

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, 1998,
S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF a Board Staff Discussion Paper
on Transmission Project Development Planning;

COMMENTS OF THE NATIONAL CHIEF'S OFFICE ON BEHALF OF THE ASSEMBLY OF FIRST NATIONS

I. INTRODUCTION

1 The National Chief's Office on Behalf of the Assembly of First Nations (NCO) is a registered participant in this proceeding.

2 These are NCO's comments on the Board Staff's Discussion Paper on Transmission Planning (Discussion Paper).

3 The Assembly of First Nations (AFN) is the national representative organization for all the First Nations in Canada. The AFN represents the interests of 615 First Nations nationally, of which 134 are located in Ontario.

4 NCO has made submissions, relevant to this proceeding, in the following proceedings:

(a) the Integrated Power Supply Plan (IPSP) EB-2007-0707 (IPSP Proceeding).

(b) the Transmission Connection Cost Responsibility Review EB-2008-0003.

(c) the Proposed Amendments to the Distribution System Code proceeding EB-2009-0077.

(d) the Regulatory Treatment of Infrastructure Investment EB-2009-0152.

5 It is surprising to NCO, given the developing government policy that acknowledges the right of Aboriginal peoples to participate in Ontario's energy industry, that Board staff has not dealt in its Discussion Paper with any of the issues raised by NCO's submissions in these proceedings.

II. OVERVIEW

6 The proposals for transmission planning and procurement in the Discussion Paper fall outside the Board's jurisdiction.

7 Transmission planning and procurement fall to the Ontario Power Authority (OPA) in accordance with its obligations under the *Electricity Act* 1998 to prepare an integrated power supply plan (IPSP) and procurement processes for approval by the Board.

8 Approval of procurement processes is predicated on there being an approved IPSP. There is no current IPSP let alone an approved one. Piecemeal efforts to deal with planning and procurement are premature and contrary to statute.

9 The requirements for the Board to approve the IPSP and its procurement processes are inconsistent with the Board undertaking a planning and procurement function. It is contrary to the rules of procedural fairness. The

Board would be approving an IPSP and procurement process some elements of which it had planned.

10 The proposals in the discussion paper would allow the OPA to sidestep its statutory obligation to prepare an IPSP and procurement processes and have them approved by the Board.

11 Failure by the Board to resume the IPSP Proceeding is also incompatible with procedural fairness and is not in the public interest because it deprives potential intervenors of the ability to bring forward and have tested issues that concern the plan in its entirety as well as in detail.

12 The Board should require the OPA to resume the IPSP Proceeding by completing and submitting the revised IPSP and procurement processes that the OPA had promised when that proceeding was adjourned.

13 Even if the Board had authority to deal with what should be the OPA's planning function, that authority must carry with it all attendant responsibilities.

14 That means, inter alia, carrying out full Aboriginal consultation on the plan, complying with the OPA's Procurement Regulation and providing an appropriate forum for third party intervention no less than would be available in an IPSP approval proceeding.

15 NCO proposed in the IPSP Proceeding that the IPSP and the OPA's procurement processes should include and/or recommend one or more

affirmative action programs for participation by First Nations and other aboriginal groups in Ontario's electricity industry.

16 The Board's statutory objectives, read in conjunction with current government policy, mandate inclusion of such a program or programs in any planning or procurement of the transmission system.

17 NCO welcomes the first steps taken by the Provincial government through the OPA's Aboriginal Energy Partnerships Program to assist Aboriginal communities to participate in developing renewable energy generation facilities.

18 However, there remain substantial gaps in capacity building programs and the financial assistance necessary to remove the systemic discrimination that prevents full participation by First Nations and other Aboriginal groups in Ontario's energy industry.

19 In particular, there are no affirmative action programs that will substantively assist First Nations and other Aboriginal groups in securing full participation in Ontario's transmission system expansion through the competitive designation and other procurement processes outlined in the Discussion Paper.

20 If the Board is to take on a procurement and planning role it should carry out further research and consultation to ascertain a suitable program or combination of programs to this end.

21 It is not sufficient for the Discussion Paper to reference Aboriginal consultation as the responsibility of transmitters in individual projects. The duty

to consult is a government obligation that applies to the entire IPSP as well as to individual projects.

22 As government bodies, both the OPA and the Board itself are directly bound by the duty to consult, especially if, as here, the Board seeks to involve itself directly in the planning and procurement process.

23 The Ministry of Energy and Infrastructure, the OPA and the Board should consult on their plans with First Nations and other Aboriginal parties.

III. DISCUSSION

A. JURISDICTION

24 The Board does not have jurisdiction to do much of what is proposed in the Discussion Paper.

25 As outlined in the Discussion Paper, planning the development of the transmission system is a statutory object of the OPA. Neither planning nor procurement is included in the Board's statutory objectives. Yet Board staff has produced a Discussion Paper that contains significant elements of planning and procurement:

- (a) the Discussion Paper is titled, "Transmission Project Development Planning."

- (b) Board Staff characterises the Discussion Paper as “Board staff’s proposals for transmission project development planning in Ontario.”¹
- (c) the Discussion Paper anticipates an assessment process, the Economic Connection Test (ECT) that has not been commenced by the OPA let alone put to the Board as part of a revised IPSP.
- (d) the proposals in the Discussion Paper confuse the Board’s power to require an incumbent transmitter to carry out a transmission project through its licence conditions with a mandate for the Board to conduct a “potentially competitive designation process”. That is the function of the OPA.

In essence, Board Staff’s proposals arrogate to the Board a procurement process that is properly the responsibility of the OPA through an IPSP and supporting procurement processes that comply with the OPA Procurement Process Regulation.²

B. PREMATURITY

26 The proposals in the Discussion Paper improperly pre-empt the OPA’s IPSP and procurement processes, in conflict with the Board’s duty to act as an impartial adjudicator in approving an IPSP.

¹ Paragraph 1.1 Discussion Paper.

² O. Reg. 426/04

27 NCO agrees with Board staff's statement:

"While an IPSP reviewed and approved by the Board would, under ideal circumstances, be best suited to the evolution of needed transmission facilities, no such approved plan is currently available."³

28 NCO goes further. The Board's mandate is limited to facilitating the implementation of all integrated power supply plans approved by the Board in accordance with the *Electricity Act*, 1998.⁴

29 The Board's obligation in giving that approval is to ensure that the IPSP complies with any directions issued by the Minister of Energy and Infrastructure (Minister) and is economically prudent and cost effective.⁵

30 The development of procurement processes such as the proposals in the Discussion Paper are mandated to the OPA⁶ and also require the Board's approval.⁷

31 Those procurement processes must be developed for managing electricity supply, capacity and demand "in accordance with the OPA's approved IPSP".⁸

32 That means the IPSP must be approved by the Board before the procurement processes can be approved. It is arguable that the procurement processes cannot even be developed before the IPSP has been approved.

³ Paragraph 2 Discussion Paper.

⁴ Section 1(2) of the *Ontario Energy Board Act*, 1998. Under s. 25.30(4) and (5) of the *Electricity Act*, 1998, the OPA must submit the IPSP to the Board for review and approval.

⁵ S. 25.30(4) *Electricity Act*, 1998.

⁶ S. 25.31(1) *Electricity Act*, 1998.

⁷ S. 25.31(3) *Electricity Act*, 1998.

⁸ S. 25.31(1) *Electricity Act*, 1998.

33 There is no current IPSP before the Board let alone one that has been approved.

C. PROCEDURAL FAIRNESS AND THE PROTECTION OF THE PUBLIC INTEREST

34 The requirements for the approval of the IPSP and the OPA's procurement processes provide opportunities for participation in the Board's approval proceedings by interested parties such as NCO.

35 They allow an intervenor to bring forward and have tested issues relevant to the proceeding that concern the plan and procurement processes in their entirety as well as in detail. That is one of the purposes of an Integrated Power Supply Plan. That purpose is denied to intervenors by a piecemeal approach.

36 NCO did precisely that in the IPSP Proceeding for review of the IPSP and the OPA's procurement processes. NCO asserted in that and subsequent proceedings that:

(a) First Nations and other Aboriginal peoples in Ontario have endured systemic discrimination that has prevented their ability to participate fully in the mainstream economy of Ontario, including, but not limited to, energy generation, transmission and distribution, by reason of their race, national or ethnic origin, and their colour.

(b) without adequate affirmative action programs, the IPSP and procurement processes will sustain this systemic discrimination.

37 NCO questioned the constitutional validity of the IPSP and procurement processes as they then stood because they discriminated against First Nations and other Aboriginal peoples in Ontario in contravention of section 15 of the *Canadian Charter of Rights and Freedoms*. NCO served Notice of Constitutional Question under the *Courts of Justice Act*.⁹

38 NCO and other Aboriginal intervenors also raised issues concerning the Government's duty to consult on the IPSP and its procurement processes.

39 Intervenors look to the Board to carry out a quasi-judicial function in its proceedings in accordance with rules of natural justice and procedural fairness.

40 The Board's participation in transmission planning and procurement is entirely inconsistent with its quasi-judicial function. In essence it means that the Board will be called upon in due course to approve an IPSP and/or procurement processes that it has had a hand in making. The Board will be judge in its own cause.

41 The Discussion Paper proposes that "the Board accept, solely for transmission designation and project development purposes, the outcome of the ECT as filed and without substantive examination [which is] to follow at the leave to construct stage." This would allow the OPA's to sidestep the statutory requirement to prepare an IPSP and procurement processes and have them approved by the Board.

⁹ R.S.O. 1990, c. C.43, s. 109.

42 It is inappropriate for the Board to:

- (a) allow the OPA to delay bringing forward a revised IPSP to resume the IPSP proceeding.
- (b) anticipate the outcome of the OPA's assessment process: the "Economic Connection Test" other than through the medium of a revised IPSP approval proceeding. It suggests that there is a dialogue between the Board and the OPA that has not been subject to the public scrutiny that the IPSP proceeding would allow. It is also a premature appraisal given that, for example, it is conceivable that the Minister may make any one of a series of directions to the OPA including directions requiring the OPA to facilitate the participation of Aboriginal peoples in the development of transmission systems.¹⁰
- (c) allow elements of the IPSP to be dealt with in a piecemeal fashion. It undermines the requirement for the IPSP to be an "integrated" plan and the approval processes referenced above. It also denies intervenors such as NCO an adequate forum in which to voice and seek remedy for the issues it raised in the IPSP Proceeding.
- (d) set up a process that would permit the OPA to sidestep its obligations to produce an IPSP and procurement process and to have them approved by the Board.

¹⁰ S. 25.32(4.2) *Electricity Act*, 1998.

- (e) allow elements of an IPSP to be carried forward without the Aboriginal consultation that was being undertaken by the OPA at the direction of the Ministry of Energy and Infrastructure.

43 NCO respectfully submits that the Board should require the OPA to resume the IPSP Proceeding by completing and submitting the revised IPSP and procurement processes that the OPA promised when the IPSP Proceeding was adjourned.

D. THE BOARD'S STATUTORY OBJECTIVES

44 The Board's statutory objectives mandate an affirmative action program for First Nations and other Aboriginal peoples in Ontario's electricity transmission industry.

45 NCO provided a non-exhaustive list examples of affirmative action programs in the IPSP Proceeding, including:

- (a) a First Nations Capacity and Governance Program and Fund.
- (b) a First Nations Capital Fund.
- (c) preferred access for First Nations and bidders from First Nations Communities to grid connections.
- (d) a Set-Aside Program for First Nations and bidders from First Nations communities, and/or

(e) installation of enabling transmission lines to service energy generation by First Nations and bidders from First Nations communities.

46 NCO's submission in EB-2009-0152 dated July 14, 2009, referenced the Board's new statutory objective 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" [Emphasis Added]¹¹

47 Government policy, when read in conjunction with the Board's new statutory objective, mandates affirmative action in favour of Aboriginal transmitters and distributors.

(a) In his directive to the OPA dated September 17, 2008, as a result of which the IPSP Proceeding was adjourned, the Minister asked the OPA to consider the principle of Aboriginal partnership opportunities in both generation and transmission.

(b) The government subsequently directed the OPA to introduce a Feed-In Tariff program for renewable energy generation including a "price adder" for Aboriginal participation and introduced a loan guarantee program for Aboriginal renewable energy generators and transmitters.

¹¹ S. 1(1)5 *Ontario Energy Board Act*, 1998.

- (c) The *Green Energy and Green Economy Act*, 2009 introduced the following provision into the *Electricity Act*, 1998.

Direction re programs for Aboriginal participation

(4.5) The Minister may direct the OPA to establish measures to facilitate the participation of Aboriginal peoples in the development of renewable energy generation facilities, transmission systems and distribution systems and such measures may include programs or funding for, or associated with, Aboriginal participation in the development of such facilities or systems.

Although action under this section is contingent on Ministerial directive to the OPA, taken together with the Minister's directive of September 17, 2008, it is a clear indication of government policy to facilitate, by funding and other means, participation of Aboriginal peoples in the development, not only of renewable energy generation, but also of transmission and distribution systems.

As such, it informs the Board's new statutory objective and, as a transmission planning and procurement exercise, should have informed the preparation of the Discussion Paper.

48 NCO welcomes the first steps taken by the Provincial government, through its Aboriginal Loan Guarantee Program and the OPA's Aboriginal Energy Partnerships Program, to assist Aboriginal communities to participate in developing renewable energy generation facilities.

49 However, there remain substantial gaps in capacity building programs and the financial assistance necessary to remove the systemic discrimination that

prevents full participation by First Nations and other Aboriginal groups in Ontario's energy industry.

50 In particular, there are no affirmative action programs that will substantively assist First Nations and other Aboriginal groups in securing full participation in Ontario's transmission system expansion through the competitive designation and other procurement processes outlined in the Discussion Paper.

51 NCO submits that any transmission planning and procurement exercise should include one or more affirmative action programs for First Nations and other Aboriginal groups sufficient to remedy the systemic discrimination against them.

52 If the Board is to take on a planning and procurement role, it should carry out further research and consultation to ascertain a suitable program or combination of programs to this end.

E. ABORIGINAL CONSULTATION


53 It is not sufficient for the Discussion Paper to reference consultation as the obligation of transmitters in individual projects. The duty to consult is a government obligation that applies to the entire IPSP as well as to individual projects.

54 As government bodies, NCO submits that both the OPA and the Board itself are directly bound by the duty to consult, especially as in this case, where the Board seeks to involve itself directly in the planning process.

55 NCO requests that the Ministry of Energy and Infrastructure, the OPA and the Board consult on their plans with First Nations and other Aboriginal parties.

56 For the avoidance of doubt, this proceeding does not discharge or substitute for the duty of the Crown to consult and accommodate Aboriginal communities in respect of transmission facilities and infrastructure and their procurement.

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