(2) of the OEB Act. In the LTC Order granting NRWC leave to construct, the OEB stated, at page 3, the following:

The OEB's power to grant an applicant leave to construct electricity transmission facilities is set out in subsection 92 (1) of the Act which states:

92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

In the LTC Order, the OEB also approved the forms of land use agreements proposed to be used by NRWC. In this regard, the OEB stated as follows: "Section 97 of the Act requires that the Board be satisfied that the Applicant has offered or will offer each landowner affected by the approved route or location an agreement in a form approved by the Board."<sup>1</sup> In accordance with the OEB's *Filing Requirements For Electricity Transmission Applications*, an affected landowner means those landowners of property upon, over or under which transmission facilities are intended to be constructed.

#### *ii. Transfers of the Original LTC Order (EB-2015-0183 and EB-2015-0290)*

On September 3, 2015, NRWC was granted leave to transfer the LTC Order to FWRN LP (EB-2015-0183). Subsequently, on November 26, 2015, the OEB granted FWRN leave to transfer the LTC Order to NR Capital General Partnership (EB-2015-0290).

Given that the second transfer had yet to occur at the time of filing the current (EB-2016-0196) application, the Applicants filed it jointly.

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<sup>1</sup> EB-2013-0203, Decision and Order issued July 3, 2015, pg. 4

***iii. The Motions to Review and Vary (EB-2016-0126 and EB-2016-0143)***

On March 14, 2016 and April 1, 2016, the Applicants filed two notices of motion (one for each of the Highway 3 Bypass and the Smithville Bypass) asking the OEB to review the previous LTC Order which granted the NRWC the right to construct the Transmission Facilities. In the motions, the Applicants asked the OEB to review and vary the LTC Order by allowing two changes to the approved route.

The OEB denied the motions. In doing so, the OEB stated that the re-routing of a transmission line by way of a motion to review and vary, almost two years after the underlying leave to construct order was granted, was not the appropriate method by which to seek to vary the Transmission Line.

**2.2 THIS APPLICATION**

Subsequent to the Decision on the motions, the Applicants filed this application on June 17, 2016. The OEB received additional supporting information and evidence related to the application on June 21, 28, 29, July 8, 11, 27, August 2, 5, 8, 10 and 11.

The Applicants' position is that the proposed modifications to the Transmission Line are in the public interest and that no person will be adversely affected in any material way if the OEB approves the application.

### 3 EVIDENCE AND FINDINGS

The Applicants have asked for two things. First the Applicants seek OEB approval for two modifications to the Transmission Line from that which was approved in 2014. Second, the Applicants request that a decision be made without a hearing pursuant to section 21(4) (b) of the OEB Act and on an expedited basis and in accordance with rules 2.01 and 7.01 the OEB's *Rules of Practice and Procedure*. The Applicants cite as their reasons for proceeding without a hearing, the advanced stages of construction of the Transmission Facilities and the timelines under the FIT contract with the IESO. The OEB must consider its jurisdiction as it relates to each of these issues.

The Decision will first deal with the manner in which the application will be considered.

#### A. Proceeding without a Hearing

##### i. Background

The OEB has the ability to make a decision on an application without a hearing when requested by an applicant if it determines that no person will be adversely materially impacted by the outcome of the proceeding<sup>2</sup>.

In seeking to determine whether a person will be adversely materially affected by the outcome of a proceeding, the OEB looks to the determining criteria of the underlying application. The OEB determined the following in a previous decision<sup>3</sup>:

In applying the test for section 21(4) (b) approval, the OEB looked at the perspectives typically considered in a [leave to construct proceeding]. In these applications, the OEB grants approval for leave to construct if it finds, pursuant to section 96 of the Act, that "the construction, expansion or reinforcement of the proposed work is in the public interest"....

...The OEB finds it appropriate to use some of these criteria in seeking to determine whether, pursuant to section 21(4) (b), any person will be adversely materially affected by the outcome of this proceeding.

In the application, the Applicants referred to three properties accessed through an unopened road allowance and stated that their owners (the Three Landowners) could

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<sup>2</sup> See s. 21(4) (b) of the OEB Act. This section states that the OEB may dispose of a proceeding without a hearing if the OEB determines that "no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing."

<sup>3</sup> EB-2016-0034, Decision and Order issued February 18, 2016, pg. 3.

be impacted during the construction of the Smithville Bypass. Specifically, paragraphs 53-55 of the application stated as follows:

*Minimal impact on residents and users of the unopened road allowance*

53. The persons currently using the Unopened Road Allowance on which a portion of the Smithville Bypass is located will be able to continue using it.

54. More specifically, the Unopened Road Allowance is currently used as a property access road by three landowners. It is also used as a recreational trail by persons with snowmobiles and ATV/ "all-terrain vehicle" users.

55. These users of the Unopened Road Allowance will be able to continue using the Unopened Road Allowance. Although there may be a small impact on those currently using the Unopened Road Allowance during the construction of the transmission line, this impact will not, in the submission of the Applicants, amount to a material adverse effect on those using the Unopened Road Allowance.

Based on the evidence filed by the Applicants, the OEB could not determine the impact of proposed route modifications on the Three Landowners. Therefore, the OEB was unable to proceed to grant the application as requested by the Applicants. As a result, on July 13, 2016, the OEB issued Procedural Order No.1 in which it directed the Applicants to give notice of the application to the Three Landowners. The Procedural Order stated that the Three Landowners could file written submissions on the application, related only to the Smithville Bypass.

On July 27, the OEB received submissions from each of Landowner A and Landowner B (the Two Landowners), with respect to the Smithville Bypass. Landowner A stated that proper notice of the proposed route modification had not been given. Landowner A also cited concerns related to the effects of construction, and the impact the construction of the Transmission Line would have on the Landowner's privacy and sight lines, as well as the impact of the Transmission Line on the Landowner's property value. Landowner B submitted that they too were not given proper prior notice of the proposed route modification and also raised concerns with potential impacts relating to health, the environment, electromagnetic fields, wildlife, safety and a resultant decline in property value as a result of the Transmission Line. Landowner B also cited concerns related to the physical impact of construction including a lack of dust control, deterioration of the access road, the impeding of access to their property, and safety hazards. Landowner B requested that the application not be expedited in order to provide time to consult a lawyer.

The submissions of the Two Landowners were provided to the Applicants. Landowner B's filing contained personal health-related information that was provided to the Applicants after the OEB received consent from Landowner B and after the Applicants' counsel signed a Declaration and Undertaking to maintain the confidentiality of the filing.

The Applicants replied to the submissions on August 2 and 11, 2016. In doing so they advocated the public interest aspect of the bypasses, sought to address the Two Landowners' concerns, and addressed the OEB's legal jurisdiction as it relates to this application. Therein, the Applicants' maintained the position that the OEB's jurisdiction to approve a change to the Transmission Facilities is in section 96(2) of its governing statute, the OEB Act. In determining what is in the public interest, the OEB shall only consider the interests of consumers with respect to three things: the price of the construction of the transmission facilities, reliability and quality of electricity service, and, where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. The Applicants' stated that, as such, "the question of material adverse affect must be addressed in the context of the decision that the Board has to make, that is, the question of material adverse affect must be considered in relation to the Board's criteria in section 96(2) of the OEB Act".

## **ii. The Two Landowners' Concerns**

Landowner B's submissions outline concerns with the proximity of the proposed Transmission Line to Landowner B's property. Because Landowner B's property is located on a corner, the modified Smithville Bypass will run adjacent to two sides of Landowner B's property. The road allowance is owned by the Township of West Lincoln. The Township has entered into a Joint Use Agreement with the Applicants which give the Applicants the right to build the Transmission Line in the road allowance. While the location of the Transmission Line is of great concern to Landowner B, the Township has exercised its legal rights to enter into an agreement with the Applicants which allows the Transmission Line to be built in the road allowance.

The Applicants obtained the necessary Renewable Energy Approvals for the proposed route modifications from the Ministry of Environment and Climate Change. The Applicants obtained their Renewable Energy Amendment Approvals for the Smithville Bypass on May 6, 2016 and on May 12, 2016 for the Highway 3 Bypass.

The Applicants have also confirmed that the Renewable Energy Approvals for the proposed route modifications were not appealed to the Environmental Review Tribunal.



Many of the issues raised by Landowner B are issues that would be applicable to the Renewable Energy Approval process. Those issues are outside what the OEB can consider in its consideration of the leave to construct process.

The Two Landowners also raised issues related to construction issues and the impact of construction activities on their ability to access their properties.

In their submission of August 11, 2016, in response to the concerns raised by the Two Landowners, the Applicants advised as follows:

...pre-construction activities are being undertaken in accordance with best construction practices and pursuant to the requirements of the *Occupational Health and Safety Act* and its regulations for construction projects. The *Occupational Health and Safety Act* is enforced by the Ministry of Labour. The Applicants are agreeable to a condition of approval which requires the Applicants to conduct pre-construction and construction in accordance with the *Occupational Health and Safety Act* and its regulations for construction projects.

The Applicants are also agreeable to another condition of approval which requires the Applicants to note each concern raised by the Three Landowners during pre- construction and construction and how the concern was addressed by the Applicants, and to file this report with the Board.

### **iii. Decision**

The OEB does not find that the issues raised by Landowner A and Landowner B fall within the jurisdiction of what the OEB can consider in a leave to construct application. No doubt, this will be disappointing to the Two Landowners who expressed very serious concerns related to the impact of the building of the Transmission Line. The Renewable Energy Approvals process was designed to address many of the issues raised by the Two Landowners related to property values, health concerns and environmental impact. The Applicants have filed evidence of Renewable Energy Approval.

While the Transmission Facilities will not be built upon, over or under the properties of the Two Landowners, the OEB takes note of the significant construction inconvenience cited by the Two Landowners.

As a result, the OEB will require the Applicants to fulfill the undertakings made in relation to construction activities, and the Applicants shall return the unopened road allowance after completion of the Smithville Bypass in a condition equal or better once construction activities are completed.

Having determined that the Three Landowners will not be materially adversely affected in relation to the factors that the OEB can consider in this application, the OEB had proceeded to consider the application on its merits.

## **B. The Merits of the Applications**

### **i. Highway 3 Bypass**

The proposed Highway 3 Bypass results in the Transmission Line route avoiding Highway 3 by instead crossing over a piece of private property. The Applicants filed evidence stating that when the transmission route had initially been studied, prior to the original filing of the leave to construct application, the applicant (or predecessor) was in contact with the local Ministry of Transportation (MTO) which did not raise any objections to the proposed Transmission Line route. When the Applicant applied for a permit to the MTO to locate poles along Highway 3, the central MTO office indicated that for safety reasons and possible expansion of Highway 3, it was the MTO's strong preference that the transmission poles not be located along Highway 3. The Applicants filed a letter on June 28, 2016 from the MTO in support of the Highway 3 Bypass.

### ***Land Issues***

This change in route results in the Transmission Line crossing over a piece of private property. The Applicants have entered into a land use agreement with the owner of this private property in a form approved by the OEB. The evidence indicates that there are no utility crossings along the Highway 3 Bypass.

### ***Interests of Consumers with Respect to Pricing***

The Applicants are party to a contract for the purchase of electricity generated by the proposed Generation Facility through the Ontario FIT Program. The proposed Transmission Facilities are necessary to connect the contracted renewable electricity being generated by the Generation Facility to the IESO-controlled transmission grid. Moreover, the Applicants have confirmed that they will be paying for all of the costs of the Highway 3 Bypass. The OEB finds that the proposed route modifications will not result in an adverse effect to the interest of consumers with respect to pricing.

### ***Interests of Consumers with respect to Reliability and Quality of Electricity Service***

The IESO confirmed, on June 13, 2016 that the proposed modification to the Transmission Line would not affect the results of its System Impact Assessment report. Similarly, on June 17, 2016 Hydro One confirmed that this reduction would not change the results of its Customer Impact Assessment report.

The Applicants state that all electrical equipment and systems for the Highway 3 Bypass will be designed in accordance with current codes and standards, including the Ontario Electrical Safety Code issued by the Electrical Safety Authority (ESA).

The OEB finds that the Highway 3 Bypass will not adversely impact the interests of consumers with respect to quality or reliability of electrical service. This finding is, premised on the requirement that the Applicants fulfill the conditions set out by the IESO in its System Impact Assessment report and Hydro One in its Customer Impact Assessment report.

## **ii. The Smithville Bypass**

The second proposed modification is an approximately 2.4 kilometer change to accommodate the interests of the Township of West Lincoln. As set out in paragraphs 12-29 of the application, the route modification came about as the result of extensive consultation between the Applicants and the Township of West Lincoln, as well as with the Ministry of Natural Resources and Forestry, in order to avoid crossing lands that were subject to an ownership dispute. This change shifts the Transmission Line to other roads in the near vicinity of the originally approved route in order to avoid construction through a new urban development area in Smithville. The modification will cross the property of a private landowner.

### ***Land Issues***

The Applicants have secured land rights from the private landowner through an option agreement (entered into March 2016) in a form approved by the OEB. The Smithville Bypass crosses properties owned by Hydro One and Canadian Pacific Railways (CP) rail line, and an unopened road allowance belonging to the Township of West Lincoln. The OEB is satisfied that the Applicants have secured the rights to construct over or beneath each of these properties as follows. The Applicants have received approval from CP for the rail crossing. The Applicants have received approval for drawings submitted to Hydro One for the underground crossing beneath the existing Hydro One transmission line.

The Applicants are party to a Road Use Agreement with the Township of West Lincoln dated October 9, 2014. The Township of West Lincoln has filed a letter supporting the Smithville Bypass.

The proposed Smithville Bypass also crosses an unopened road allowance currently used by the Three Landowners for access to their properties. The Applicants maintain that these landowners would not be impacted during construction.

The OEB has considered the points raised by the Two Landowners who filed submissions and notes that many of the issues they set out relate to environmental impacts, property values and concerns surrounding health risks relating to electromagnetic fields from transmission lines. Determinations on matters such as these are outside the jurisdiction of the OEB, and these matters are not considered by the OEB in a leave to construct proceeding. The OEB notes that the Applicants have obtained the REA approval for the amended route. Because the issues raised by the Landowners are outside the OEB's jurisdiction, they cannot factor into the OEB's consideration of what is in the public interest.

### ***Interests of Consumers with Respect to Pricing***

As indicated above, the Applicants are party to a contract for the purchase of electricity generated by its proposed Generation Facility through the Ontario FIT Program. The proposed Transmission Facilities are necessary to connect the contracted renewable electricity being generated by the Generation Facility to the IESO-controlled transmission grid. The Applicants have confirmed that they will be paying for all of the costs of the Smithville Bypass. The OEB finds that the proposed route modifications will not result in an adverse effect to the interest of consumers with respect to pricing.

### ***Interests of Consumers with respect to Reliability and Quality of Electricity Service***

The IESO confirmed, on June 13, 2016 that the proposed modification to the Transmission Line would not affect the results of its System Impact Assessment report. Similarly, on June 17, 2016 Hydro One confirmed that this modification would not change the results of its Customer Impact Assessment report.

The Applicants state that all electrical equipment and systems for the Smithville Bypass will be designed in accordance with current codes and standards, including the Ontario Electrical Safety Code issued by the Electrical Safety Authority (ESA).

The OEB finds that the Smithville Bypass will not adversely impact the interests of consumers with respect to quality or reliability of electrical service. This finding is premised on the requirement that the Applicants fulfill the conditions set out by the IESO in its System Impact Assessment report and Hydro One in its Customer Impact Assessment report.

### **iii. Promotion of the Use of Renewable Energy Sources as it relates to both Bypasses**

In the LTC Order, the OEB found that the Transmission Facilities promote the use of renewable energy sources.<sup>4</sup> The OEB noted that the Applicant was awarded a contract in respect of the Niagara Region Wind Farm by the Ontario Power Authority (“OPA”) under the Government of Ontario’s FIT program. The OEB came to the conclusion that the proposed Transmission Facilities were needed to convey electricity from the Niagara Region Wind Farm to the provincial electricity grid. On that basis, the OEB agreed that the approval of the Transmission Facilities was consistent with policies of the Government of Ontario concerning the promotion of the use of renewable energy sources. In this proceeding, the OEB finds that the approval of the proposed route modifications would not adversely affect this objective.

### **iv. Statutory Land Issues**

Section 97 of the Act requires that the OEB be satisfied that the Applicants has offered or will offer each landowner affected by the approved route or location an agreement in a form approved by the OEB. The Applicants state that land rights have been secured from the owner of the land on which the Highway 3 Bypass is proposed. In the case of the Smithville Bypass, land rights have been secured in the form of an option on a portion of the proposed route. In both cases the land use agreement is in the form approved by the OEB in the LTC Order. Neither landowner filed letters of comment, or expressed any concerns with the forms of land agreements offered to them. With respect to the Two Landowners, the Transmission Facilities will not be constructed upon, over or under their properties and, thus, they are not directly affected landowners within the context of this leave to construct proceeding.

### **v. Decision**

Having considered the evidence and submissions of the Applicants and the Two Landowners, the OEB finds that, pursuant to section 92 of the Act, it is in the public interest to grant the Applicants leave to construct the Highway 3 Bypass and the Smithville Bypass as described in the maps attached at Schedule “A” and “B”.

The OEB notes that this decision is premised, among other things, on fulfillment of the commitments by the Applicants in its submissions, which include, among other things, the Applicants’ commitments to fulfill the conditions in the Customer Impact Assessment and System Impact Assessment reports, and obtaining and maintaining all necessary approvals, permits, licences, certificates and easement/property rights required to construct, operate and maintain the Transmission Facilities.

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<sup>4</sup> EB- EB-2013-0203, Decision and Order issued July 3, 2015, pg. 8

## 4 ORDER

### THE OEB ORDERS THAT:

1. FWRN LP and NR Capital General Partnership are granted, pursuant to section 92 of the OEB Act, leave to construct the Highway 3 Bypass and the Smithville Bypass, as defined above, and as described fully in Schedules “A” and “B” hereto.
2. All other elements of the original Leave to Construct Order issued in EB-2013-0203, and as may have subsequently been amended in EB-2015-0183 and EB-2015-0290, including the conditions of approval, remain unchanged.

**DATED** at Toronto August 17, 2016

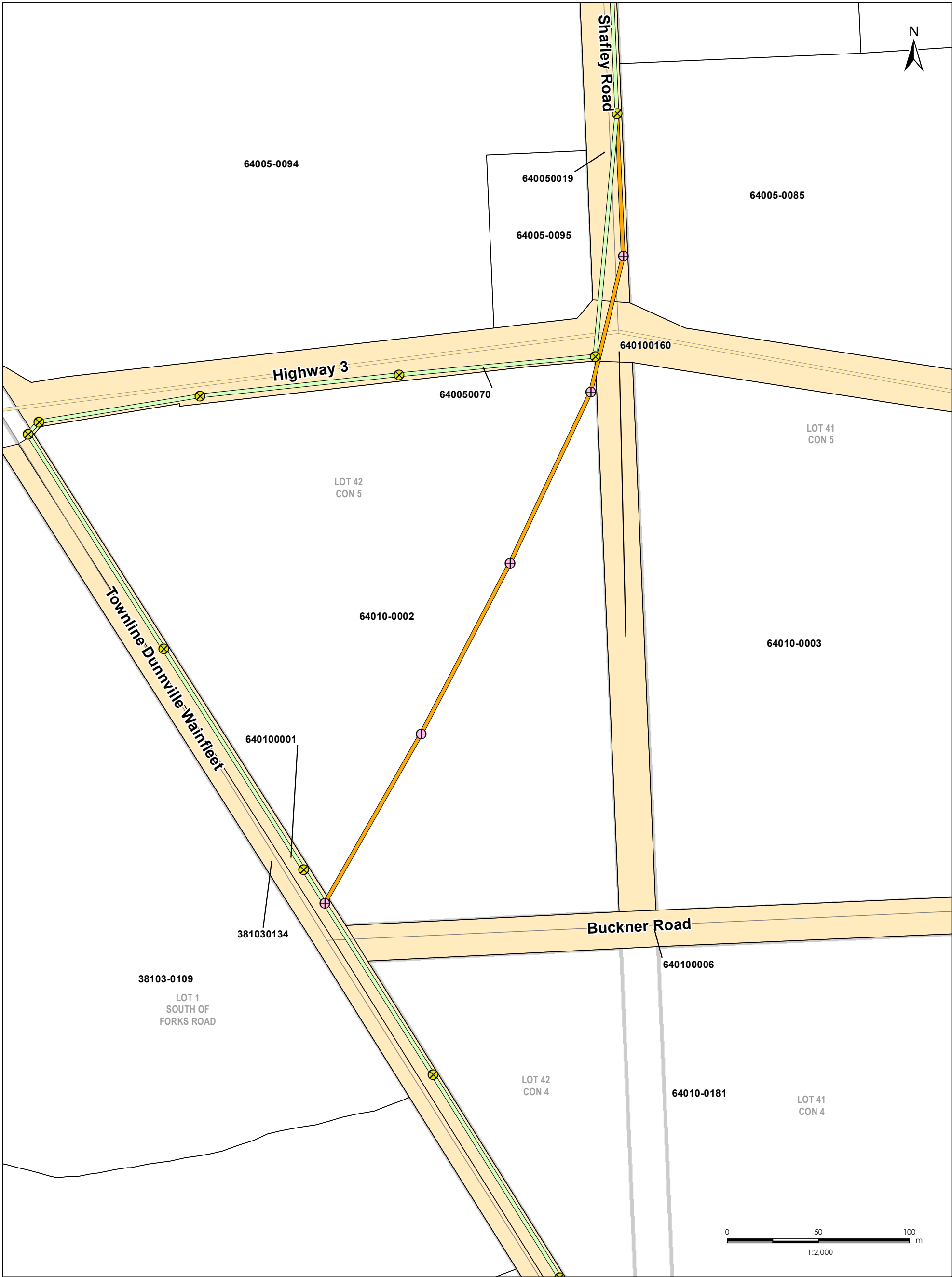
### ONTARIO ENERGY BOARD

*Original Signed By*

Kirsten Walli  
Board Secretary

Schedule A - Highway 3 Bypass

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Revised: 2016-03-11 By: bcowper



March 2016  
160950269



**Notes**  
1. Coordinate System: NAD 1983 UTM Zone 17N.  
2. Base features produced under license with the Ontario Ministry  
3. of Natural Resources © Queen's Printer for Ontario, 2011.  
Smithville By-pass preliminary pole locations are provided by  
FWRN LP and are subject to change based on final detailed  
design.

**Legend**

- Public Road
- Public Expressway / Highway
- Property Boundary
- Pole Locations – FWRN LP detailed design
- Transmission Line Route (LTC as designed)
- Pole Locations (Highway 3 Bypass)
- Modified Alternate Transmission Route

Client/Project

FWRN LP  
Niagara Region Wind Farm

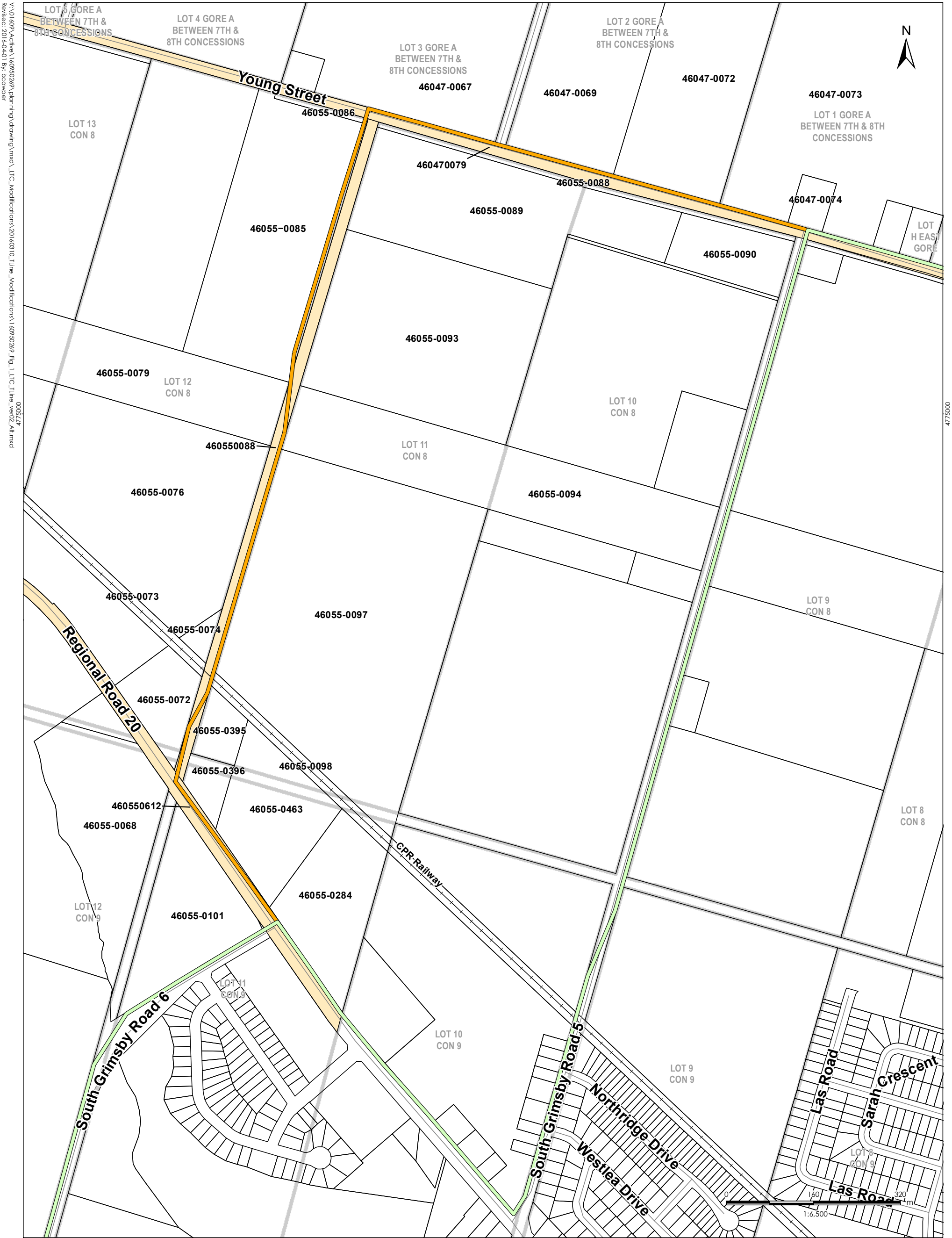
Figure No.


**1**

Title

**Transmission Line  
Alternate Route –  
Highway 3 Bypass**

Schedule B - Smithville Bypass





**Notes**

- Coordinate System: NAD 1983 UTM Zone 17N.
- Base features produced under license with the Ontario Ministry of Natural Resources © Queen's Printer for Ontario, 2011.
- Smithville By-pass preliminary pole locations are provided by FWRN LP and are subject to change based on final detailed design.

**Legend**

- Public Road
- Active Railway
- Property Boundary
- Transmission Line Route (LTC as designed)
- Modified Alternate Transmission Route

Client/Project

FWRN LP  
Niagara Region Wind Farm

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Figure No.

**1**

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Title

**Transmission Line  
Alternate Route –  
Smithville By-pass**