

IN THE MATTER OF Sections 70 and 78 of the *Ontario Energy Board Act*, 1998;

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 of the
Ojibways of Pic River First Nation (“PRFN”)**

The PRFN is pleased to offer its reply submissions in respect of three matters as follows:

Access to Information

1. PRFN notes the concern raised by AltaLink at paragraph 13 of its May 7, 2012, submissions that certain parties may have had early access to information identifying the relevant First Nations and Metis groups affected by the East-West Tied Project, (such as the May 31, 2011, letter from Jon Norman) prior to this information being publicly released.
2. PRFN respectfully submits that information as to the potentially affected aboriginal communities has been publicly available since at least November 23, 2010, if not earlier, through the Integrated Power System Plan (“IPSP”) planning process.

3. On November 23, 2010 Ontario issued its Long Term Energy Plan (“LTEP”). In section 4 of the LTEP, the government outlined the future needs for electricity transmission and the plan that government would implement:

Ontario will proceed first with an investment of approximately \$2 billion in five priority projects to be completed in the next seven years, which will ensure a growing mix of renewable sources can be reliably transmitted across the province.”¹

4. The LTEP outlined five priority transmission projects, with corresponding areas delineating the geographic region of each project - one of which was the East-West Tie.² The LTEP noted that the East-West Tie would be submitted to the OEB to carry out a designation process to select the transmission company to develop the line.³

5. In section 5 of the LTEP under “Aboriginal Communities”, the government outlined the following:

Transmission...

Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of this interest may vary between communities.

...

Ontario will encourage transmission companies to enter into partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest. The government will also work with the

¹ LTEP, p. 44.

² LTEP, Figure 12, p. 45, 46.

³ LTEP, p.46

OPA to adjust the Aboriginal Energy Partnership Program – currently focused on renewable energy projects – to provide capacity funding for aboriginal communities that are discussing partnerships on future transmission projects.

The Plan

Ontario Recognizes that successful participation by First Nation and Metis communities will be important to advance many key energy projects identified under a Long-Term Energy Plan.

6. It is respectfully submitted that by at least 2010, if not before, the following information was in the public domain:
 - (i) The geographic region of the East-West Tie project;
 - (ii) That the East-West Tie project would be submitted to the OEB, to select a designated transmitter;
 - (iii) That aboriginal communities have an economic interest in transmission projects crossing through their traditional territories; and
 - (iv) That the Ontario government encourages transmission companies to enter into partnerships with aboriginal communities.

7. As a result any party, without too much effort, would have been able to identify the aboriginal communities potentially affected by the East West Tie project, or for that matter, those aboriginal communities affected by any of the other priority transmission projects identified in the LTEP.

OPA's Consultation Record

8. Pursuant to the Board's direction dated May 2, 2012, the OPA provided its consultation record. The record confirms that the OPA's consultation activities with aboriginal communities on the East-West Tie have been integrated with those consultations on the IPSP. PRFN submits that the OPA has not conducted adequate or proper consultations and reserves its right to make further submissions on this issue.
9. In their submissions dated May 7, 2012 at p.20 PRFN referenced Chief Michano's letter dated January 27, 2012. Chief Michano noted that certain First Nations, not within the Robinson Superior Treaty area were included on the Crown's list of aboriginal communities provided to OPA for the purpose of carrying out consultation. In order for the duty to consult to be engaged, there must be (i) an existing or potentially existing Aboriginal right or title that may be affected by Crown contemplated conduct; and (ii) the Crown must have knowledge (actual or implied) of these rights or title and that they may be adversely affected⁴.
10. The East-West Tie takes place completely within the Robinson Superior Treaty area. In PFRN's respectful submission, there are no potential impacts on First Nations lying outside the Robinson Superior Treaty area and where there are no potential or possible impacts on rights or title that may be affected, there is no obligation to consult. This matter has not been addressed although in PRFN's respectful submission, the scope of consultation is vital to the transmitters who presumably will be filing plans for consultation and therefore to the Board's designation process overall.

⁴ *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 1139, para 87.

11. The OPA was delegated the procedural aspects of consultation by letter dated May 31, 2011 from the Crown. It is not for the OPA to determine that its obligations have discharged; it is for the Crown to determine whether its duty has been properly fulfilled. PRFN is not aware that the Crown has confirmed the OPA has discharged the consultation responsibilities delegated to it. PRFN submits that the obligation of fulfilling the procedural requirements of consultation therefore remains vested in the OPA prior to designation and as such, it should be undertaking appropriate action, including, clarifying and addressing the issue raised by Chief Michano.

Crown Delegation of Procedural Aspects of Consultation

12. PRFN agrees with NAN's submission that the Crown's duty to consult cannot be delegated to a third party.⁵ The Crown's assumed sovereignty over lands and resources formerly held by the aboriginal community means that the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated. The Crown must always ensure that consultation, including accommodation, has been properly carried out and the duty adequately discharged.
13. PRFN does not agree however, with the proposition that the procedural aspects of this duty cannot be delegated. While the Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests, the Crown may delegate the procedural aspects of consultation to industry proponents seeking development.⁶ From a practical standpoint, as well, this procedural delegation needs to occur. Otherwise, engagement would be unduly prolonged, projects could not be completed and the

⁵ Submissions of NAN on Issues List, May 7, para. 5

⁶ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 53.

relationships that need to be built between a developer and the aboriginal communities, which are critical both to the success of the project and the well-being of the communities impacted, would not be facilitated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2012.

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