

East-West Tie Line Designation

Board File No.: EB-2011-0140

PHASE 1

**REPLY SUBMISSIONS OF THE
NATIONAL CHIEF’S OFFICE FOR THE ASSEMBLY OF FIRST NATIONS**

May 22, 2012

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1 INTRODUCTION

The National Chief’s Office (NCO) for the Assembly of First Nations (AFN) has reviewed the submissions of the participants on the issues in Phase 1 of this proceeding. These are the NCO's reply submissions. References and expressions are the same as in the NCO’s principal submissions.

2 ABORIGINAL PARTICIPATION AND CONSULTATION

The NCO’s principal submissions spoke of the opportunity afforded to the Board in this designation process to take a step towards the eradication of systemic discrimination that has prevented the Aboriginal peoples from participating fully in Ontario’s energy industry.

The Board’s statutory objectives, government policy, the Minister’s Letter, the Charter, international human rights law and the Board’s duty to serve the public interest all mandate that step.

Six First Nations: Fort William First Nation, Red Rock Indian Band, Pays Plat First Nation, Ojibways of Pic River First Nation, Pic Mobert First Nation, Michipicoten First Nation have chosen to participate in this process, presumably in reliance on the government’s Long Term Energy Plan (LTEP) and the Minister’s Letter.

Several of the competing transmitters seek, in one form or another, to exclude any advantage to any applicant who, before applying for designation, has

- Undertaken Aboriginal “consultations”; or

- Secured Aboriginal participation

In reality, these objections are focussed on one transmitter because the six First Nations own it in part through a limited partnership.

In effect, those transmitters are asking the Board to

- Deny those First Nations the benefit of their own enterprise
- Ignore any timing and cost advantage for the project (and ultimately the ratepayer) arising from the established participation arrangement of those First Nations

The Minister's Letter makes it clear that these advantages are an essential part of the designation:

"A designation process for the East-West Tie also promotes the Board's electricity objectives of protecting the interests of consumers with respect to prices and of promoting cost-effectiveness in the transmission of electricity. In respect of those particular ends, and given the location and value of the East-West Tie in ensuring reliability and maintaining efficiency and flexibility of the system, I would expect that the weighting of decision criteria in the Board's designation process takes into account the significance of Aboriginal participation to the delivery of the transmission project, as well as a proponent's ability to carryout the procedural aspects of Crown consultation."

What those transmitters suggest is a level playing field for competition is, in fact, a skewed playing field for Aboriginal participation. The Board should not perpetuate the systemic discrimination that has operated against Aboriginal participation in Ontario's energy industry by acceding to these requests.

Some transmitters suggest that the incumbent transmitters had information that allowed them to identify and secure the participation of the six First Nations before other transmitters.

The NCO notes that the LTEP was released in November 2010. It was clear from the LTEP that

The East-West tie will be submitted to the OEB to carry out a designation process to select the most qualified and cost-effective transmission company to develop the line

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

The Minister's Letter is an implementation of what was already in the LTEP. It was open to all of the transmitters in this proceeding, from the time the LTEP was released, to take steps to identify potentially affected Aboriginal communities. If any of those transmitters are now saying that they and their advisors have insufficient knowledge and experience to have undertaken such a task, it calls into question whether they are capable of carrying out the procedural aspects of Aboriginal consultation for this designation.

Of course, no party is able to carry out any formal consultation activities unless and until the Crown delegates the procedural aspect of its duty to consult. To that extent, the NCO accepts that it cannot be a bar to any applicant that it has not carried out any "consultations" prior to its application. However, the Board is not asked at this point to adjudicate the adequacy of consultation. It is only asked to consider which party is best equipped to carry out the delegation. It would be a fiction for the Board to ignore the real advantages to an applicant of prior discussions or participation arrangements with the six First Nations.

Some submissions conflate Aboriginal participation with Aboriginal consultation. Although there may be an overlap, the two are distinct. The duty to consult is the duty of the Crown. The Crown may in some circumstances delegate the procedural aspects of consultation but the primary duty remains with the Crown.

The fact of participation of some Aboriginal communities in the designated transmitter does not pre-empt or limit the Crown's duty to consult all relevant Aboriginal peoples. The Board does not have to wait for the outcome of consultation to assess which applicant best satisfies the Aboriginal participation requirement in this proceeding.

For the avoidance of doubt, the NCO does not accept the assertion by the OPA in its submission that

"... in our view, if any duty to consult arose prior to the Board's letter of August 22, 2011 calling for transmitters interested in filing a plan for the development of the E - W Tie, the procedural aspects of such duty were met by the activities undertaken by the OPA on or before the July 29, 2011 date that Aboriginal communities had been given to write to the OPA with their questions or comments."

3 CONCLUSION

In making this designation, the Board should not ignore the advantages of the participation arrangements entered into by the six First Nations and the benefits of such arrangements to the Aboriginal consultation process.

In any event, those participation arrangements are a minimum benchmark for the Board's designation. Whichever applicant is designated, the Board should ensure, by condition or otherwise, that equivalent or greater participation is a minimum requirement

These reply submissions are made subject and in addition to the NCO's principal submissions which are restated here.

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

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