

May 22, 2012

COURIER, RESS, EMAIL

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

Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

**Re: EB-2011-0140 -- Great Lakes Power Transmission EWT LP submissions
pertaining to the issues in Phase 1 of the East West Tie Designation
Proceeding**

We are counsel to Great Lakes Power Transmission EWT LP ("GLPT EWT"). In accordance with the Board's Procedural Order No. 3, attached are GLPT EWT's reply submissions in Phase 1 of the East West Tie designation proceeding.

Yours truly,



Crawford Smith

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cc: A. McPhee, GLPT-EWT LP
M. Zajdeman, GLPT-EWT LP

Enclosure

1
2 **IN THE MATTER OF** Section 70 and 78 of the *Ontario Energy*
3 *Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

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

8
9 **GREAT LAKES POWER TRANSMISSION EWT LP**

10 **REPLY PHASE I SUBMISSIONS**

11 **1. Introduction**

12 These are the submissions of Great Lakes Power Transmission EWT LP (“GLPT EWT”) in reply
13 to the Phase I submissions made by certain designation applicants and intervenors (the
14 “Opposing Parties”) regarding document disclosure by Great Lakes Power Transmission LP
15 (“GLPTLP”).

16 In their Phase I submissions, various Opposing Parties have taken the position that GLPTLP
17 should disclose all documents in its control or that were in its control related to the East-West
18 Tie without regard to the nature of those documents or the basis of their creation. Based on
19 GLPTLP’s initial submissions, it would appear not to have any documents related to the
20 development of the East-West Tie. However, GLPT EWT does have documents related to the
21 development of the East-West Tie.

22 As discussed further below, the Board should not order the disclosure of these documents as they
23 are not under the control of GLPTLP (and even if they were there is no legal basis to require
24 disclosure); the documents contain highly confidential work product and production would be
25 prejudicial to EWT LP’s designation application and the process itself.; and this information was
26 obtained at expense of the partners of GLPT EWT and they are vested with a proprietary interest,
27 together with the interest of First Nation partners of Bamkushwada LP that contributed to the
28 preparation of parts of the information.

1 GLPT EWT has raised this matter at this juncture of the proceeding to ensure clarity in respect of
2 any order the Board may make regarding GLPTLP's document disclosure and to ensure that
3 GLPT EWT's, and ultimately EWT LP's, reliance on the information in question in Phase II of
4 this proceeding is beyond doubt.

5 **2. Relevant Background**

6 **(a) GLPT EWT**

7 GLPT EWT is a limited partnership. Its partners are Brookfield Infrastructure Holdings Canada
8 Inc. ("BIH") and Great Lakes Power Transmission Inc. ("GLPI"). BIH and GLPI are also the
9 partners of GLPTLP, the regulated transmitter. GLPT EWT was formed in September 2011.

10 **(b) EWT LP**

11 EWT LP is the designation applicant. It is a limited partnership whose partnership interests are
12 held equally by three limited partners, Hydro One Inc., Bamkushwada LP. ("BLP") and GLPT
13 EWT.

14 The partners of EWT LP have agreed that GLPT EWT's interest in the partnership shall be partly
15 funded by the costs incurred in gathering and preparing the documents at issue here.

16 **(c) The Designation Framework**

17 In considering the Phase I submissions, the Board must have regard to the context of the
18 designation process, from the time the concept of designation began with the Board's policy
19 deliberations in EB-2010-0059 to the Board's letter of December 20, 2011 announcing the
20 commencement of the designation process and project parameters.

21 Under the Board's framework, existing licensed transmitters were entitled to participate in a
22 designation process with the only concern expressed at the time being that there may be
23 knowledge possessed by the licensed transmitter with respect to the configuration of connection
24 points and that this concern could be addressed as part of possible amendments to the

1 Transmission System Code.¹ No special conditions were imposed on licensed transmitters with
2 respect to their activities. At no time did the Board state that a licensed transmitter must not
3 consider designation or that it would be required to make some form of organizational change.

4 On November 23, 2010, the East-West Tie was identified as one of the five priority lines under
5 the Long-term Energy Plan. Under the Plan, the East-West Tie was to be submitted to the Board
6 for purposes of the designation process (p. 46). On March 29, 2011, the Minister provided a
7 letter to the Board requesting the Board use its designation transmitter policy framework for
8 purposes of establishing a designated transmitter for the East-West Tie. In response, the Board
9 Chair filed a letter with the Ontario Power Authority (“OPA”) requesting a report with respect to
10 the East-West Tie for purposes of the designation process. At no time did the Board provide any
11 instructions or direction to licensed transmitters, or to any other participant in the designation
12 process, restricting or directing the activities related to the preparation of a development plan.

13 Following the OPA’s report on June 30, 2011, the Board issued a letter on August 22nd
14 requesting parties interested in designation to file letters of interest on September 21, 2011.
15 Again, no direction was provided to licensed transmitters or any other party with respect to the
16 activities they could undertake with respect to the East-West Tie Line.

17 (d) **The EWT Designation Team**

18 In the above framework, GLPTLP took steps to separate the designation and non-designation
19 functions. Accordingly, designation and non-designation teams were formed by GLPTLP.
20 When GLPT EWT was formed in September 2011, the GLPT designation team members also
21 became representatives of GLPT EWT. The designation team is referred to as the “EWT
22 Designation Team”, whereas the non-designation team is referred to as the “GLPT Team”.

23 As described in correspondence filed with the Board by GLPTLP on January 9, 2012, protocols
24 were put in place to enforce the separation of team functions and control the access to
25 information.

¹ Ontario Energy Board, *Board Policy: Framework for Transmission Project Development Plans*, August 26, 2010 at p. 12.

1 The EWT Designation Team relied on the framework described above and undertook the
2 activities on its own and, from time to time, in conjunction with other partner members of
3 EWT LP's Designation Team (i.e., representatives from the First Nations forming Bamkushwada
4 LP ("BLP")). It is fair to say that these activities occurred both before and after GLPT EWT was
5 formed. In either case, they gave rise to the documents discussed herein.

6 There is nothing surprising in the fact that the EWT Designation Team undertook development
7 activities. Certain Opposing Parties may also have done so. All of them could have. Participants
8 were aware of the designation process in respect of the East-West Tie Line by November 2010.
9 For example, TransCanada Transmission's transmission license proceeding commenced at that
10 time and was for the purpose of participating in a designation process. Similarly, there is nothing
11 significant about EWT LP's organizational structure.

12 3. The Information

13 Through their development activities, the EWT Designation Team has gathered or prepared
14 confidential development documentation. The documents or information reflected in those
15 documents will ultimately form part of EWT LP's designation plan.

16 The EWT Designation Team documentation falls into two categories.

- 17 • Category No. 1: This category is comprised of technical, background documentation,
18 such as historic or geographical images and reports which were obtained from public
19 sources. It is available to all parties.
- 20 • Category No. 2: This category is comprised of proprietary, highly confidential strategic
21 information prepared by the Designation Team related to EWT LP's approach to its
22 development plan. Examples include project schedules, cost estimates and other
23 commercial and financial information. A number of the documents in this category were
24 created by the EWT Designation Team and BLP, together. Category 2 documents are
25 referred to as hereafter as the "Strategic Information."

1 **4. GLPT Does not Control The Documentation**

2 Other than those documents that it has already identified, GLPTLP does not have in its control
3 documents related to the development of the East-West Tie. The documents are controlled by
4 GLPT EWT and will ultimately be held by EWTLP and used by it in its designation plan.

5 While often referred to as GLPT representatives, properly understood the individuals assigned to
6 the EWT Designation Team carried out their work, even before GLPT EWT was formed, on the
7 ultimate understanding that it would be used by EWT LP or some other comparable entity in its
8 designation plan. In this respect, and consistent with the Long-Term Energy Plan, it was BIH and
9 GLPI's intention at the outset to participate in the designation process in combination with First
10 Nations and, perhaps, others. As matters subsequently unfolded, GLPT EWT was formed and
11 became a one third partner in EWT LP the designation applicant. As discussed above, the
12 documents at issue including the Strategic Information form part of GLPT EWT's partnership
13 interest in EWT LP.

14 **5. Disclosure Would be Inappropriate**

15 Even if the documents were under GLPT's control, an order by the Board for disclosure would
16 be inappropriate. As to the documents in Category 1, they are public and are already available to
17 all parties through the exercise of reasonable diligence. As to the Strategic Information
18 (Category 2), it should not be ordered disclosed because:

- 19 (a) it represents confidential work and, production of the documents would be highly
20 prejudicial;
- 21 (b) ratepayers have not paid rates which include any amount in respect of the
22 Strategic Information;
- 23 (c) even if ratepayers had paid rates which included an amount on account of the
24 Strategic Information, that would not provide a basis for disclosure.

1 (a) **The Strategic Information is Confidential**

2 There is no basis to order the production of those documents; disclosure would be manifestly
3 unfair to GLPT EWT and EWT LP.

4 The Strategic Information concerns how EWT LP's intends to proceed with development of the
5 East-West Tie and its approach to the development plan. Disclosure of this information would
6 reveal EWT LP's current thinking regarding its development plan. It would permit EWT's
7 competitors to use the information in the documents (without cost) in the development or
8 modification of their own plans. In this respect, EWT LP's plan would become a benchmark; its
9 disclosure akin to communicating a competitor's price prior to bidding. Plainly, disclosure of the
10 Strategic Information would be prejudicial to EWT LP and the competitive nature of the
11 designation process itself.

12 In the course of a typical hearing, the Board can cause the disclosure of information that is both
13 relevant and confidential (albeit subject to the Board's protocol). However, the designation
14 proceeding is not like a typical proceeding before the Board. Although it is a hearing, it is also
15 premised on a competitive process centered around the preparation of competing development
16 plans. Until those plans are prepared and submitted disclosure of proprietary, financial and
17 strategic information to other designation applicants, even in confidence, would negatively
18 impact a particular filing and compromise the process. Accordingly, even if the Strategic
19 Information is relevant, disclosure should only take place after parties have disclosed their plans
20 in Phase II of this proceeding. Prior to that time if information is obtained by a designation
21 applicant in a fair and proper manner, it should remain confidential to and available for use by
22 the designation applicant until made public as part of Phase II when all plans are before the
23 Board. To do otherwise would render the competitive process unfair and subject to challenge.

24 (b) **Not Ratepayer Funded**

25 Certain Opposing Parties have purported to bolster their submissions by referring to the fact that
26 GLPT is rate regulated. Regardless of whether the information is viewed as GLPT's or GLPT
27 EWT's, this is an irrelevancy designed to distract. It is no more relevant than the fact that

1 AltaLink is rate regulated in Alberta or TransCanada in respect of natural gas. The fundamental
2 fact is that ratepayers have not paid any amount on account of the Strategic Information.

3 By order of the Board in EB-2009-0409, GLPT was authorized to establish a deferral account for
4 the purposes of recording expenditures relating to renewable energy projects and required
5 transmission system planning arising from the *Green Energy and Green Economy Act, 2009*.
6 The account covers capital expenditures as well as operation, maintenance and administration
7 expenses.

8 When it authorized the account, the Board was aware that it would be used to record costs in
9 respect of the East-West Tie. In its decision, the Board noted that:

10 GLPTLP indicated that it is expected that its Transmission Plan will address the scope,
11 the estimated financial commitment and the time needed for transmission development to
12 accommodate renewable generation resources. In addition, the Transmission Plan will
13 address the need for natural extensions of GLPT's existing system as part of the Ontario
14 bulk transmission system, particularly, the **East-West Tie (Nipigon by Wawa)** and the
15 Sudbury Area by Algoma Area projects. (Emphasis added.)

16 GLPTLP has maintained separate financial accounting for the activities, documents or
17 information of the EWT Designation Team. All associated costs were recorded in the deferral
18 account. The account balance has not been disposed of or claimed from rate payers. The costs
19 are incremental and the amount in question remains the "shareholder's" risk. Ratepayers have
20 not paid these costs, and will not unless EWT is the successful designation applicant.

21 As discussed above, GLPT EWT's interest in EWT LP is to be funded in part by the activities
22 and documents undertaken, gathered or prepared by the EWT Designation Team. Ultimately,
23 EWT LP will assume full responsibility for the balance in the deferral account related to the
24 East-West Tie. The balance will be reversed by GLPTLP which will not seek recovery from rate
25 payers. Like all other designation participants, EWT LP will only seek recovery of all or part of
26 these costs if designated.

1 (c) **No Proprietary Interest**

2 Even if ratepayers had paid rates which included an amount on account of the Strategic
3 Information that fact, alone, would not ground a proper claim for disclosure. First, because of the
4 highly confidential, strategic nature of the information and the prejudice which would result from
5 disclosure, discussed above. Second, because ratepayers have no proprietary interest in the
6 documents.

7 None of GLPTLP, GLPTEWT and EWT are legal persons. Partners in a partnership have an
8 undivided interest in the partnership's property . Accordingly, whether viewed as documentation
9 under the control of GLPT or GLPT EWT, the proprietary interest in those documents is held by
10 GLPI and BIH. Ratepayers have no such interest.

11 Ratepayers pay for utility service. But, this payment does not entitle them to a proprietary
12 interest in the assets of the utility. This is true whether or not those assets are used in the
13 provision of utility service.

14 The lack of any proprietary interest is particularly plain in relation to those documents which
15 were prepared in conjunction with BLP. The Board has no jurisdiction over BLP and BLP's
16 information should not be subject to disclosure.

17 Ultimately, the proprietary interest of the partners above should not be expropriated. Doing so
18 would be inconsistent with the cost recovery regime established in the designation process, with
19 rate-making principles and would be patently unfair.

20 **6. Conclusion**

21 For all of the above reasons, GLPT EWT respectfully requests that the Board reject the requests
22 for further disclosure asserted by the Opposing Parties.

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

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5 Crawford Smith / Jr.

6 Crawford Smith

7 Counsel to the GLPT EWT