

Ontario Energy Board Staff Submission

EB-2011-0140

**Proceeding to designate a transmitter to carry out
development work for the East-West Tie Line**

Phase 2

April 8, 2013

East-West Tie Line Designation Proceeding - Phase 2 Board Staff Submission

The Ontario Energy Board initiated a proceeding under file number EB-2011-0140 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. Six transmitters applied to be designated. In this submission Board staff does not assess the merits of any of the applications. Rather, this submission addresses the basis for the Board's designation process, the nature of the order needed to give effect to the designation, and recommendations regarding conditions to be included in that order or the licence of the designated transmitter.

Board staff invites all parties to respond to this submission, particularly with respect to the proposed milestones and reporting requirements to be imposed on the designated transmitter.

The Board's Policy Framework for Transmission Development

The *Ontario Energy Board Act, 1998*, sets out objectives for the Board in electricity. One of those objectives is to promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. On August 26, 2010, the Board issued its policy entitled *Framework for Transmission Project Development Plans*¹. The Board's policy framework created a competitive process to designate a transmitter to develop transmission projects that would promote connection of renewable generation projects. In order to encourage competition in the development of major transmission facilities, the Board indicated in its policy framework that the transmitter designated for a particular project would be eligible to recover its budgeted project development costs.

The Commencement of the East-West Tie Designation Proceeding

The Government of Ontario identified five priority transmission projects for the province in Ontario's Long-Term Energy Plan released in 2010. One of the priority projects was a major new transmission line to increase transfer capacity between the transmission system in the northwest and the rest of Ontario, the East-West Tie line.

¹ All documents referred to in this submission are available through the Board's website on the Transmission Infrastructure: East-West Tie Line page.

In a letter to the Chair of the Board, dated March 29, 2011, the then Minister of Energy suggested that the designation process outlined in the Board's policy framework could be used to select the most qualified and cost-effective transmission company to develop the East-West Tie line. Consequently, by letter to the Ontario Power Authority's ("OPA") Chief Executive Officer dated April 25, 2011, the Board requested a report from the OPA regarding its preliminary assessment of the need for an East-West Tie line, and asked that the assessment of need be sufficiently robust to allow the Board to determine whether the designation process should be initiated.

On June 30, 2011, the Board received the OPA's report *Long Term Electricity Outlook for the Northwest and Context for the East-West Tie Expansion* (the "OPA Report"). The OPA Report presented a preliminary assessment of need for a new East-West Tie line and provided planning justification to support the initiation of the Board's transmitter designation process. The Board has indicated that it expects the final determination of the need for the line to be made as part of a future proceeding for leave to construct the line, not through this designation process.

On August 18, 2011, the Board received from the Independent Electricity System Operator (the "IESO") its feasibility study, entitled *An assessment of the westward transfer capability of various options for reinforcing the East-West Tie*.

The Board invited licensed transmitters and those who had applied for a transmission licence to indicate their interest in filing a plan for the development of the East-West Tie line, and by way of notice dated February 2, 2012 commenced the designation proceeding. Seven transmitters and 23 other parties intervened in response to the Board's notice. Phase 1 of the proceeding was completed on July 12, 2012 with the issuance of the Board's Phase 1 Decision and Order ("Phase 1 decision"). That decision established the decision criteria, filing requirements, the hearing process for Phase 2 and the schedule for the filing of applications for designation. Applications for designation were received on January 4, 2013 from six transmitters.

Order to Give Effect to Designation

The primary statute granting jurisdiction to the Board is the *Ontario Energy Board Act, 1998 (the "Act")*. The Act does not refer expressly to the Board designating an entity to develop a transmission line. However, the Act provides licensing and rate-setting powers to the Board under sections 70, 74 and 78, which together can be used to implement the designation decision. Board staff submits that the Board consider

making the following orders under these sections in order to give legal and practical effect to its designation decision:

- Set an appropriate term for the designated transmitter's licence (an effective date and an expiry date). Board staff submits that the term should be the standard term of 20 years;
- Require adherence to scheduled milestones and reporting of progress for the development of the East-West Tie line;
- Specify that in determining the costs to be recovered by the designated transmitter, the development costs up to the budgeted amount are to be regarded as recoverable from ratepayers, in the absence of persuasive evidence to the contrary brought before the Board in a rate or other cost recovery proceeding;
- Establish a deferral account for the recording by the designated transmitter of the actual development costs of the East-West Tie line.

Board staff invites all applicants, in their arguments in chief, to indicate any exemptions they believe they will require from the terms in the standard transmission licence, or any of the Board's Codes or other regulatory requirements. Staff notes that the Board, in previous decisions licensing transmitters for the purpose of participation in the designation process (EB-2010-0126, EB-2010-0403 and EB-2010-0324), indicated that some sections of the transmission licence, the Transmission System Code and the Electricity Reporting and Record Keeping Requirements would not apply to transmitters who had as yet no transmission assets in Ontario. Board staff submits that the designated transmitter should comply with all applicable regulatory requirements as soon as these requirements become applicable. Board staff expects that some of the regulatory requirements may not be applicable until the East-West Tie line is energized.

Proposed Milestones and Reporting Conditions

In its Phase 1 decision, the Board indicated that it will impose performance milestones and reporting obligations on the designated transmitter. While it asked the applicants to file proposed milestones and reporting obligations for both the development and construction phases, the Board has said it will not impose construction-related milestones and reporting obligations at the time of designation.

Most applicants proposed the filing of Terms of Reference for an Environmental Assessment and the filing of a leave to construct application with the Board as critical milestones in the development phase. Board staff submits that these are appropriate milestones. Staff submits that other milestones should be imposed, and proposes the following list for the Board's and parties' consideration:

- Signing of a memorandum of understanding with the Ministry of Energy regarding the delegation of certain procedural aspects of consultation with Aboriginal peoples;
- Commencement of negotiation or discussions with all landowners and permitting agencies (would include identification of, and at least one contact with, each landowner and permitting agency);
- Signing of an engineering contract for design of the line, if an engineering contract is to be used and not already signed;
- Approval of the Route and Structure Configuration Proposal by senior management of designated transmitter;
- Completion of the Conductor Optimization Study;
- Filing of Terms of Reference for the Environmental Assessment;
- Filing of request for a System Impact Assessment with the IESO;
- Approval of the Terms of Reference for the Environmental Assessment;
- Receipt of the final System Impact Assessment from the IESO; and
- Filing of a leave to construct application with the Board.

Board staff does not have a recommendation as to the exact order of these milestones, or the time period from the date of the Board's designation decision by which each event should occur. The Board has the authority to impose the schedule for line development it believes is appropriate, and require compliance through adherence to milestones and reporting. However, staff submits that the designated transmitter will be in the best position to judge where the milestones fit in its development schedule.

In considering a suggestion that development costs proposed by a transmitter could be adjusted at the time of designation, the Board said, at page 17 of its Phase 1 decision:

The level of development costs is only one aspect of the proposal put forward by a transmitter. The Board does not intend to adjust this part of the proposal any more than it would adjust the proposed organization, design, financing or any other aspect. Unlike an application for rates or approval of a facility, this proceeding concerns itself with choosing from among several competing proposals. The Board will compare these proposals to each other and will determine which proposal is best overall. It would be inappropriate and unfair to the applicants to expect any of them to adjust their applications once they have been filed.

Board staff submits that just as the Board does not intend to adjust most aspects of the proposals from the applicants, it should not adjust the schedule proposed by the

designated transmitter in its application. The schedule is a criterion by which the Board will compare applications. Staff presumes that the Board will not select a transmitter for designation if the schedule proposed by that transmitter is unacceptable. Staff suggests that the Board require that the designated transmitter, within a reasonable time after designation, refile the development schedule proposed in its application, with two changes. The first change would be the addition of any milestones that the Board considers necessary and that were not included in the transmitter's original schedule. Secondly, the dates in the schedule should be adjusted to recognize the actual date of the Board's designation decision. Staff submits that in making this adjustment, the transmitter must not be permitted to adjust the time period between events in the schedule, but merely reset the initial date.

In the alternative, if the Board determines that a single development schedule should be imposed on whichever transmitter is selected for designation, staff submits that the Board should offer some opportunity for the applicant transmitters to make submissions on the proposed schedule.

Board staff submits that the designated transmitter should be required to report quarterly to the Board on the following matters:

- Updates on progress towards milestones in the development schedule, including an explanation and a description of mitigation undertaken for any actual or anticipated delay;
- For any actual or anticipated delay, an indication of the impact of the delay on the designated transmitter's ability to complete the development (i.e. apply for leave to construct the line);
- The amount in the deferral account for development costs;
- The percentage of the development budget spent;
- Any risks identified and mitigation undertaken (e.g. a risk log);
- Any change proposed to the plan as originally filed, including the development budget, First Nation and Métis participation, and First Nation and Métis consultation, and a detailed explanation of the reason for the proposed change; and
- Any change to the governance of the designated transmitter, or any change in financial status that adversely affects or is likely to adversely affect the completion of the development of the East-West Tie line.

Board staff recognizes that the designated transmitter may apply to the Board to vary the schedule or reporting obligations. However, Board staff submits that the adherence

of the designated transmitter to its original schedule and reporting obligations should be taken into account by the Board in any leave to construct or cost recovery proceeding.

Regarding consequences for failure to meet milestones and reporting obligations, the Board indicated in its Phase 1 decision:

The Board finds that it is premature to determine in this Phase 1 decision the consequences for failure to meet the required performance milestones and performance obligations. Applicants for designation must include in their applications their proposals regarding the consequences of failure to meet their proposed performance milestones and reporting obligations.

The Board's policy indicates that the loss of designation and the inability to recover development costs are two potential consequences of failure. The Board is of the view that the severity of the consequences should be proportional to the severity of the breach, and take into account the designated transmitter's mitigation efforts. In determining how to address any failure the Board will consider:

- *the nature and severity of the failure*
- *the specific circumstances related to the failure*
- *the consequences of the failure*
- *the designated transmitter's proposal to address the failure.*

The applicants generally did not propose any specific consequences that would automatically apply in the case of a failure to meet prescribed milestones or reporting obligations. Board staff submits that the findings of the Board in the Phase 1 decision quoted above provide guidance on the consequences of failure, and that the specific sanctions to be imposed should be determined at the time of the breach. Increased frequency and rigour of reporting, and co-operating with or undertaking an audit of performance, are two potential sanctions that could be considered for failure to meet milestones where the failure does not have significant consequences. Serious delays or a failure to complete development and file a leave to construct application could result in the two consequences identified in the Board's designation policy and in its Phase 1 decision: loss of designation and the inability to recover development costs. Staff also suggests that revocation of the transmitters' licence could be a consequence of a failure to proceed with development.

Staff acknowledges the Board's finding in its Phase 1 decision that the leave to construct proceeding will provide an opportunity for the Board to assess the reasonableness of any deviations from the designated transmitter's plan, and that the

specific circumstances of the failure will need to be considered before a remedy for breach of any conditions is determined.

Board staff notes that the Board, at page 12 of its Phase 1 decision, asked parties to address the issue of a threshold of materiality for a prudence review of development cost overruns. Board staff suggests that a 10% overrun would warrant a review. Although this amount would be insignificant when considered in the context of the total transmission revenue requirement for the province, staff submits that it is reasonable to ask for an explanation of this level of overage for a major capital project.

Recommendation Regarding Update on Need for the East-West Tie

The OPA Report states the following on page 1:

The report presents a preliminary assessment of need for a new E-W Tie line and provides planning justification to support the implementation of the OEB's transmitter designation process. The OPA will update this assessment as required for future proceedings, such as a Leave to Construct application undertaken by a selected transmitter.

Board staff recognizes that the need assessment undertaken by the OPA for the purposes of its Report was preliminary. Board staff also accepts that the final assessment of the need for the line will be completed by the OPA to provide supporting evidence in a future proceeding for leave to construct the line. However, Board staff notes the stated intention of the Board in its policy framework, and reaffirmed in its Phase 1 decision in this proceeding: in the absence of fault on the part of the designated transmitter, the designated transmitter will be able to recover the costs of project development (up to the budgeted amount), even if the final assessment of need indicates that the line is no longer required.

Board staff notes that the OPA, at page 5 of its Phase 1 submission, indicated that it would, during the development phase of the project, "update system studies based on the latest information to ensure there is an accurate picture of the project need and requirements, and provide this information to the designated transmitter and other parties as appropriate". Board staff submits that as ratepayer money is at risk, it would be prudent for the Board to receive an interim assessment of need as soon as possible from the OPA.

Board staff invites the OPA to include in its Phase 2 submission any update it can offer with respect to the need for the East-West Tie expansion. If no new information is

available to be included in the submission, staff invites the OPA to indicate when it could provide such an update. Staff recommends that the Board require that the OPA provide an interim update of its assessment of need for the line a short time after the release of the designation decision. Although Board staff has no reason to anticipate that the OPA will indicate that the line is not needed, the Board may wish to receive the update from the OPA before considering the revised development schedule for the designated transmitter.

All of which is respectfully submitted.