



Sent by Electronic Mail

October 18, 2011

Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: EB-2011-0140 Ontario Energy Board Electricity Transmission Infrastructure:  
The East-West Tie Line**

We are counsel to the National Chief's Office on Behalf of the Assembly of First Nations (NCO) and Chiefs of Ontario (COO).

NCO and COO are concerned to note that the Board has commenced this proceeding to designate a transmitter to develop the East-West Tie line without an approved IPSP and Procurement Processes.

The process instituted by the Board's "Framework for Transmission Project Development Plans" (Framework) is a procurement exercise. The very nature of this proceeding is properly characterized as a request for proposal and is entirely distinct from the Board's usual quasi-judicial role. The fact that the procurement involves steps by different parties: namely an economic connection test by the OPA and a designation by the Board, does not alter the position.

The Board has no jurisdiction to make such procurement and the *Electricity Act* requires that an approved IPSP and Procurement Plan be in place to authorize such procurement by the OPA.

NCO and COO have previously noted the tension between the Framework and the IPSP processes and the potential for the Board to be conflicted in its roles under each. The Board dealt with this issue in the Framework as follows:

A few stakeholders commented that the Board's proposed approach presumes the approval of the IPSP in relation to transmission and, as such, the approach pre-empts the due process of an IPSP proceeding and aboriginal consultation and accommodation requirements. The same argument was made in the consultation on transmission connection cost responsibility, in which the Board stated that:

“The Board is not, through this process, determining whether [transmission] facilities will be identified in an IPSP, nor what those facilities might be nor when or on what conditions the Board might approval the IPSP once it has been re-filed with the Board. Any aboriginal consultation and accommodation requirements associated with the IPSP and/or with the siting and construction of any [transmission] facilities remain unaffected by the Board’s proposals...”

The Board maintains the view set out above and reiterates that the OPA remains responsible for independent transmission planning in Ontario. The Board’s mandate is restricted to those review and approval authorities given in the legislation. Further, the Board notes that legislation grants to the Minister of Energy the authority to direct the OPA to implement procedures for consulting aboriginal peoples (among others) in relation to the planning and development of transmission systems and to establish measures to facilitate the participation of aboriginal peoples in the development of renewable generation facilities and transmission systems.

The point is not that the designation presumes approval of the IPSP but that it pre-empts the IPSP process. In so doing, it deprives potential intervenors of the opportunity to bring forward and have tested issues that relate to the IPSP and its Procurement Processes as a whole as well as in detail. The Framework does not do this. It requires the Board to accept transmission projects and implement their procurement without the scrutiny or consultation required by the IPSP and Procurement Plan processes.

Although the Framework process does not dictate whether transmission facilities will be part of the IPSP, if they are included, the Board will be called upon to consider an IPSP and Procurement Processes some elements of which it had already facilitated. The Framework necessarily places the Board in a conflict.

The Board is aware that a main theme of NCO’s participation in proceedings before the Board is the need to eradicate, by affirmative action and otherwise, the systemic discrimination that has prevented the ability of First Nations in Ontario from participating fully in Ontario’s energy generation, transmission and distribution industries.

NCO and COO fully expect to be given the opportunity to pursue these issues in relation to the OPA’s IPSP and Procurement Processes. Recent correspondence with the OPA indicates that the OPA may not produce a Procurement Processes plan despite the requirements of the *Electricity Act* to do so.

In his letter to the Board dated March 29, 2011, Minister Duguid required the Board to take into account “the significance of Aboriginal participation to the transmission project”. The Minister’s requirement must be read as extending to the opportunities and assistance to be provided to First Nations, both in the vicinity of the East-West Tie and

throughout Ontario, to develop and operate or participate in the development and operation of the project.

The OPA's brief discussion in section 5.1 of its "Long Term Electricity Outlook for the Northwest and Context for the East-West Tie Expansion" misses this point entirely

*Conclusion*

The NCO and COO request that:

- OPA produce and the Board require a Procurement Processes plan for its IPSP as required by the *Electricity Act*
- the Board integrate this proceeding with the anticipated IPSP and Procurement Processes proceeding so as to accommodate the issues and concerns raised in this letter. If the Board is unwilling to do so then, without prejudice to their position, NCO and COO request that
- the Board clarify that the weighting of its decision criteria in this proceeding will take into account the opportunities and assistance to be provided to First Nations, both in the vicinity of the East-West Tie and throughout Ontario, to develop and operate or participate in the development and operation of the East-West Tie.

Yours truly



Paul Manning  
*Specialist in Environmental Law*  
*Certified by the Law Society of Upper Canada*