



Jay Shepherd

Professional Corporation
2300 Yonge Street
Suite 806, Box 2305
Toronto, ON M4P 1E4

BY EMAIL and RESS

May 22, 2012

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2011-0140 – East-West Tie Line Designation – Phase 1 Reply Submissions

Please find enclosed the Phase 1 Reply Submissions of the School Energy Coalition (SEC).

Should you require additional information, please do not hesitate to contact me.

Yours very truly,
Jay Shepherd P.C.

Originally signed by

Mark Rubenstein

cc: All Parties (by email)

T. (416) 483-3300 F. (416) 483-3305

mark.rubenstein@canadianenergylawyers.com

www.canadianenergylawyers.com

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 70 and 78 of the *Ontario Energy Board Act 1998*, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

**REPLY SUBMISSIONS ON PHASE 1
ON BEHALF OF THE
SCHOOL ENERGY COALITION**

May 22, 2012

Jay Shepherd P.C.
2300 Yonge Street, Suite 806
Toronto, Ontario M4P 1E4

Mark Rubenstein
mark.rubenstein@canadianenergylawyers.com
Tel: 416-483-3300
Fax: 416-483-3305

Counsel to the School Energy Coalition

TABLE OF CONTENTS

1	GENERAL COMMENTS.....	2
1.1	<u>OVERVIEW</u>	2
2	DECISION CRITERIA.....	2
2.1	<u>ISSUE 1</u>	2
2.2	<u>ISSUES 2-4</u>	3
3	USE OF THE DECISION CRITERIA.....	5
3.1	<u>ISSUES 5-6</u>	5
4	FILING REQUIREMENTS	7
4.1	<u>ISSUES 7-8</u>	7
5	OBLIGATIONS AND MILESTONES.....	8
5.1	<u>ISSUE 9</u>	8
5.2	<u>ISSUES 10-11</u>	8
5.3	<u>ISSUES 12</u>	8
6	CONSEQUENCES OF DESIGNATION	10
6.1	<u>ISSUES 13-14</u>	10
6.2	<u>ISSUES 15-16</u>	11
7	PROCESS	12
7.1	<u>ISSUE 17</u>	12
7.2	<u>ISSUES 19-20</u>	12
7.3	<u>ISSUE 21</u>	13
7.4	<u>ISSUE 22</u>	13
7.5	<u>ISSUE 23</u>	14
8	OTHER MATTERS	15
8.1	<u>COSTS</u>	15

1 GENERAL COMMENTS

1.1 Overview

1.1.1 On May 7th 2012, the School Energy Coalition (“SEC”) filed its submissions on Phase 1 of the Ontario Energy Board (the “Board”) initiated proceeding to designate an electricity transmitter to undertake development for the East-West Tie Line. SEC has reviewed the extensive submissions by other parties, and this is our reply to those submissions.

2 DECISION CRITERIA

2.1 Issue 1

1. What additions, deletions or changes, if any, should be made to the general decision criteria listed by the Board in its policy Framework for Transmission Project Development Plans (EB-2010-0059)

2.1.1 SEC agrees that the “encouragement of new entry and facilitating competition” is a criterion that Board should consider in selecting a designated transmitter.¹ However, that should not in our view be construed into a situation in which the incumbent transmitter (in this case EWT LP) is itself placed at a disadvantage. A fair, transparent and robust proceeding to designate a transmitter is what will foster competition. The Board must ensure that EWT LP does not have an unfair institutional advantage because of its relationship with Hydro One Networks Inc. (“HONI”) and Great Lakes Power Transmission LP (“GLPT”). If the criterion is construed as something more than that, creating additional barriers for EWT LP that would in our view no longer be fair competition. This includes suggestions by RES Canada Transmission LP (“RES”) that there should be a blanket prohibition against sharing of employees between HONI, GLPT and EWT LP.² Employee sharing can produce economies of scope and scale, and should be allowed as long as cost allocation, system access, and sharing of information are properly controlled.

2.1.2 Northwatch has suggested that the ability to mitigate environmental impacts should be relevant criteria. SEC submits that it is not necessary to have specific criteria for this issue; it is clearly contained within other aspects of the decision criteria including

¹ *Upper Canada Transmission Inc.* at para 29. *Iccon Transmission Inc.* at para 19

² *RES Canada Transmission LP* at p. 12

technical ability.³

2.1.3 SEC agrees with EWT LP that regulatory expertise should be considered in this designation process, but does not believe that it should be separate criteria.⁴ The Board should require each proponent to demonstrate that it has the ability to undertake the various regulatory requirements within the context of demonstrating its organizational and technical expertise.

2.2 Issues 2-4

- 2. *Should the Board add the criterion of First Nations and Métis participation? If yes, how will the criterion be assessed?***
- 3. *Should the Board add the criterion of the ability to carry out the procedural aspects of First Nations and Métis consultation? If yes, how will that criterion be assessed?***
- 4. *What is the effect of the Ministers letter to the Board dated March 29, 2011 on the above two questions?***

2.2.1 Transcanada Power Transmission (“TPT”) raises the concern of a “parallel directive power” by the Minister if he is able to direct the Board outside of his statutory authority to do so.⁵ SEC agrees that the Board must guard against the erosion of its independence, but this is not that situation. The Board should give weight to the Minister’s letter of May 20th, 2011 encouraging aboriginal participation as a factor in the decision criteria, because the statement is a reflection of s.1(1)(5) of the *Ontario Energy Board Act, 1998*. SEC agrees with a number of parties who have provided examples showing that encouraging aboriginal participation in the electricity sector is consistent with government policy.⁶

2.2.2 SEC disagrees with a number of proponents who have taken the position that the designation process is not the place to define and evaluate First Nations and Métis participation⁷ or even a general plan for it.⁸ In addition to the specific wording of the Minister’s letter which asks that this be done at this stage, the aim of the process is to choose the most capable transmitter, which includes an ability to involve aboriginal participation. That evaluation is best accomplished during Phase 2 of this proceeding.

³ *Northwatch* at p. 3

⁴ *EWT LP* at p.3

⁵ *Transcanada Power Transmission LP* at p. 5-6

⁶ *National Chief’s Office* at p.2-3, *Ojibways of Pic River First Nations* at p. 3-5. Also see Chapter 5, *Long-Term Energy Plan*.

⁷ *Transcanada Power Transmission LP* at p. 5-6. *Upper Canada Transmission Inc* at para 32, 36

⁸ *Iccon Transmission Inc.* at para 37

- 2.2.3** SEC does agree with RES that participation agreements should not *per se* be favored over participation plans.⁹ The Board should be open to a wide variety of participation arrangements which accrue benefits to First Nations and Métis communities.
- 2.2.4** In its submissions, the Ojibways of Pic River First Nation has proposed that only impacted First Nations and Métis communities can comment on the scope of aboriginal participation. They have outlined a very detailed and onerous process in which the affected First Nations and Métis communities themselves judge the participation plans.¹⁰ SEC submits the Board will be very interested in the views of First Nations and Métis communities themselves, to help inform it in their decision, but that the proposal of Pic River should be rejected for two reasons. First, the Board cannot legally, and should not as a matter of policy, hand over the decision-making responsibility for any issue before it. Second, the proper venue to consider First Nations and Métis participation is the Phase 2 process in this proceeding.
- 2.2.5** Further, while directly impacted First Nations and Métis communities will most likely be the beneficiaries of any participation plans or agreements, it is not clear to SEC why non-impacted First Nations and Métis cannot also be beneficiaries.¹¹

⁹ *RES Canada Transmission* at para 12

¹⁰ *Ojibways of Pic River First Nation* at p. 7-12

¹¹ This is especially important considering there is a dispute as to which communities are affected. See Chief Michano's Letter to the Board dated January 27, 2012

3 USE OF THE DECISION CRITERIA

3.1 Issues 5-6

- 5. *Should the Board assign relative importance to the decision criteria through rankings, groupings or weightings? If yes, what should those rankings, groupings or weightings be?***
- 6. *Should the Board articulate an assessment methodology to apply to the decision criteria? If yes, what should this methodology be?***

3.1.1 SEC agrees with Icon Transmission Inc. (“Icon”) that in applying the decision criteria the Board must reflect the larger objective of choosing not just a proponent who can develop, but one who can build and maintain, a cost-effective East-West Tie Line.¹² Many of the other proponents take the opposite view because of the preliminary nature of the construction estimates.¹³ While the construction budget will only be a preliminary forecast, it is clearly an important factor that the Board must weigh in ensuring the best transmitter is selected. What is the point of encouraging competition if the cost to build and operate the competitive project is not a central concern?

3.1.2 The OPA’s comments regarding costs are also quite salient. The Board should select a proponent whose plan leans towards a lower cost solution, subject to the relevant criteria.¹⁴ While the leave to construct proceeding will be opportunity for the Board to determine the reasonableness of those costs, practically speaking this process is determining who will be the proponent to bring forth that application. A budget forecast itself is one indicator of a proponent’s technical expertise.

3.1.3 A number of parties have advocated for some form of weighting, or identifying criteria that should be assessed on a pass/fail basis.¹⁵ SEC reiterates its disagreement with that approach. Since this is the first process of its kind, the Board does not have a history of reviewing designation applications or adjudicating between them. The Board must allow for a flexible approach, especially since this is not technically a procurement process but an administrative proceeding.

3.1.4 In addition, SEC disagrees with the Power Workers’ Union (“PWU”) position that the criteria assessment should necessarily favor Ontario based companies.¹⁶ While having

¹² *Icon Transmission Inc.* at para 15-17

¹³ *Transcanada Power Transmission LP* at p. 13

¹⁴ *Ontario Power Authority* at p.2

¹⁵ *Northwatch* at p. 7, *Power Workers’ Union* see issue 6, *Canadian Niagara Power Inc.* at p. 4

Ontario based expertise will likely benefit a proponent, as it may reflect relevant experience, the Board cannot assume that to be automatic. Other applicants who are based, or have completed transmission projects outside of the province, should have a fair opportunity to explain how their experience is relevant.

¹⁶ *Power Workers' Union* see issue 6

4 FILING REQUIREMENTS

4.1 Issues 7-8

7. *What additions, deletions or changes should be made to the Filing Requirements (G-2010 0059)?*
8. *May the applicants submit, in addition or in the alternative to plans for the entire East-West Tie Line, plans for separate segments of the East-West Tie Line?*

4.1.1 Many of the proponents' submissions seek to remove many items from Board Staff's proposed Filing Guidelines. While SEC submits that not all information will be available at the time of filing the application, the Board should seek a broad scope of information from the proponents. Ultimately not all of the information will be as useful as expected, since this is the first proceeding of its kind, but in SEC's view it is simply too early to make a predetermination that potentially useful information should be excluded.

4.1.2 SEC supports the specific recommendation of the OPA that proponents be required to explain why their plan leads to a lower cost solution than other alternatives, while still meeting the project requirements.¹⁷ In addition, SEC supports the suggestion by the PWU to include that the ability of a proponent to hire necessary staff and its safety history.¹⁸

¹⁷ *Ontario Power Authority* at p. 2

¹⁸ *Power Workers' Union* see issue 7

5 OBLIGATIONS AND MILESTONES

5.1 Issue 9

9. What reporting obligations should be imposed on the designated transmitter (subject matter and timing)? When should these obligations be determined? When should they be imposed?

5.1.1 SEC believes it is important to have robust reporting requirements, and disagrees with Canadian Niagara Power Inc. (“CNPI”) that they should not be required by the Board.¹⁹ To protect ratepayer financial interests, and their interest in the timely completion of the East-West Tie Line, the Board needs to be kept up to date on the progress of the designated transmitter and any complications that it foresees.

5.2 Issues 10-11

10. What performance obligations should be imposed on the designated transmitter? When should these obligations be determined? When should they be imposed?

11. What are the performance milestones that the designated transmitter should be required to meet for both the development period and the construction period? When should these milestones be determined? When should they be imposed?

5.2.1 Performance obligations and milestones are important to ensuring the designated transmitter pursues development work in a timely and effective manner. RES proposes that there should not be any performance obligations.²⁰ SEC disagrees. The Board has the authority to impose such obligations on the designated transmitter, and should do so whenever a proposed obligation or milestone materially furthers the aim of this process. At the same time, SEC does agree with TPT, that performance obligations or milestones regarding scheduling should not come at the expense of a cost-effective project.²¹

5.3 Issues 12

12. What should the consequences be of failure to meet these obligations and milestones? When should these consequences be determined? When should they be imposed?

5.3.1 In a situation where a designated transmitter has lost its designation, SEC believes that the transmitter should be required to deliver all the information developed during the development phase to their replacement. The Board should order that agreements

¹⁹ Canadian Niagara Power Inc. at p.7

²⁰ RES Canada Transmission LP at para 35

between the designated transmitter and any third parties not be subject to a confidentially agreement without the express approval of the Board, so that if a transfer of information is required, there are no legal obstacles to doing so.

²¹ *Transcanada Power Transmission* at 15

6 CONSEQUENCES OF DESIGNATION

6.1 Issues 13-14

13. On what basis and when does the Board determine the prudence of the budgeted development costs?

14. Should the designated transmitter be permitted to recover its prudently incurred costs associated with preparing its application for designation? If yes, what accounting mechanism(s) are required to allow for such recovery?

6.1.1 The appropriate time for recovery of the approved budgeted amount is at the filing of the designated transmitter's first rate proceeding, not (as suggested by RES) as part of the leave to construct process.²² Of course, if there is no successful leave to construct application, and some or all of the budgeted costs are recoverable, an alternate approach will be required.

6.1.2 SEC notes AltaLink's comment in its submission that the deferral account "should allow the designated utility to earn a fair return on capital invested."²³ It is unclear to SEC how any development costs could be capitalized (under IFRS or CGAAP), but if they are, they would not earn a return until they close to rate base, which would not occur until the East-West Tie Line is in-service and becomes "used and useful". Capitalized costs may have a related AFUDC, but that is a separate issue with its own well-defined parameters, and should not be replaced with interest on a deferral account.

6.1.3 The Board in this process must review the entire development budget for the purposes of determining prudence. The Board has the authority to designate a particular transmitter, but then alter their budgeted development costs if it finds that they are not "just and reasonable" SEC therefore disagrees with TPT's position that the "development costs itemized in the application will be deemed prudent upon designation".²⁴ What will be deemed prudent are the *approved* budgeted development costs upon designation.

6.1.4 Regarding non-budgeted expenses incurred after designation, SEC disagrees with Altalink that the test should only be prudence.²⁵ The test should be prudence, but only as far as the expense could not reasonably be foreseen at the time of the filing of the

²² RES Canada Transmission LP at para 34

²³ AltaLink Ontario L.P. at para 24

²⁴ RES Canada Transmission LP at p. 15

²⁵ AltaLink Ontario L.P. at para 25

Phase 2 application. This process should seek accurate forecasted development costs and not budgets which can be inflated after designation. If the Board subsequently determines that an additional expense should reasonably have been included in the original budget, it should be open to the Board to deny recovery of all or part of that expense, even if prudently incurred.

- 6.1.5** The Métis Nation of Ontario (“MNO”) has commented that costs associated with engagement, negotiations and arriving at arrangements in relation to First Nations and Métis participation should be recoverable by the designated transmitter to ensure the proper incentives to encourage First Nation and Métis participation.²⁶ SEC conditionally agrees with that position, but submits that this will depend on the type of participation agreed to and the specific context.

6.2 *Issues 15-16*

15. *To what extent will be designated transmitter be held to the content of its application for designation?*

16. *What costs will a designated transmitter be entitled to recover in the event that the project does not move forward to successful application for leave to construct?*

- 6.2.1** SEC reiterates its position that the designated transmitter should be “at risk” in its leave to construct application if its estimated construction costs turn out to have been unreasonably understated. SEC agrees with CNPI, that “if a transmitter’s leave to construct application departs from its designation application without reasonable justification, the Board should consider rejecting the leave to construct application.”²⁷ SEC also agrees with the suggestion of UCT, that the Board should require proponents to address in their application their level of commitment to their forecasts of construction and operations and maintenance costs.²⁸

- 6.2.2** The costs the designated transmitter will be entitled to recover in the event that the project does not move forward to a successful leave to construct should be determined based on the reason for non-success. SEC disagrees with TPT that the threshold for non-recovery should be as high as “negligence”.²⁹ If the reason is within the reasonable control of the designated transmitter, then prima facie it should not be able to recover its budgeted development costs.

²⁶ *Métis Nation of Ontario* at p. 8

²⁷ CNPI page 9

²⁸ *Upper Canada Transmission Inc.* at para 73

²⁹ *Transcanada Power Transmission* at p.17

7 PROCESS

7.1 Issue 17

17. The Board has stated its intention to proceed by way of a written hearing and has received objections to a written hearing. What should the process be for the phase of the hearing in which a designated transmitter is selected (phase 2)?

18. Should the Board clarify the roles of the Board's expert advisor, the IESO, the OPA, Hydro One Networks Inc. and Great Lakes Power Transmission LP in the designated process? If yes, what should those roles be?

7.1.1 At this time the Board should not determine if the hearing should be oral, written, or some combination. Until the applications have been filed and interrogatories have been answered, the Board and parties will not have a clear understanding of where the truly disputed issues lie. Additionally, while the development costs will only be a small part of overall cost of the East-West Tie Line, they still will be a significant amount for ratepayers, and it may be appropriate for an oral hearing to test the prudence of the budgeted costs.

7.1.2 SEC disagrees with a number of proponents regarding the role of Board Staff in the interrogatory process.³⁰ While it might be appropriate for interrogatories to be posed to applicants by Board Staff, their role in editing those submitted to them by from other parties should be strictly limited to avoiding repetition. The rights of ratepayer groups and other intervenors must be respected, and it is not the appropriate role of the Board Staff to be put in an adjudicative role. In this regard SEC agrees with submissions made by the Nishnawbe Aski Nation ("NAN").³¹

7.1.3 The Board must ensure procedural fairness not just for the proponents, but for all intervenors. While the nature of this proceeding requires some changes to the Board's normal practice, that should not come at the expense of the rights of other parties.

7.2 Issues 19-20

19. What information should Hydro One Networks Inc. and Great Lakes Power Transmission LP be required to disclose?

20. Are any special conditions required regarding the participation in the designation

³⁰ RES Canada Transmission LP at para 38, EWT LP at p.22

³¹ Nishnawbe Aski Nation at para 21-34.

process of any or all registered transmitters?

7.2.1 HONI objects outright to disclosing one document, the *Study Estimated Report* prepared by SNC Lavalin, on the basis of a confidentiality agreement prohibiting release of the report to third parties. The Board has made it clear that it will make any final determinations regarding confidentiality treatment of documents germane to its process in the possession of a regulated utility. As the Board stated in EB-2011-0123 addressing a similar argument:

Utilities, such as Guelph Hydro must be cognizant of this when entering into confidentiality agreements with third parties that extend to the provision of information and documents that the utility knows or ought to know may reasonably be required to be produced as part of the regulatory process.³²

7.2.2 Like all other documents in which HONI claims should not be released in full due to commercially sensitive information within, SEC submits the Board should adapt its current process under its *Practice Direction on Confidentiality Filings* to determine what information, to whom it should be released to, and if it should be accorded confidentiality treatment. The fact that HONI has agreed not to disclose the particular study should not be a relevant factor.

7.3 *Issue 21*

21. Are the protocols put in place by Hydro One Networks Inc. and Great Lakes Power Transmission LP, and described in response to the Board's letter of December 22, 2011, adequate and if not, should the Board require modification of the protocols.

7.3.1 SEC agrees with CNPI's suggested improvements to the protocols put in place by Hydro Networks Inc. and Great Lakes Power LP.³³

7.4 *Issue 22*

22. Given that EWT LP shares a common parent with Great Lakes Power Transmission LP and Hydro One Networks Inc., should the relationship between EWT LP and each of the Great Lakes Power Transmission LP and Hydro One Networks Inc. be governed by the Board's regulatory requirements (in particular the Affiliate Relationship Code) that pertains to the relationship between licensed transmission utilities and their energy service provider affiliates.

³² *Decision on Confidentiality*, dated August 19th, 2011 (EB-2011-0123) at p. 3.

³³ *Canadian Niagara Power Inc.* at p. 10-11

7.4.1 In furtherance of ensuring proper regulatory oversight between EWT LP and Hydro One and Great Lakes Power Transmission LP (and its affiliates), SEC agrees with the proposed protections adapted from the *Affiliate Relationships Code for Electricity Distributors* (ARC), as outlined by UCT.³⁴

7.5 *Issue 23*

23. What should be the required date for filing an application for designation?

7.5.1 SEC does not take a position regarding this issue.

³⁴ *Upper Canada Transmission Inc* at para 83

8 OTHER MATTERS

8.1 Costs

8.1.1 SEC hereby requests that the Board order payment of our reasonably incurred costs in connection with our participation in this proceeding. It is submitted that the School Energy Coalition has participated responsibly in all aspects of the process, in a manner designed to assist the Board as efficiently as possible.

All of which is respectfully submitted on this 22nd day of May, 2012

Mark Rubenstein
Counsel to the School Energy Coalition