

**IN THE MATTER** of the *Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B, (the "OEB Act")*;

**AND IN THE MATTER** of an Application by wpd White Pines Wind Incorporated for an Order or Orders pursuant to Section 41(9) of the *Electricity Act, 1998, S.O. 1998, c. 15*, to establish the location of distribution and collector lines and associated facilities within road allowances in Prince Edward County

OEB File No. EB-2018-0004

**RESPONSE TO OEB STAFF INTERROGATORIES OF THE COUNTY OF PRINCE EDWARD**

In accordance with Procedural Order No. 2 dated February 20, 2018, please find attached the response of the County of Prince Edward (the "County") to the OEB Staff interrogatories in the above noted proceeding:

**1- Ref: McAuley Affidavit, Paragraphs 18-19**

**Preamble:**

In these paragraphs, Mr. McAuley states that there are "areas where the Distribution System is proposed by the Applicant to be placed underneath the travelled roadway, instead of under the shoulder or outside the edge of shoulder" and that "the proposed location of the Distribution System underneath the travelled roadway is inappropriate due to the possibility of future full depth road rehabilitation... unearthing the Distribution System or any part thereof.

**Question:**

Please advise as to whether it is the County's position that there is no depth under and/or location within the travelled roadway that it would be possible for White Pines to locate the proposed distribution lines and/or related facilities. Please explain your response.

**County Response:**

It is common for utilities to be located within and under the traveled portion of the roadway when they are crossing at a right angle to the roadway. The County accepts these types of placements, but at a depth of 1.5 metres as noted in Appendix 1 of Mr. McAuley's Affidavit.

The County's position is that it is uncommon, and indeed discouraged by the County, for

a utility to place its distribution lines, collector lines and/or related facilities parallel to and underneath the travelled portion of the roadway. The result of such an installation is that entire travel lanes of the roadway are subject to construction disturbance and settlement or heaving failures over time with the result that travel along the roadway becomes difficult and/or unsafe. The County has a statutory obligation to keep its roads at all times in a proper state of repair. Section 44 of the *Municipal Act, 2001* provides that a municipality that defaults with respect to the foregoing is, subject to the *Negligence Act*, liable for all damages that any person sustains because of the default. Accordingly, it is the concern of the County that it can be liable for any default arising from the effects of the placement by the Applicant of distribution lines, collector lines and/or related facilities, particularly within the travelled portion of the roadway. The Applicant has not provided any information or reports in support of its intention to place the distribution lines, collector lines and/or related facilities under travelled portions of the roadway. Typically, such installations within adjacent roadside ditches are acceptable to the County, subject to proper consideration of other relevant matters.

## **2- Staff**

**Ref: McAuley Affidavit, Paragraphs 20-24**

### **Preamble:**

In these paragraphs, Mr. McAuley states (in part) that:

- "there may be issues with respect to title, ownership and occupation of some of the road allowances under which they [White Pines] propose to locate the Distribution System."
- "Some of the road allowances are "forced roads" (and/or have not been surveyed) with no consistent widths or boundaries. In other instances, title to some of the road allowances may be recorded in the names of third parties, abutting owners or the Crown or there may claims for rights of occupation or title by third parties or abutting owners."
- "In addition, some road allowances are unopened road allowances over which claims for rights of occupation or title by third parties or abutting owners may exist."
- "As the County is the statutory authority responsible and liable for roads within its jurisdiction, this lack of information is unacceptable."

### **Questions:**

- a) Does the County consider the roads that are the subject of this application (the subject roads) to be public streets and/or highways pursuant to legislation including, without limitation, the *Municipal Act, 2001*, and for the purposes of the *Electricity Act, 1998*?

Please explain your answer.

**County Response:**

With the exception of Walmsley Extension, the roads that are proposed to be used by the Applicant are currently opened, travelled and maintained by the County. However, for reasons discussed below in this Response, it is important to note that some of these roads are forced/trespass roads.

- b) If the County does not consider the roads to be public streets and/or highways in their entirety, please provide drawings of the subject roads that illustrate the portion(s) of the roads that the County considers to be public streets and/or highways and the portion(s) of the roads that the County does not consider to be public streets and/or highways.

**County Response:**

See response to (a) above and (c) below.

- c) Please discuss the County's view of the impact of the status of the subject roads or any portion(s) thereof as "forced roads" on the OEB's authority to consider the current application under section 41 of the *Electricity Act, 1998*.

**County Response:**

The response from the Applicant does not properly or fully address/recognize the meaning or significance of the term "forced road". A forced road (sometimes referred to as a "trespass road") is a road that was built on **private land**, but which has been used by the public as a roadway. For example, "forced roads" were created when an obstacle prevented a road from physically being built on the surveyed crown road allowance thereby forcing the road to deviate from the surveyed crown road allowance onto private property.

The case law is very clear that in order for a forced road on private land to become part of the public road network, there must be "**implied dedication**" by the owner of the private land PLUS "**acceptance**" by the municipality by the passage of a bylaw (or, prior to January 1, 2003, "**implied acceptance**" by the performance of statute labour) in order to create "**municipal ownership**". Thus, while the maintenance of these types of roads by a municipality may be evidence of "implied acceptance", unless there is evidence of "implied dedication" by the owner of the private land, a public road has not been created. The cases are very clear that whether or not forced roads have become public roads is a "question of

fact". The County has consistently advised White Pines that the County has not conducted an ownership search of the "forced roads" and there may exist private rights or claims that are unknown to the County and may negatively impact on the Applicant's ability to locate their proposed distribution system in reliance on S. 41 of the *Electricity Act, 1998* to undertake the proposed work.

Section 26 of the *Municipal Act 2001* provides that "all highways that existed on December 31, 2002 are deemed to be "highways". This may have the effect of grandfathering some "forced roads" (i.e. trespass roads) as public highways provided that the requirements of dedication plus acceptance (resulting in municipal ownership) were met before January 1, 2003. However, as noted above, the County has not conducted an ownership search of the "forced roads" and there may exist private rights or claims that are unknown to the County.

Even where it can be established that a forced road has become a public road under public ownership, forced roads do not have a consistent width of 66 feet as is the case with roads laid out by the Crown surveyors. By their very nature, forced roads arose from "trespass" and accordingly were not surveyed. Forced roads are limited in their width to only those portions actually being used for vehicular travel, including the shoulder. Thus, the width of a forced road can vary widely from spot to spot depending on actual historic use of the road. Therefore, only the travelled portion and shoulder of such road is available for use by the Applicant. Any attempt by the Applicant to use a portion of the private land outside of the travelled portion and shoulder of the forced road would require the consent of the private owner.

Further, even where a "forced" road may have become an open public highway this declaration does not automatically convey title ownership to the lands upon which the road is situated. Russell on Roads (third edition) states at page 77 that: "it has long been recognized that a person could 'reserve' an interest in a public highway". In fact, Section 30 of the *Municipal Act, 2001* provides as follows:

S.30. A highway is **owned** by the municipality that has jurisdiction over it subject to any rights reserved by a person who dedicated the highway or any interest in the land held by any other person. (Underline emphasis added)

Russell on Roads states at page 78 that: "The term "subject to any rights reserved" could apply to a trespass road [aka "forced road"] maintained by the municipality where the owner of the land has not "impliedly" granted title..."

For all of the above reasons, the County has consistently advised White Pines there may

exist “rights reserved” that are unknown to the County and may negatively impact on the Applicant’s ability to locate their proposed distribution system.

- d) When did the subject roads come into existence?

**County Response:**

The exact dates of the various road’s creation are unknown, leading back to the settlement of the County. Many are reflected in the Belden Atlas of 1845.

- e) What class are the subject roads under Ontario Regulation 239/02?

**County Response:**

The roads are Class 5 roads according to O. Reg 239/02 and County Policy RD 900, with the exception of Walmsley Extension which is unclassified.

- f) Does the County maintain the subject roads? If so, please provide the County’s standards for maintaining and patrolling each of the subject roads.

**County Response:**

The County maintains and patrols the open roads according to the *Municipal Act, 2001*, O. Reg 239/02, County Policy RD 900, Minimum Maintenance Standards for Municipal Roads and County Policy RD 700 Winter Control Standards.

- g) If the subject roads did not exist on December 31, 2002, were they established by by-law of the County or any other municipality on or after January 1,2003?

**County Response:**

With the exception of Walmsley Extension, the roads that are proposed to be used by the Applicant are currently opened, travelled and maintained by the County. However, for reasons discussed above in this Response, it is important to note that some of these roads are forced/trespass roads.

h) Were the subject road allowances made by Crown surveyors?

**County Response:**

The County does not have this information but clearly the forced roads were not laid out by the Crown surveyors.

i) Were the subject roads shown on a registered plan of subdivision?

**County Response:**

None of the roads in the Application are shown on a registered plan of subdivision.

a) Does the County have any municipal services including, without limitation, storm sewers and/or drainage ditches, sanitary sewers, and watermains along and/or under the subject roads? Please provide drawings indicating the locations of all municipal services and, to the extent known, all other services including, without limitation, electricity, natural gas and telecommunications.

**County Response:**

The County has roadside drainage ditches along many of the roads proposed to be used by the Applicant. Being older historic roads, the County does not have drawings indicating the locations of all municipal services. The County does not maintain a database of third party utility locations within these rural roads.

**3- Staff**

**Ref: OEB letter to Wayne Fairbrother, counsel to the County, dated March 14, 2018**

**Preamble:**

The County, through its solicitors, wrote to the OEB requesting an extension of the March 14, 2018 deadline for the filing of its interrogatories in this proceeding to March 19, 2018, on the basis that the parties were actively engaged in without prejudice settlement negotiations. The OEB granted that request by letter dated March 14, 2018.

OEB staff has similar questions for the County to those asked of White Pines by OEB staff.

**Questions:**

- a) What counter-proposals for the location of both the 44 kV Distribution System and Walmsley Road Extension Crossing element of the 34.5 kV Collector System (collectively referred to as the Distribution System) has the County made to White Pines? See below
  
- b) Would any such counter-proposals resolve the concerns raised by the County with regard to title, ownership and occupation of some of the road allowances under which White Pines proposes to locate the Distribution System, including the County's concern about "forced roads"? Please explain your answer. See below
  
- c) Please provide an update of any communications with White Pines, which are not already described in the application. Please provide copies of this communication, if any. See below

**County Response:**

In its reply to the OEB Staff Interrogatory **Negotiations with the County (a)** the Applicant indicates no counter-proposals have been made by the County. To the contrary, the County has repeatedly indicated to the Applicant that it desires the level of information and assurances that were provided in the 2016 RUA for the 34.5KV collector lines to protect the County's road infrastructure. These discussions are currently ongoing on a "without prejudice" and "off the record" basis and as such cannot be disclosed at this time.

In its reply to the OEB Staff Interrogatory "Proposed 44 kV Routing and Walmsley Road Extension Crossing (e)" Wpd states that "The County indefinitely deferred a decision on Staff's recommendation to approve the RUA amendment." The lack of approval of an amending Road Users Agreement ("RUA") is cited as a reason for this OEB Application. It is respectfully submitted that this is a mischaracterization of the purpose and content of the draft amending RUA.

The amending RUA had no bearing on the Distribution System that is the subject of this OEB Application (then referred to by the County as the "Interconnection Line"). The original RUA that was signed in 2016 expressly excluded, at the Applicant's Insistence, the "interconnection line" works proposed for OEB approval in this Application. The Applicant repeatedly stated that since they had a Leave to Construct Order ("LTC") issued by the OEB (EB-2013-0339), they were not obliged to enter into an RUA with the County with respect to the interconnection line works. This position was taken by the Applicant notwithstanding the fact that the Applicant's Responses to Interrogatories in EB-2013-0339 frequently stated that the County's concerns and issues would be addressed "as part of the negotiations surrounding the terms of the road use agreement". The draft amending RUA did not purport to deal with the interconnection line, as the 2013 LTC was, at that time, still in effect. The proposed amendment to the RUA was drafted to address only the reduction in turbines approved by the ERT and related roads and financial guarantees.

The Applicant also indicates that the County received the design for the Distribution System (i.e. the interconnection line drawings) through the summer of 2017. Firstly, to be clear, the Council deferral of the proposed draft amending RUA had nothing to do with not being able to find the interconnection line drawings. Secondly, as the proposed draft amending RUA did not deal with the interconnection line, County staff initially were not aware that such drawings were contained within the numerous drawings that were provided by the Applicant and relevant to the draft amending RUA. Further, County representatives asked the Applicant for the interconnection line drawings on numerous occasions, but no response was received directing the County to the location of such drawings until January 2018 (after the Application was filed).

It should also be pointed out that the interconnection line design drawings provided to the County in the summer of 2017 are dated July 2017, whereas the design drawings submitted by the Applicant with the OEB Application are dated October 13, 2017. As such, the design drawings that are the subject of this Application were not filed with the County in the summer of 2017 as stated by the Applicant.

In its reply to the County's Interrogatories **(1), (2) & (3)** the Applicant indicates that the level of detail provided in this Application was previously accepted by the County as sufficient to issue the right of way permits that the County required for construction of the 34.5 kV Collector System. This statement neglects to advise the Board that the 34.5 KV Collector System to which the Applicant refers is encompassed within a RUA that provides for certain processes, permits, assurances and guarantees to the County. The County's decisions with respect to other wpd works are not part of this Application and does not prejudice the County in taking issue with the Application as filed before the OEB.