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September 19, 2018

Board Secretary  
Ontario Energy Board  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, ON  
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Attention: Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Upper Canada Transmission, Inc. ("NextBridge") and  
Hydro One Networks Inc. ("HONI")  
East-West Tie Line Project and Lake Superior Link Project  
Combined Hearing  
EB-2017-0182/EB-2017-0194/EB-2017-0364  
Bamkushwada Limited Partnership ("BLP") Interrogatories to HONI**

In accordance with Procedural Order No. 3 dated August 31, 2018, please find enclosed BLP's Argument-in-Chief regarding the Development Costs filed by NextBridge in the above-noted proceedings.

In addition to the interrogatories that follow, BLP supports NextBridge's Argument-in-Chief dated September 10, 2018 and relies on BLP First Nation's written submissions in respect of the Motion to Dismiss HONI's Leave to Construct Application dated August 30, 2018.

Yours truly,

Olthuis, Kleer, Townshend LLP



KATE KEMPTON

1. The duty to consult and accommodate is a constitutional duty that cannot be ignored. This duty must be met before construction of a project occurs, and time and resources need to be built into a project development plan to address potential delays and costs which will be required to meet this duty.
2. Efforts to meet this constitutional duty must commence at the earliest possible planning stages for a project, and must be completed *before* final decisions about a matter are made, for example:
  - (a) before the transfer of ownership or control of tree farm licences;<sup>1</sup>
  - (b) before the sale or sub-leasing of lands subject to a claim;<sup>2</sup>
  - (c) before a change in a regulatory regime applicable on privately owned lands;<sup>3</sup> and
  - (d) before making an agreement to purchase electricity from a hydro-electricity project.<sup>4</sup>
3. The OEB must factor in all relevant matters when it assesses prices or costs. A decision-maker must “be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.”<sup>5</sup> In this particular case, the OEB knows that the duty applies and must be met, and that accommodation measures are to include economic participation, since the Crown gave aboriginal consultation and economic participation high priority at the beginning of this process – the designation stage – in the letter from the Minister of Energy (“MOE”) to the OEB dated March 29, 2011, which the OEB incorporated into its filing requirements.<sup>6</sup> Even had the MOE not explicitly required consultation and economic participation to be factors in this process, the duty to consult and accommodate always applies as a matter of law and requires at least this much.
4. The BLP First Nations consider these costs essential to the development phase as participation agreements needed to be finalized as much as possible before the filing of the Leave to Construct and well before the commencement of construction in order to ensure that all Indigenous communities and organizations to which the duty to consult and

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<sup>1</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*] at paras 35, 46-47.

<sup>2</sup> *Musqueam Indian Band et al v City of Richmond et al*, 2005 BCSC 1069 at paras 114 and 116.

<sup>3</sup> *Hupacasath First Nation v British Columbia (Minister of Forests) et al*, 2005 BCSC 1712 at paras 201-233.

<sup>4</sup> Although the Court found that in that case, the agreement would not adversely affect Aboriginal rights, it held that the agreement was “Crown conduct”: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, at para 81.

<sup>5</sup> *Oakwood Development Ltd v St-François Xavier*, [1985] 2 SCR 164 at para 16; *Hilewitz v Canada (Minister of Citizenship and Immigration)*; *De Jong v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 at para 70.

<sup>6</sup> Letter from the MOE to the OEB dated March 29, 2011 filed as Exhibit D of Chief Collins’ Affidavit filed in the file EB-2017-0364 on May 7, 2018; OEB, “Filing Requirements for Designation Applications,” Appendix A to Phase 1 Decision and Order, ss 3, 10 (2-3, 13-14).

accommodate was owed had time to be properly consulted and for appropriate accommodation measures to be negotiated for each community or organization.

5. As stated previously in this proceeding, it has taken NextBridge five years to consult and accommodate the BLP First Nations regarding this project,<sup>7</sup> and it is the BLP First Nations' understanding that NextBridge has to date signed economic participation agreements with not only the BLP First Nations but also the Métis Nation of Ontario (representing 3 Métis organizations).
6. NextBridge provided funding to the BLP First Nations, and presumably to other communities and organizations, via a series of capacity funding agreements to facilitate their participation in negotiations, the collection of traditional ecological knowledge for the environmental assessment process, and to retain their own independent legal counsel.
7. Funding of this type is a critical and customary practice in project development to provide First Nation communities with the opportunity to ensure their values are protected during project development, and to secure participation or other arrangements with the goal of ensuring that projects occurring on their traditional territories provide accommodation measures including economic benefits to offset project impacts and provide upside positive results for use of lands and resources to which First nations have rights.
8. The number of agreements signed between NextBridge and various communities and organizations also required travel time, meeting time and related costs. BLP is aware of this regarding its own process with NextBridge and the work done with its communities, which brings BLP to agree that NextBridge's reported costs are reasonable and prudently incurred.
9. NextBridge, through prudently incurred costs, has established a positive working relationship with BLP and the BLP First Nations upon which mutual consent achieves social licence and sustains a greater likelihood of reduced conflict at any stage of the development or operation of the project.
10. There is no certainty about any potential future relationship with HONI should it be granted Leave to Construct. Some or many of the accommodation measures including business relationships, developed between BLP First Nation owned businesses and NextBridge or its general contractor may not be continued with HONI and its general contractor. Many such businesses may have to fold due to delays if HONI is granted Leave to Construct.<sup>8</sup>
11. Consultation requires the time, attention and human capital of First Nation leaders and their designates. NextBridge was right to prioritize Indigenous engagement, and its costs in doing so are justified by its success in establishing positive working relationships with the BLP First Nations, among others.

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<sup>7</sup> See paras 15 and 19 of the Affidavit from Chief Collins, para 9 of the Affidavit from Chief Desmoulin, and para 10 of the Affidavit from Chief Michano filed in the file EB-2017-0364 on May 7, 2018.

<sup>8</sup> Affidavit from Chief Collins at paras 8-10 filed in the file EB-2017-0364 on May 7, 2018.