

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

**AND IN THE MATTER OF** an Application by Canadian Niagara  
Power Inc. ("CNPI"), for approval to establish a deferral account.

**CNPI's RESPONSES TO BOARD STAFF INTERROGATORIES**

**February 7, 2011**

**Board Staff Interrogatory 1**

- (1) What is CNPI's rationale for requesting a deferral account now, ahead of the Board's Notice of hearing to designate development work and ahead of the ECT report which is the starting point for of the transmission project development planning according to the Policy?

***CNPI Response to Interrogatory 1:***

As a licensed transmitter, CNPI will be seeking designation to develop transmission project(s) in Ontario that (i) have been identified by the OPA as required for connection of renewable generation sources, and/or (ii) otherwise approved transmission projects identified, for example, in an approved Integrated Power System Plan. In this regard, CNPI has reviewed the recently issued policy under EB-2010-0059 entitled "Framework for Transmission Project Development Plans" (the "Policy") and has begun preliminary work in order to submit competitive application(s) when the Economic Connection Test ("ECT") reports are issued (ie. every six months).<sup>1</sup>

CNPI is currently engaged in preliminary work in the form of First Nations consultations, pre-engineering, cost estimation, and is incurring costs associated with these initiatives and related expenses. CNPI's parent FortisOntario Inc. ("FortisOntario"), and the First Nations' Lake Huron Anishinabek Transmission Company Inc. ("LHATC") announced on February 2, 2011 (see attached Schedule "A") that FortisOntario and LHATC have entered into a binding memorandum of understanding for a joint venture to develop, construct and operate regulated electricity transmission projects in Ontario. LHATC represents First Nations who are signatories or are adherent to the Robinson-Huron Treaty of 1850. This work is consistent with the purpose of the Policy to:

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<sup>1</sup> The Policy at page 7.

"...allow transmitters to move ahead on development work in a timely manner... and support competition in transmission in Ontario to drive economic efficiency for the benefit of ratepayers."<sup>2</sup>

FortisOntario's partnership with LHATC is consistent with Ministry of Energy directives to provide opportunities for participation by First Nations in these projects. It is also considered by the Board as a criterion for deciding which transmitter should be designated for a project.

CNPI acknowledges that its recovery of these expenditures is potentially at risk, since even if it is granted a GEA deferral account, it could be unsuccessful in the designation process. In order to submit a competitive transmission development plan and to comply with the Filing Requirements mandated by the Board in the Policy, certain preliminary work must be undertaken now by CNPI.

The OPA's assessment process is expected to involve ECT reports being completed as often as every six months. The OPA's initial ECT report could come out at anytime, and two of CNPI's competitors have indicated that they are already engaged in preliminary transmission development work. These competitors are Great Lakes Power Transmission LP ("GLPL") and Hydro One Networks Inc. ("HONI"), who were both granted deferral accounts ("GEA deferral accounts")<sup>3</sup> on the basis that non-material costs for project development plans associated with the designation process may be recorded now, before the initial ECT reports are issued:

"First, as has been noted by Board staff and the intervenors, the OPA is still conducting its analysis of the FIT applications and is still in the process of developing its Transmission Availability Tests and Economic Connection Tests. These activities are fundamental to the overall process. The Board cautions GLPT against making significant expenditures in advance of the OPA's work in this area."<sup>4</sup>

To deny or delay CNPI's request for approval to establish a GEA deferral account to record its preliminary expenses would put CNPI and its First Nations partners at a distinct disadvantage to its competitors. CNPI submits that this result would be contrary to the Policy's objective of encouraging competition. It would also be contrary to Ministry directives encouraging First Nations participation. To grant CNPI a GEA deferral account now would be consistent with the Board's previously identified principles it has used and continues to use in fulfilling its objectives in transmission policy, being: economic efficiency, regulatory predictability, and Board efficiency.<sup>5</sup>

The distinct disadvantage can be described in two ways: Firstly, timelines are critical to any competitive process. With the issuance of an ECT report, presumably the other transmitters will be in an immediate position to react and continue their efforts and invest according to the Policy.

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<sup>2</sup> The Policy at page 1.

<sup>3</sup> EB-2009-0409 and EB-2009-0416

<sup>4</sup> OEB Decision at page 5 of the GLPL proceeding EB-2009-0409. We note that the same caution was given to HONI in the Board's decision in EB-2009-0416 at page 5.

<sup>5</sup> The Policy at page 3.

Should CNPI be denied this request for a deferral account, the company would, at the time the ECT list is issued, have to reapply, and absorb the regulatory lag and costs associated with this lengthy process and lose valuable time and focus compared to the other transmitters who are now ready to act and respond to the initial ECT report. If the default Board timelines are applied, CNPI would not get an approval of its deferral account request until possibly after the second ECT report is issued six months later.

Secondly, a great deal of effort is required by CNPI and its First Nations partners prior to the issuance of the OPA's initial ECT report in order to prepare a timely and competitive designation application. As noted on page 12 of the Policy, the default period will be three months from the date of issuance of the Notice of a Designation Hearing in connection with the ECT report, the first of which could be issued in the near future. In the mandated designation application, the decision criteria are stated as follows:

"...organization, technical capability, financial capacity, schedule, costs, landowner, and other consultations. Participation by First Nations should be noted where applicable."<sup>6</sup>

Recent decisions of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*,<sup>7</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*<sup>8</sup> and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*<sup>9</sup> reinforce and clarify that First Nations must be consulted where projects may have an adverse impact on constitutionally protected rights. In order to develop meaningful consultation and participation with First Nations, an extensive consultation process has already begun well in advance of the first Notice of Designation Hearing. A comprehensive consultation plan needs to be developed for each application; yet this can only be developed after meaningful discussions with the appropriate First Nations and their Chiefs. The same applies to preliminary engineering work and other organizational, costing, landowner and related legal issues. There are real costs being incurred by CNPI at this time regarding the preliminary First Nation consultation work noted above, which CNPI proposes to record in the GEA deferral account. These costs are required to ensure that proper First Nation consultation takes place.

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<sup>6</sup> *Ibid.*

<sup>7</sup> [2004] 3 S.C.R. 511

<sup>8</sup> [2004] 3 S.C.R. 550

<sup>9</sup> [2005] 3 S.C.R. 388

**Board Staff Interrogatory 2**

- (2) If the Board were to grant the deferral account requested, under what conditions and at what point would CNPI begin recording expenses on that account?

***CNPI Response to Interrogatory 2:***

CNPI expects that if the Board were to grant the GEA deferral account requested, it would impose the same conditions as it did for the GEA deferral accounts it granted to GLPL and HONI. Any difference in treatment among the licensed transmitters would be unfair. CNPI is not aware of any conditions imposed on the other two transmitters, however the Board did issue cautions to GLPT and HONI that are relevant to CNPI:

"First, as has been noted by Board staff and the intervenors, the OPA is still conducting its analysis of the FIT applications and is still in the process of developing its Transmission Availability Tests and Economic Connection Tests. These activities are fundamental to the overall process. The Board cautions GLPT against making significant expenditures in advance of the OPA's work in this area."<sup>10</sup>

As explained in the response to interrogatory #1, CNPI is consulting with its LHATC First Nations partners in regard to transmission projects that may be put forward by the OPA after ECT reports are completed. CNPI wishes to start recording such costs in a GEA deferral account immediately. CNPI understands that it bears the risk of the projects not being put forward by the OPA as a result of its ongoing ECT process, as well as the risk that CNPI and its LHATC First Nations partners may not be designated by the Board. CNPI would heed the same cautions that the Board gave to GLPT and HONI, such that CNPI would not make significant expenditures in advance of the OPA's work.

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<sup>10</sup> OEB Decision at page 5 of the GLPL proceeding EB-2009-0409.

### **Board Staff Interrogatory 3**

- (3) What is CNPI's understanding of the Policy with respect to recovery of costs associated with transmission project development work that is associated with the Board designation process?

#### ***CNPI Response to Interrogatory 3:***

CNPI's understanding of the Policy "with respect to recovery of costs associated with transmission project development work that is associated with the Board designation process" is exactly as it is described in the Policy. Notably, the following provisions of the Policy are relevant:

"The Board accepts the premise that designation should carry with it the assurance of recovery of the budgeted amount for project development. When subsequent analysis by the OPA suggests that a project has ceased to be needed or economically viable (e.g. FIT applications have dropped out of the reserve such that the project falls below the economic threshold), the transmitter is entitled to amounts expended and reasonable wind-up costs. Threshold materiality for amounts beyond the approved budget could be established in the order and would likely be in relation to the total budget.

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>11</sup>

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<sup>11</sup> The Policy at page 15.

#### **Board Staff Interrogatory 4**

(4) What specific section in the Policy does CNPI rely on for justification of its request for a deferral account now?

#### ***Response to Interrogatory 4:***

CNPI interprets the focus of this interrogatory to be a request for justification for the deferral account *now* (i.e., the timing of obtaining the deferral account), as opposed to justification for the deferral account at all. The Policy does not state when a GEA deferral account will be granted. For that matter, the Policy does not preclude the granting of a deferral account prior to an ECT report. From a practical perspective, it would be reasonable to grant transmitters GEA deferral accounts prior to an ECT report being issued to eliminate any delays in progressing with their transmission plans. Since GLPL and HONI already have Board approved GEA deferral accounts, they can incur and record their planning costs immediately, while CNPI could be delayed from incurring recoverable planning costs until an ECT report is issued. This circumstance would put CNPI and its partners at a disadvantage relative to GLPL and HONI.

The Policy clearly envisages a successful proponent recovering its planning costs:

"Only the transmitter that is successful in being designated will be able to recover the costs of preparing a plan."<sup>12</sup>

The only way such recovery could occur is if the successful transmitter has recorded its planning costs in a GEA deferral account. Therefore, presumably GEA deferral accounts will be granted to all licensed transmitters that are interested in participating in the designation process. CNPI questions the reasonableness of delaying the approval of its GEA deferral account until an ECT report is issued, especially since as mentioned above, CNPI bears the risk of recovery, and two other licensed transmitters already have GEA deferral accounts. The Policy contemplates transmitters being on "equal footing" in regard to their plans:

"This is comparable to the more usual business model in which proponents prepare proposals or bids at their own costs and own risk. In this way, the Board seeks to ensure that all transmitters will be on equal footing when submitting plans..."<sup>13</sup>

CNPI submits that granting it a GEA deferral account now would put it on "equal footing" with GLPT and HONI.

Finally, the announcement in Schedule "A" is a clear indication that LHATC and First Nations participation and consultations are an integral part of CNPI's preparations and that preliminary transmission planning has occurred and is actively underway in order to move ahead on development work in a timely manner upon issuance of an ECT report and the Board's Notice of Hearing.

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<sup>12</sup> The Policy at page 11.

<sup>13</sup> *ibid.*