

September 19, 2018

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
P.O. Box 2319  
Toronto, Ontario  
M4P 1E4

Dear Ms. Walli:

**RE: EB-2017-0182/0194/0364 – Recovery of Development Costs by NextBridge Infrastructure LP for the East-West Tie Line**

Please find, attached, the Final Argument of the Consumers Council of Canada regarding the above-referenced proceeding.

Yours truly,

*Julie E. Girvan*

Julie E. Girvan

CC: F. Cass, Aird&Berlis  
All Parties

**Upper Canada Transmission Inc. (on behalf of NextBridge Infrastructure)  
Application for leave to construct an electricity  
transmission line between Thunder Bay and Wawa, Ontario**

**- and-**

**Hydro One Networks Inc.  
Application to upgrade existing transmission station facilities  
in the Districts of Thunder Bay and Algoma, Ontario**

**-and-**

**Hydro One Networks Inc.  
Application for leave to construct an electricity transmission line between  
Thunder Bay and Wawa, Ontario**

**SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA**

**RE: THE DEVELOPMENT COSTS CLAIMED BY UPPER CANADA TRANSMISSION  
INC. ON BEHALF OF NEXTBRIDGE INFRASTRUCTURE**

**September 19, 2018**

## I. OVERVIEW AND SUMMARY OF POSITIONS

Upper Canada Transmission Inc., operating as NextBridge Infrastructure LP (“NextBridge”) is claiming a total of \$40.2M in development costs for approval in this proceeding from the Ontario Energy Board (“OEB” or “Board”). NextBridge characterizes those costs as follows:

- (1) \$22.4M in Board-approved development costs approved at the time of designation;
- (2) \$13.3M in incremental development costs that were incurred during the extended development period; and
- (3) \$4.5M in expenditures related to First Nations and Métis participation, land acquisition costs, and other costs that were identified as unbudgeted at the time of designation.<sup>1</sup>

The Council respectfully submits that:

- 1) The Board should allow NextBridge recovery of the originally budgeted \$22.4M in development spending as was approved in the designation proceeding<sup>2</sup>;
- 2) The Board should allow NextBridge recovery of incremental development costs related to the need to accommodate major reroutes around Pukaskwa Park, the Township of Dorion and Loon Lake, estimated to be \$.7M by the Council<sup>3</sup>;
- 3) The Board should allow NextBridge recovery of incremental development costs related to the extension of the development period (also referred to Project Delay costs) to accommodate the updated needs assessment by the IESO, estimated at \$7.4M by NextBridge<sup>4</sup>;

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<sup>1</sup> NextBridge AIC, page 1.

<sup>2</sup> EB-2011-0140, Phase 2 Decision and Order dated August 7, 2013, page 41. The Council notes that the Decision refers to approval of \$22.2M in 2012\$; the Council assumes that the discrepancy between the Decision amount and the Amount claimed by NextBridge relates to escalation of the amount over time.

<sup>3</sup> The Council makes its estimate based on the methodology at Exhibit JD1.6 in conjunction with Exhibit JD1.2, Attachment 1, as explained in detail later on in these submissions.

<sup>4</sup> The Council relies on the estimate provided by NextBridge at Exhibit JD1.2, Attachment 1, which varies slightly from the estimate provided by NextBridge at Exhibit JD1.6 as explained later on in these submissions.

- 4) The Board should not allow NextBridge to recover incremental development costs unrelated to either major reroutes or the extension of the development period, estimated at \$5.7M by the Council, a disallowance which the Council respectfully submits should be permanent<sup>5</sup>;
- 5) The Board should not allow NextBridge to recover incremental development costs that are in nature construction costs that have been “phase shifted” into the development period, estimated at \$1.9M by NextBridge<sup>6</sup>, a disallowance that the Council respectfully submits should only relate to the award of development costs such that if NextBridge is successful in its Leave to Construct application, and becomes the developer for the proposed project, those costs can be recovered as a component of NextBridge’s construction costs,
- 6) The Board should not allow NextBridge to recover the costs noted by it as identified but “unbudgeted” at the time of designation in relation to First Nation and Metis Land Acquisition, First Nation and Metis Participation Costs, and Pic River Appeal Costs, a total disallowance estimated at \$3,662,412 by NextBridge which the Council respectfully submits should be permanent; and
- 7) The Board should allow NextBridge to recover the noted by NextBridge and “unbudgeted” at the time of designation in relation to carrying costs, estimated by NextBridge to be \$733,013 based on its total spend<sup>7</sup>, an amount that will need to be recalculated to exclude carrying costs on any principal amounts that the Board agrees should not be recoverable.

## **II. SUBMISSIONS:**

### **A. RECOVERABILITY OF DEVELOPMENT COSTS BY A DESIGNATED TRANSMITTER**

NextBridge’s submissions include several propositions with respect to the test for prudence in terms of recovery of committed costs by a utility. In the Council’s view the primary issue for this Board to determine is the impact of the Designation Proceeding and related Development Cost approval on the recoverability of development costs by NextBridge in this proceeding in the absence of a decision granting NextBridge leave to construct the related project. The Council submits that the Board is faced with a very special circumstance in this proceeding, wherein a

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<sup>5</sup> The Council makes this estimate based on the total of \$6.4M in non extension related costs detailed in Exhibit JD1.2 Attachment 1, less the \$.7M embedded in that amount in relation to the major reroutes as calculated using the methodology in Exhibit JD1.6.

<sup>6</sup> This amount is quantified at Exhibit JD1.1, attachment 1.

<sup>7</sup> Exhibit JD1.1, attachment 1.

proponent of a project, NextBridge, has been extended a special right to recover a pre-approved level of development costs regardless of whether it ultimately undertakes the project or not. In this context the Council believes that the general theme of NextBridge's argument, that it is entitled to all prudently incurred costs, is incorrect. Rather, the Council submits, NextBridge is entitled to all prudently incurred costs up to the amount of the pre-approved budget, with, the Council concedes, the ability to claim additional recovery for prudently incurred costs in response to unanticipated causes.

What follows is a summary of the various relevant Board assertions, both in its generic policy with respect to development costs and specific to the development cost recovery extended to NextBridge with respect to the East-West Tie:

***Board Policy regarding implications of plan approval:***

*The transmitter designated for a particular project will be assured of recovery of the budgeted amount for project development. Material overages will be at risk until a future prudence review. Threshold materiality for amounts beyond the approved budget could be established in the designation order and would likely be in relation to the total budget. When subsequent analysis by the OPA suggests that the project has ceased to be needed or is no longer economically viable, the transmitter will be entitled to appropriate wind-up costs.(emphasis added)<sup>8</sup>*

*The selection of a transmitter for designation will indicate that the Board has found the development costs to be reasonable as part of an overall development plan. This selection will also establish that the development costs are approved for recovery. The Board will not select a transmitter for designation if it cannot find that the development costs are reasonable. However, applicants should be aware that costs in excess of budgeted costs that are put forward for recovery from ratepayers will be subject to a prudence review, which would include consideration of the reasons for the overage. (emphasis added) <sup>9</sup>*

*Any development costs in excess of budgeted costs may not be recovered from ratepayers, and will be subject to a prudence review if recovery is sought. (emphasis added)<sup>10</sup>*

*A consequence of this designation decision is that, if it meets its obligations, UCT will be able to recover the costs of project development (up to the budgeted amount) from transmission ratepayers, even if the final assessment of need indicates that the line is no longer required. (emphasis added)<sup>11</sup>*

<sup>8</sup> EB-2010-0059 Board Policy: Framework for Transmission Project Development Plans, August 26, 2010, page 17.

<sup>9</sup> EB-2011-0140, Phase 1 Decision and Order, July 12, 2012, page 17.

<sup>10</sup> EB-2011-0140, Phase 1 Decision and Order, July 12, 2012, page 18.

<sup>11</sup> EB-2011-0140, Phase 2 Decision and Order, August 7, 2013, page 42.

*By designating one of the applicants, the Board will be approving the development costs, up to the budgeted amount, for recovery. The School Energy Coalition submitted that there is insufficient information for the Board to determine that the development costs are just and reasonable. The Board does not agree. The Board has had the benefit of six competitive proposals to undertake development work. In the Board's opinion, the competitive process drives the applicants to be efficient and diligent in the preparation of their proposals. With the exception of Icon/TPT, the development cost proposals ranged from \$18.2 million to \$24.0 million which is relatively narrow given the overall size of the project. Therefore, the Board finds that the development costs for the designated transmitter are reasonable, and will be recoverable subject to certain conditions. (emphasis added)<sup>12</sup>*

*The OEB remains of the view that the established parameters of the DCDA adequately facilitate the tracking of unanticipated costs for full review at a later date. (emphasis added)<sup>13</sup>*

In the Council's view the designation of a transmitter as in the current case is an exception to the general rule that development costs, regardless of whether they are prudently incurred or not, are not recoverable by a transmitter unless and until they successfully obtain leave to construct the related project. The designation process removes the risk of non-recovery of development costs up to the approved, budgeted amount. Accordingly, the Council respectfully submits that NextBridge's view that it is entitled to all prudently incurred costs as a result of its designation is not correct. Throughout both phases of the designation proceeding and the subsequent EB-2015-0216 proceeding to examine the adjustments to be made in response to updated information from the IESO the Board was very clear that:

- a) designation guarantees recovery of development costs only up to the budget amount approved by the Board;
- b) amounts in excess of the budgeted amount may not be recovered;
- c) amounts in excess of the approved budget, if sought for recovery, will be subject to a prudence review, and the causes for the excess spending will be considered;
- d) the deferral account set up to track development costs for future disposition facilitates the tracking of unanticipated costs for full review at a later date; and

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<sup>12</sup> EB-2011-0140, Phase 2 Decision and Order, August 7, 2013, pages 30-31.

<sup>13</sup> EB-2015-0216 Decision and Order, November 19, 2015, page 9.

- e) the budgeted amount has been approved following a competitive process, which provides the basis for a finding that the approved budget is just and reasonable.

The culmination of these warnings and limitations by the Board in the specific context of a designated transmitter's pre-approved development costs, the Council respectfully submits, is that the scope of recovery beyond the approved budget is fairly limited. In the Council's view it is not enough that costs in excess of the budget be prudently incurred; in the Council's view those costs must be prudently incurred and in response to causes outside the control of the transmitter, i.e., as noted by the Board, unanticipated costs. In the Council's respectful submission it would undermine the competitive process that relied on the proposed budgeted costs and led to the designation of a proponent to broadly allow all claimed development costs; the Council respectfully submits that the responsibility imposed on the designated transmitter includes the requirement that the designated transmitter operate within the confines of its approved budget with very narrow exceptions.

With that preamble, the Council has set out the different categories of costs that make up the \$40.2M in Development Costs claimed by NextBridge in this proceeding, and provides the following submissions with respect to the recoverability of each category of costs.

## **B. SPECIFIC COST CATEGORIES**

### **1. ORIGINALLY BUDGETED DEVELOPMENT BUDGET**

The Council does not dispute the recoverability of the claimed \$20.4M in development costs incurred by NextBridge in accordance with the originally approved Development Costs budget.

### **2. MAJOR REROUTE COSTS**

As detailed by NextBridge in its Argument-in-Chief, NextBridge was unable to follow the route assumed by the Board in the reference plan that underpinned the designation proceeding, forcing NextBridge to develop a major rerouting of the proposed project around Pukaskwa Park, the Township of Dorion and Loon Lake. In the Council's submission the incremental costs to develop the adjusted route are unanticipated costs that are properly recoverable within the scope of the approval provided to NextBridge as the designated transmitter.

At Exhibit JD1.6 NextBridge estimates the incremental costs associated with the major reroutes at \$1.7M using an 11% allocation of the total incremental development costs of \$15.8M on the basis that the new route constituted approximately 11% of the total proposed transmission line. While the Council accepts the 11% allocation factor as reasonable, the Council does not believe that it is appropriate to apply that allocator to the entire claimed \$15.8M development

budget, particularly given the Council's position on the other elements of those costs.

Exhibit JD1.2, Attachment 2 breaks down the \$15.8M in incremental development costs into three categories: Project Extension, Scope Change and Budget Variance, and Phase Shift. As will be noted later on in these submissions the Council accepts the Project Extension costs as a whole (\$7.4M) and submits that the Phase Shifted costs as a whole should be considered as Construction Costs outside of the development costs approval process, leaving only the "Scope Change and Budget Variance" costs to account for. 11% of the Scope Change and Budget Variance costs is \$.7M, as opposed to the \$1.7M calculated by NextBridge; because the Council ultimately accepts all the Project Extension costs and submits that the Phase Shifted costs should all be considered as Construction costs, it is only necessary to identify the subcomponent of the Scope Change and Budget Variance subtotal that is allocable to Major Reroutes.

In summary, the Council agrees that costs attributable to Major Reroutes are recoverable, and that in view of the Council's position on Project Extension and Phase Shifted costs the discrete impact of the Major Reroute costs is 11% or \$.7M of the Scope Change and Budget Variance costs of \$6.4M.

### **3. PROJECT DELAY COSTS**

As detailed by NextBridge in its Argument-in-Chief NextBridge was required to extend the development cycle of the proposed project as a result of an updated needs assessment by the IESO in 2015, which caused the government of Ontario to issue an updated Order in Council specifying the need for the proposed project starting in 2020.

The Council agrees that the delay and extension of the development cycle for the proposed project was a cause for unanticipated development costs that it should be entitled to recover in its role as the designated transmitter for the project.

NextBridge provides two slightly different calculations for the estimation of the delay related costs. At JD1.2 Attachment 1 NextBridge provides a total extended development budget of \$15.8M including an itemized breakdown of extension related costs that total \$7.46M. At JD1.6 NextBridge estimates Project Delay related costs at \$7.6M by backing out several other categories of costs from the \$15.8M total cost, including its separately estimated \$1.7M in Major Reroute costs.

Based on the concerns that the Council has with respect to the fact that NextBridge is likely double-counting some costs by the way in which it is calculating the Major Reroute costs, the Council prefers the evidence at Exhibit JD1.2 Attachment 1 which itemizes the different categories of costs that NextBridge incurred as a result of the extension of the development period. Accordingly, the Council respectfully submits that the appropriate amount to approve as a result of Project Delay is \$7.46M.

#### 4. FORECAST VARIANCES UNRELATED TO MAJOR REROUTES OR PROJECT DELAY

As noted above, Exhibit JD 1.2 Attachment 1 sets out the total incremental Development Costs of \$15.8M, divided into Project Extension, Scope Change and Budget Variance and Phase Shift subtotals. The Council accepts that NextBridge should be able to recover the Project Extension costs, and as will be further explained below, the Council submits that the Phase Shift costs should only be recovered as part of the Construction Costs. That leaves only the Scope Change and Budget Variance subtotal of \$6.4M to address; of that amount, as previously noted, NextBridge has asserted, and the Council agrees, that 11% or \$.7M of that total amount is attributable to the Major Reroutes, which leaves \$5.7M in, essentially budget variances.

In the Council's respectful submission, insofar as the remaining \$5.7M relates to simple variances from the forecast amounts the Board's policy with respect to the designation of the transmitter and subsequent assurance of recovery of development costs pursuant to an approved budget developed through a competitive process dictate that NextBridge should not be permitted to recover that amount from ratepayers. In the Council's view, the Board's designation of a transmitter is not tantamount to a blanket approval of all budget variances in the development phase of the project. If that were the case the Board's reliance on the competitive process as the basis for a finding with respect to the just and reasonableness of the approved development budget as part of the designation process would be rendered meaningless.

It is of note that of the \$5.7M in remaining costs related to simple budget variances, approximately 50% of that variance relates to NextBridge's failure to properly forecast the costs related to the Environmental Assessment ("EA") process. The major contributor to the variance related to the Environmental costs related to NextBridge's failure to forecast the requirement to complete a comprehensive Alternatives Assessment. NextBridge explained this failure in the following manner:

*NextBridge is not able to comment on the reasons why Hydro One Networks Inc. was not required to complete an alternatives assessment in relation to the Bruce to Milton project as part of the environmental assessment scope. NextBridge received advice from its environmental consultant that it did not anticipate NextBridge would need to prepare an alternatives assessment in relation to the EWT Line project. The Bruce to Milton project was the most recent large transmission project in Ontario at the time of preparing for the EWT Line Project designation proceeding. Because the EWT Line Project was to parallel an existing transmission line in accordance with the Provincial Policy Statement under the Planning Act similar to the Bruce to Milton project, was to tie into existing transformer stations, was identified as a priority project in provincial long term energy plans and had been the subject of a government-mandated designation proceeding coordinated by the Ontario Energy Board with an indicative*

*reference route, NextBridge assumed that a comprehensive alternatives assessment would not be required in relation to the EWT Line Project.<sup>14</sup>*

The Council submits that there is nothing in NextBridge's response that suggests that the full scope of the EA process that would be required of it was unknowable at the time it came forward with its proposed budget in the Designation process. It appears that instead of, for example, consulting with the then Ministry of Natural Resources and Forestry (MNRF) and Ministry of Environment Conservation and Parks, NextBridge relied on the advice of its environmental consultant in conjunction with certain attributes of the proposed project to arrive at the assumption that a comprehensive alternatives assessment would not be required. In the Council's view these turned out to be errors on the part of NextBridge that underpinned their Development Budget proposal, which in turn contributed to their successful designation. It is not an unanticipated increase in costs caused by some factor that NextBridge should not be held accountable for.

The Council does not intend to do a similar analysis for the remaining \$3.1M of budget variance amounts, except to point out that a \$3.1M variance relative to the approximate budget of \$30.5M that the Council agrees NextBridge should be able to recover (not including potential recovery of Phase Shifted Construction costs and full recovery of carrying costs on approved amounts) is only an approximate 10% variance, and perhaps more importantly less than a .5% variance on the total forecast project cost.

## **5. PHASE SHIFTED CONSTRUCTION COSTS**

At Exhibit JD1.2 Attachment 1 NextBridge sets out that \$1.89M of the extended development costs relate to costs for items that would normally have been conducted in the construction phase. With respect, the Council submits that it would be inappropriate to treat such costs a development costs for the purposes the of the special recovery that NextBridge is entitled to as the designated transmitter; as set out in the Board's Framework for Transmission Project Development Plans:

*From the Board's perspective, the objective of the development phase is to bring a project to the point where there is sufficient information for the transmitter to submit a leave to construct application. Therefore development costs begin when a transmitter is designated and end when a leave to construct application is submitted. The Board expects, therefore, the development budget to include route planning, engineering, site/environmental reports and some (but not all) consultation.<sup>15</sup>*

In the Council's view simply performing what are clearly construction tasks prior to the leave to construct phase does not automatically extend designation "protection"

<sup>14</sup> Exhibit I.JD1.NextBridge.CCC.1, part c)

<sup>15</sup> EB-2010-0059 Board Policy: Framework for Transmission Project Development Plans, August 26, 2010, page 15.

to a category of costs; it is necessary that the costs fall within the categories of costs set out by the Board for eligibility as development costs.

Having said that, the Council submits that the “Phase Shifted” costs should be included in, and recoverable, as part of NextBridge’s construction costs in the normal course if and when NextBridge obtains leave to construct the proposed project.

## **6. IDENTIFIED BUT UNBUDGETED COSTS (PRIMARLY FIRST NATIONS AND METIS PARTICIPATION RELATED COSTS)**

Aside from carrying costs, which are referred to below, NextBridge is claiming recovery in relation to First Nation and Metis Land Acquisition, First Nation and Metis Participation Costs, and Pic River Appeal Costs, a total claim estimated at \$3,662,412.

The Council will not deal specifically with the Land Acquisition costs and the Pic River Appeal costs, as they are relatively immaterial costs in relation to the \$3,415,388 claimed by NextBridge with respect to First Nation and Metis Participation Costs (the “Participation Costs”).

While NextBridge referred to these potential Participation Costs in its designation application,<sup>16</sup> the Board, in designating NextBridge and approving a development budget, did not identify Participation Costs as a separately recoverable item or approve any separate tracking of that cost. The only approval that was granted NextBridge with respect to its development budget was a blanket approval permitting it to recover its development spending up to a pre-approved budget amount:

*The Board finds that the development costs budgeted by UCT of \$22,187,022 (in \$2012) are reasonable. The Board will establish a deferral account in which UCT is to record the actual costs of development. The Board expects that UCT, at the time it applies for leave to construct the East-West Tie line, will file a proposal for the disposition of the development cost account.<sup>17</sup>*

The Board further specified that the approval is limited to recovery up to the approved amount:

*A consequence of this designation decision is that, if it meets its obligations, UCT will be able to recover the costs of project development (up to the budgeted amount) from*

<sup>16</sup> Exhibit I.JD1.NextBridge.CCC.2, a) and b)

<sup>17</sup> EB-2011-0140, Phase 2 Decision and Order, August 7, 2013, page 41.

*transmission ratepayers, even if the final assessment of need indicates that the line is no longer required.*<sup>18</sup>

At the same time, other, competing proponents in the designation proceeding included forecast Participation Costs in their development cost budgets, ranging from \$290,000 to \$9,010,000.<sup>19</sup>

Accordingly it is clear, the Council submits, that Participation Costs were an identified, potentially material aspect of the development budgets that were put forward by the different proponents seeking designation for the proposed project. While it is impossible to know for certain what impact, for example, the inclusion of \$9,010,000 in participation costs for one proponent and, essentially, zero for NextBridge had on the Board's ultimate decision, what is known is that NextBridge was the designated proponent and as part of that designation was approved for a total development budget of \$22.2M (or \$22.4 after escalation) notwithstanding NextBridge's assertion of uncertainty with respect to the level of Participation Costs.

Based on the circumstances leading to the Board's decision in Phase 2 of the designation proceeding, and in recognition of the fact that Participation Costs were a known component of the development costs at the time of designation, the Council respectfully submits that there was, and continues to be, a legitimate expectation on the part of the Board and on behalf of ratepayers that NextBridge was to account for Participation Costs within the approved Development Budget. Unlike the circumstances leading to the Major Reroutes and Project Delay, Participation Costs were not unanticipated costs beyond the control of NextBridge that should be recoverable as part of the special relief granted to NextBridge as the designated transmitter for the proposed project.

For all these reasons the Council respectfully submits that the "identified but unbudgeted" costs, including the Metis and First Nations Participation Costs but excluding the carrying costs which are discussed below, should not be recoverable by NextBridge in this proceeding. In making this submission the Council wants to be clear that it is not asserting that NextBridge was not under a duty to consult with First Nations and Metis groups with respect to Participation, or commenting on the level of the claimed costs. The Council's position rests on the special nature of the preapproval granted to NextBridge with respect to development costs, and the consequences that the Council believe flow from the failure by NextBridge to forecast an appropriate amount for those costs in the midst of a competitive process or to obtain special relief for those costs as part of their designation.

## **7. CARRYING COSTS**

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<sup>18</sup> EB-2011-0140, Phase 2 Decision and Order, August 7, 2013, page 42.

<sup>19</sup> Exhibit I.JD1.NextBridge.CCC.2 c). In its response NextBridge notes that at least one proponent including a budget of zero for participation costs, but noted that those costs were included as part of other relevant activities.

Although the carrying costs claimed by NextBridge were not budgeted as part of the designation process, the Council does not oppose the notion that in the normal course approved costs, once incurred, attract carrying costs until disposed of, and that the calculation of those costs is mechanical in nature as opposed to a manifestation of the proponent's obligation to forecast and present a budget for the Board's approval. Accordingly, the Council does not oppose the recovery of carrying costs by NextBridge in an amount calculated on the basis of the approved principal amounts of the development budget approved for recovery in this proceeding.

**III. COSTS:**

The Council requests that it be awarded its reasonably incurred costs associated with its participation in this proceeding.

**All of which is respectfully submitted on September 19, 2018**