



**EB-2010-0324**

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

**AND IN THE MATTER OF** an application under  
section 60 of the *Ontario Energy Board Act*, 1998,  
S.O. 1998, c. 15, Schedule B for an electricity  
transmission licence.

**BEFORE:** Paul Sommerville  
Presiding Member

Paula Conboy  
Member

## **DECISION AND ORDER**

### **BACKGROUND**

TransCanada Power Transmission (Ontario) L.P. ("TransCanada Transmission") filed an application with the Ontario Energy Board (the "Board"), received on October 27, 2010, under section 60 of the *Ontario Energy Board Act, 1998* (the "Act") for an electricity transmission licence.

The Board issued a Notice of Application and Hearing on November 19, 2010. Intervention requests were filed by Hydro One Networks Inc. ("Hydro One") and Great Lakes Power Transmission L.P. ("GLPT"). The Independent Electricity System Operator ("IESO") initially filed a letter of comment and subsequently requested late intervenor status. The Power Workers' Union and Canadian Niagara Power Inc. requested observer status. The Board granted all the intervenor and observer status requests.

On December 14, 2010, the Board issued Procedural Order No. 1, providing for interrogatories and submissions. Board staff and intervenors filed interrogatories on January 14, 2011 and TransCanada Transmission filed its interrogatory responses on

January 28, 2011. On February 9, 2011, the Board issued Procedural Order No. 2 extending the dates for submissions, stating that it was actively seeking views from all parties on the exemptions requested by TransCanada Transmission. Submissions were received from Board staff and intervenors on February 16, 2011 and February 23, 2011, respectively. On March 3, 2011, TransCanada Transmission requested an extension to April 15, 2011 for the filing of its reply submission, stating that it needed additional time to consider the various ways to address the specific submissions. The Board issued Procedural Order No. 3 on March 7, 2011 approving the requested extension of time. TransCanada Transmission filed its reply argument on April 18, 2011.

The full record of the proceeding is available at the Board's offices and on the Board's website. The Board has summarized the record in this proceeding only to the extent necessary to provide context to its findings.

## THE APPLICATION

TransCanada Transmission has stated that it is making this application in order to participate in any upcoming Board transmitter designation process for new transmission investment in Ontario. The applicant has no existing transmission assets in Ontario although its intended business activity is to develop, construct, own and operate transmission assets in the province.

As part of its licence application, TransCanada Transmission requested a temporary exemption from the transmitter obligations of Section 3 of the Board's *Electricity Reporting and Record Keeping Requirements* ("RRR") until it either becomes designated by the Board to undertake transmission development work or it becomes active in the Ontario transmission market.

TransCanada Transmission also sought exemptions from sections 2.2.2 and 2.2.3 of the *Affiliate Relationships Code for Electricity Distributors and Transmitters* ("ARC").

Sections 2.2.2. and 2.2.3 of the ARC state the following:

2.2.2 Where a utility shares information services with an affiliate, all confidential information must be protected from access by the affiliate. Access to a utility's information services shall include appropriate computer data management and data access protocols as well as contractual provisions regarding the breach of

any access protocols. A utility shall, if required to do so by the Board, conduct a review of the adequacy, implementation or operating effectiveness of the access protocols and associated contractual provisions which complies with the provisions of section 5970 of the CICA Handbook. A utility shall also conduct such a review when the utility considers that there may have been a breach of the access protocols or associated contractual provisions and that such review is required to identify any corrective action that may be required to address the matter. The utility shall comply with such directions as may be given by the Board in relation to the terms of the section 5970 review. The results of any such review shall be made available to the Board.

2.2.3 A utility shall not share with an affiliate that is an energy service provider employees that are directly involved in collecting, or have access to, confidential information.

TransCanada Transmission stated that it is part of a large family of energy companies, containing both regulated and unregulated energy businesses. In response to Board Staff Interrogatory No. 2, the Applicant stated that the ultimate parent company, TransCanada Corporation ("TransCanada") has data management and access protocols based on classifying TransCanada's personnel and electronic assets into three functional categories: (a) Regulated Business (i.e., the Canadian Mainline); (b) Non-Regulated Business; and (c) Shared Corporate Services. Under this system, TransCanada Transmission would be classified as a Regulated Business. TransCanada's personnel in its Regulated Business and Shared Corporate Services have access to information relating to all of TransCanada's Regulated Businesses and would therefore have access to TransCanada Transmission's confidential information. However, personnel in its Non-Regulated Business would not have access to TransCanada Transmission's confidential information.

TransCanada Transmission stated that in order to comply with section 2.2.2 of the ARC, TransCanada would be required to isolate TransCanada Transmission's confidential information, not only from personnel in its Non-Regulated business but also from all other Regulated Business and Shared Corporate Services personnel. TransCanada Transmission stated that the cost of the changes required to isolate TransCanada Transmission's business in this manner would be significant.

With respect to compliance with section 2.2.3 of the ARC, the applicant has stated that the use of TransCanada's Shared Corporate Services ("Shared Services") provides

significant cost efficiencies for its Regulated Businesses. In support of its exemption request, the applicant has stated that personnel in Shared Services are prohibited from: (a) providing any information about the Regulated Business to the Non-Regulated Business and personnel; and (b) having commercial or operational roles in TransCanada, eliminating the potential for any competitive advantage to accrue to Non-Regulated Business affiliates by virtue of the sharing of these personnel. TransCanada Transmission stated that if required to strictly comply with section 2.2.3 of the ARC, it would have to establish a duplicative structure of dedicated employees to provide those functions or a shifting of personnel in ways that may not be efficient.

## **SUBMISSIONS OF PARTIES**

### **Exemptions from the ARC**

Board staff, Hydro One and the IESO raised concerns regarding TransCanada Transmission's request for exemptions from the above provisions of the ARC. Board staff stated that it does not support the requested exemption from section 2.2.2 of the ARC. In Board staff's view the evidence provided does not demonstrate that a regulated affiliate is prevented from sharing or using to its own advantage confidential information that it has obtained regarding another regulated affiliate. Board staff also opposed the applicant's exemption request from section 2.2.3 of the ARC, stating that it is not clear that TransCanada Transmission has adequately examined the costs of establishing the appropriate protocols and procedures for the segregation of its confidential information and employees who have access to confidential information to enable it to comply with the ARC. Board staff also noted that exemptions that have been granted by the Board in earlier decisions were for a specific purpose or for specific facilities, employees and information set out in a services agreement whereas TransCanada Transmission is seeking a much broader, generic exemption in this case that would apply to unknown future activities.

Hydro One's submission focused on the timing of the ARC's applicability to TransCanada Transmission. Hydro One stated that if the applicant receives an exemption from the ARC during the designation process this would enable TransCanada Transmission to receive potentially confidential information that incumbent transmitters would be required to provide to all bidders as part of the designation process.

The IESO submitted that as a licensed transmitter, TransCanada Transmission would be in a rather unique position to potentially access or would be the recipient of a significant amount of market participant confidential information, including financial, planning and operational information and data. The IESO further submitted that exemptions from sections 2.2.2 and 2.2.3 of the ARC is likely to result in a conflict with the IESO Market Rules pertaining to accessibility and secure management of confidential information and data that will be made available to TransCanada Transmission.

In its reply submission, TransCanada Transmission withdrew its request for an exemption from section 2.2.2 of the ARC, stating that it would establish the requisite data management and access protocols to comply with section 2.2.2. TransCanada Transmission modified its exemption request with respect to section 2.2.3 of the ARC, requesting that the provisions of the ARC not be made applicable to TransCanada Transmission until such time as it is successfully designated as a transmitter or until it purchases or operates a transmission system in Ontario. TransCanada Transmission also filed a proforma shared services agreement that it intends to enter into with TransCanada Pipelines Limited ("TCPL") upon being designated as a transmitter for a particular project or becoming active in Ontario through the purchase or operation of a transmission system in Ontario. The Shared Services personnel are all employees of TCPL and provide functions to both the regulated and non-regulated entities within the TransCanada group of companies, including taxation and accounting, regulatory and legal affairs, environmental affairs, field operations, communications, engineering, treasury secretarial and executive administration functions. This proposed agreement places restrictions around the sharing of employees and the disclosure of confidential information.

### Scope of Licence

The IESO submitted that the licence authorization be limited to that of enabling TransCanada Transmission's participation in the Board's transmission project designation process only. The IESO stated that it is unclear whether the approval being sought here includes authorization to participate in the Board's transmission project designation process, as well as authorization to own and/or operate transmission facilities that may be constructed, modified or acquired by TransCanada in the future. The IESO stated that a "blanket authorization" to own/operate any transmission facilities is not warranted without knowing the specific facilities for which an owner and/or operator licence is required.

TransCanada Transmission replied stating that the licence it has applied for should not be constrained as suggested by the IESO for a number of reasons. Firstly, TransCanada Transmission stated that the issue raised by the IESO has already been considered and decided in the Board's Policy Framework for Transmission Project Development Plans Proceeding[EB-2010-0059] ("Board's Policy"). Secondly, TransCanada Transmission submitted that section 57 of the Act which sets out the Board's licensing authority does not provide licensing authority to enable participation in the transmitter designation process nor does the Board's Policy contemplate different "types" of transmission licences as between existing transmitters and new entrants. Finally, TransCanada Transmission stated that it would be more efficient, from a practical perspective for the Board to issue a standard electricity transmission licence to an entrant transmitter as this could be amended to add the specific facilities if the transmitter is successful in the designation process.

## **BOARD FINDINGS**

### **Licence Application**

The Board assesses a licence application by reviewing the evidence filed by the applicant and parties who participated in the proceeding. Based on the evidence filed, the Board has determined that it is in the public interest to grant an electricity transmission licence to TransCanada Transmission for a period of five years. In reaching its decision, the Board has considered the following issues:

1. Applicant's Financial and Technical Capabilities;
2. Scope of Licence; and
3. Term of Licence.

### **Applicant's Financial and Technical Capabilities**

The key areas reviewed by the Board in any licence application are the financial position, technical capability and conduct of an applicant. In the case of electricity transmission licence applications by entrant transmitters, the Board's review is also guided by the Board's Policy [EB-2010-0059], referred to earlier and the Board's Filing Requirements: Transmission Project Development Plans [G-2010-0059] ("Filing Requirements"). These documents reflect the Board's initial directions with respect to

the development of new transmission infrastructure in Ontario and the proposed electricity transmitter designation process.

The Board's Policy seeks to encourage new transmission entrants to Ontario, thereby bringing additional resources for project development and supporting competition in the transmission sector to drive economic efficiency for the benefit of ratepayers. The Board considered it reasonable to require that new entrants be licensed in order to participate in the designation process. The Board's Policy anticipates that the process of licensing new entrant transmitters will enable the Board to evaluate the financial viability and technical capabilities of new entrant transmitters. Once the financial resources and technical capabilities of a new entrant transmitter are considered and found to be satisfactory, the transmitter would be issued a licence.

The Board finds that TransCanada Transmission has provided sufficient evidence of its financial and technical capabilities to qualify for a transmission licence.

The issuance of a transmission licence will enable TransCanada Transmission to participate in the designation process. The Board notes, however, that the granting of a transmission licence does not endorse the applicant's technical and financial capabilities in relation to the development of a specific transmission project in the future. As set out in the Filing Requirements, licensed transmitters who file plans to develop a transmission project under the Board's designation process will be required to provide a significantly more detailed demonstration of their technical and financial capabilities in relation to the development of a specific transmission project. These expectations are reflected on page 2 of the Board's Filing Requirements, which states that organization, technical capability, financial capacity, schedule, costs, landowner and other consultations and other factors will be evaluated by the Board, based on the evidence in the proceeding, taking into account the individual circumstances of the project. Additionally, on page 4, the Filing Requirements state that entrant transmitters should provide evidence of experience in other jurisdictions, evidence that business practices are consistent with good utility practices for design, engineering, land acquisition, licensing and permitting, construction and operation amongst other things. Entrant transmitters will also be required to confirm that they have not previously had a licence or permit revoked and are not currently under investigation by any regulatory body.

The licensing process allows the Board to undertake a preliminary review of entrant transmitters' financial and technical capacities and to subsequently rely on the deemed licence conditions, as set out in section 70 (2.1) of the Act, to enable these transmitters

as and when mandated by the Board and in the manner determined by the Board, to develop transmission system plans to accommodate renewable generation, and to file those plans for review and approval by the Board.

### Scope of Licence

The Board has considered the IESO's and the applicant's submissions with respect to the scope of the licence. As noted above, the Board is granting a licence to TransCanada Transmission based on a satisfactory preliminary review of its financial and technical capabilities. The Board will not limit the scope of TransCanada Transmission's licence. The Board agrees with the applicant that section 57 of the Act which sets out the Board's licensing authority does not provide licensing authority solely to enable participation in a transmitter designation process nor does the Board's Policy contemplate different "types" of transmission licences as between existing transmitters and new entrants. The issuance of a transmission licence will permit TransCanada Transmission to participate in a designation process. TransCanada Transmission will still be subject to a competitive selection process which will determine whether it is chosen as a designated transmitter and will actually own and operate transmission facilities in the future.

The Board will amend the licence granted to TransCanada Transmission to add the specific facilities that it is authorized to own and operate if it is successful in a designation process.

### Term of Licence

A transmission licence is typically granted for a term of 20 years recognising the long term nature of transmission assets. However, the Board considers that a shorter term of licence is appropriate in the present circumstances of the Board's designation process. The granting of a licence to TransCanada Transmission enables it to participate in a designation process and to compete with other licensed transmitters who participate in a designation process to become a designated transmitter. As such, the Board will set an initial term of 5 years.

The term of the licence may be amended and extended to the standard 20 year term in the event that TransCanada Transmission becomes a designated transmitter.



## **Exemption Requests**

As noted earlier, as part of its application TransCanada Transmission requested exemptions from sections 2.2.2 and 2.2.3 of the ARC and a temporary exemption from section 3 of the RRR.

Given that TransCanada Transmission has indicated in its reply submissions that it is withdrawing its request for an exemption from section 2.2.2 of the ARC, the Board makes no findings on that request.

With respect to TransCanada Transmission's modified request for an exemption from section 2.2.3 of the ARC, the Board denies that request for the reasons set out below.

The Board is generally very reluctant to grant exemptions from the ARC. The ARC, like all Codes, was developed according to specific statutory provisions and safeguards and was the product of highly transparent consultation processes involving a wide range of interests. In 2008, significant revisions were made to the ARC that relaxed certain rules to allow utilities greater flexibility where appropriate, but that retained other provisions as being key to ensuring an appropriate level of protection of from various harms that might arise from the activities of utilities relative to their affiliates. Section 2.2.3 of the ARC is in this latter category. Exemptions from the ARC should therefore be granted only in the clearest case where the risk of harm is slight. The Board does not believe that this threshold has been met in this case.

TransCanada Transmission's case for exemption rests primarily on the achievement of cost efficiencies. Promoting economic efficiency and cost effectiveness in the transmission sector is a statutory objective of the Board, but it is not the primary purpose or objective of the ARC. The ARC protects against harm by limiting or circumscribing how a utility may interact with its affiliates to ensure, for example, that affiliates are not in a position to gain inappropriate advantages from their relationship with a regulated utility. The ARC will, by its very nature, restrict utility behaviour rather than facilitate it, sometimes at the expense of utility efficiency.

Of particular concern to the Board in the context of TransCanada Transmission's exemption request are the submissions of the IESO and Hydro One in relation to confidential information that a licensed transmitter may be expected to receive both during the designation process and as part of the ongoing business of operating a transmission system. The Board notes that the IESO requested late intervenor status

in this proceeding for the very purpose of addressing this issue among others. As noted above, from the IESO's perspective the confidential information in question can include market participant confidential information such as financial, planning and operational information and data (for example, customer forecast, planning and load flow information, as well as settlement and billing data). From Hydro One's perspective, it can include potentially confidential and commercially sensitive technical and connection information that is required to be provided by incumbent transmitters to all bidders as part of the designation process.

The Board agrees that confidential information of the type referred to by the IESO and Hydro One is deserving of a very high degree of protection. In the Board's view, contractual services agreements of the kind proposed by TransCanada Transmission are not adequate to that purpose. The Board believes that maintaining the additional protection afforded by section 2.2.3 of the ARC is necessary to ensure that employees that have access to confidential information are not shared as between the transmission licensee and its energy service provider affiliate(s), even if that comes at some cost and inconvenience to the utility.

The Board notes that, quite apart from section 2.2.3 of the ARC, TransCanada Transmission will upon being licensed also be subject to the confidentiality provisions set out in both the ARC and the licence being issued to it. The Board takes this opportunity to confirm that, for the purposes of the application of the confidentiality provisions of the ARC, information obtained by TransCanada Transmission as part of a designation process is considered to be information obtained "in the process of providing...prospective utility service" within the meaning of the ARC definition of "confidential information". The Board expects TransCanada Transmission to treat it as such. The Board also reminds TransCanada Transmission that, if and where it shares employees with an affiliate other than an energy service provider affiliate, TransCanada Transmission must ensure through appropriate measures that any confidential information obtained by TransCanada Transmission, whether as part of a designation process or otherwise, is not shared with or used for the benefit of that affiliate.

Neither the IESO nor Hydro One, by or through whom any of the confidential information at issue would flow to TransCanada Transmission, requested that the Board consider the imposition of any additional safeguards beyond denying TransCanada Transmission's request for an exemption. On that basis, the Board has not considered it necessary to impose additional safeguards at this time. However, the Board emphasizes that the protection of that confidential information is of utmost concern to it.

The Board has yet to initiate a designation process, but has received from the Minister of Energy an expression of interest that a designation process be undertaken in relation to the development of the “East-West Tie”. The Board will remain mindful of the IESO’s and Hydro One’s concerns as it further develops details of its designation process and as it considers other applications for licensing for the purposes of participation in a designation process. The Board will also be interested in any proposals that the IESO, Hydro One or other interested parties might wish to make at the relevant time if considered appropriate to ensure that confidential information is protected in a manner commensurate with its commercial value and sensitivity.

The Board acknowledges that some of the reporting and record-keeping requirements under section 3 of the RRR will, by definition, not apply to TransCanada Transmission unless and until it has transmission assets in the Province. However, a number of these requirements by their terms can and, in the Board’s view, should apply as of the date of licensing. These include, most notably, the reporting and record-keeping requirements related to compliance with the ARC, which itself is a condition of the licence granted in this proceeding. The Board therefore denies TransCanada Transmission’s request for an exemption from section 3 of the RRR.

**THE BOARD ORDERS THAT:**

The application by TransCanada Transmission for an electricity transmission licence is granted on such conditions as are contained in the attached licence.

**DATED** at Toronto June 22, 2011

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary