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Ontario Energy Board  
2300 Yonge Street  
P.O. Box 2319  
Suite 2700  
Toronto ON M4P 1E4

**Attention: Ms Kirsten Walli  
Board Secretary**

Dear Ms. Walli:

**Re: TransCanada Power Transmission (Ontario) L.P. ("TPT")  
Electricity Transmission Licence EB-2011-0260**

### **Introduction and Summary of Position**

These submissions are made by TPT in response to the Board's Notice of Application to Amend a Transmission Licence and Notice of Written Hearing dated August 26, 2011 (the "Notice"). The Notice invited TPT and other interested parties to make "submissions on the advantages and disadvantages of the following potential effective dates for the [transmission] Licence:

1. June 22, 2011
2. The date that TransCanada Transmission registers its interest in a designation process, which in the recently announced designation process would be no later than September 21, 2011.
3. The date TransCanada Transmission files evidence in a designation proceeding
4. The date TransCanada Transmission applies to own or operate a transmission system outside a designation proceeding."

Option 4, above addresses the prospective ownership and operation of a transmission system. Although that option refers to an application outside of a designation proceeding, it shares the same characteristics as an additional option, namely, that licensing becomes effective upon designation. In both cases, it is the prospective ownership and operation of a transmission system that triggers the effective date of licensing. These submissions will therefore include the date upon which TPT is designated (assuming it is designated) as included in option 4.

With this refinement, these prospective dates may be put into 3 general categories: (i) Upon licensing (date 1); (ii) during the designation proceeding (dates 2 and 3); and (iii) prospective

ownership and operation (date 4, which for these purposes will include, assuming it occurs, the date that TPT is selected as a designated transmitter by the OEB).

TPT submits that the consideration of the advantages and disadvantages of each of these options should be evaluated with reference to the Board's intended purpose in requiring new entrant transmitters to be licensed for the designation process. The Board has identified three potential advantages of licensing:

- 1) to screen for financial viability and technical capabilities;
- 2) to address the treatment of confidential information that the transmitter may be expected to receive as part of the ongoing business of operating a transmission system; and
- 3) to address the treatment of confidential information that the transmitter may be expected to receive during the designation process.

As will be argued below it does not appear that there are any advantages to requiring TPT to have a license in effect at any of the prospective dates prior to option (4) upon prospective ownership and operation. The only reason why the effective date should arise prior to that time would be to prevent the sharing of customer specific confidential information that both (i) arises in the designation hearing process; and (ii) would be incapable of being protected in the normal course through the Board's practices and procedures. In light of current information respecting the designation process, TPT has not identified any reasonable scenario under which this is likely to occur.

The advantages of making licence requirements effective prior to designation are therefore speculative and uncertain. By contrast, the disadvantages of doing so are significant and clear. Requiring TPT (and other new entrant transmitters) to set up a stand-alone transmission company in Ontario just to participate in the designation process with the sole purpose of protecting customer confidential information that can otherwise be dealt with would be incredibly inefficient. Further, unlike incumbent transmitters, TPT is not in a position to recover the costs of a stand alone transmission company from transmission rate-payers. TPT would therefore face a competitive disadvantage in comparison to incumbent transmitters if it was required to incur those costs.

The nature of these potential advantages and disadvantages of these options are addressed in greater detail below.

### **Advantage #1 – Screen for Financial and Technical Viability and Capability**

Advantage #1 was addressed in the *Framework for Transmission Project Development Plans*<sup>1</sup>, which established the licensing requirement. In fact, in this policy document – the only policy document to be approved by the entire Board on this matter - the Board treated this as the *only* reason for licensing. The Board stated this as follows:

The Board considers it reasonable to require that new entrant transmitters be licensed in order to participate in the designation process. The licensing process will allow the Board to evaluate the financial viability and technical capabilities of the new entrant

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<sup>1</sup> Board Policy: Framework for Transmission Project Development Plans, August 26, 2010 (EB-2010-0059), p. 5.

transmitters. The Board would need to evaluate these items regardless of whether it was done in a licensing process or another type of pre-qualification process.

The Board has now had the opportunity to review TPT's financial viability and technical capabilities. In its decision approving TPT's transmission licence application (the "Licensing Decision"), the panel concluded that TPT "has provided sufficient evidence of its financial and technical capabilities to qualify for a transmission licence."<sup>2</sup> It may be that, at the post designation stage, the Board may impose a more rigorous standard. The Board addressed this in the TPT Licence Decision:<sup>3</sup>

"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."

As a result, the Board will review financial viability to conduct a specific transmission proposal in the designation process where the entrant transmitters' viability will be examined on its merits. There is no additional licensing requirement at this stage. Accordingly, the advantage of screening for viability is not impacted one way or another by the potential effective date of licensing prior to designation. In other words, none of the effective dates prior to that time (Options 1, 2 or 3) have any additional advantage with respect to this purpose.

## **Advantage #2 - The Treatment of Confidential Information arising as part of the Business of Operating a Transmission System**

With respect to Advantage #2, the Board has confirmed that, if and when TPT is designated, it will be subject to all of the regulatory requirements that apply to licensed transmission companies. Thus, the treatment of confidential information that TPT may receive as part of the ongoing business of operating a transmission system is clearly managed by the licence taking effect upon prospective ownership and operation of a transmission system (Option 4). Like Advantage #1 above, none of the other effective dates (Options 1-3) have any advantage with respect to this purpose.

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<sup>2</sup> Decision and Order respecting TPT's Transmission Licence Application, June 22, 2011 (EB-2010-0324) ("TPT Licence Decision"), p. 7.

<sup>3</sup> TPT Licence Decision, at p. 7

### **Advantage #3 - The Treatment of Confidential Information arising During the Designation Process**

With respect to Advantage #3, the issue here is how to best address the treatment of confidential information that an applicant may be expected to receive *during* the designation process. The *Framework for Transmission Project Development Plans* did not raise this as a rationale for licensing. Instead, the Board made the point (with which TPT agrees) that the designation process – which is an OEB hearing - should be as open as possible and issues respecting confidential information would be treated in accordance with the Board’s practices and procedures:<sup>4</sup>

In fact, the Board emphasizes that the designation hearing is an open, public process. Information that the transmitter considers to be commercially sensitive should be identified as such and confidentiality requested according to the Board’s “Practice Direction on Confidential Filings”. The Board will then make a determination of the degree of confidentiality to be provided to balance the competing interests of private intellectual property and commercially sensitive information with the public interest in a transparent process. Potential solutions include redacted evidence, in camera proceedings, and undertakings by counsel to maintain confidentiality.

The *Framework for Transmission Project Development Plans* document did not suggest that the hearing process would be inadequate to protect against unauthorized disclosure of confidential information obtained through that process.

The suggestion that confidential information obtained in the course of the designation hearing had to be protected through licensing obligations was thus not a part of the Board’s policy framework for the designation process. That issue first arose in the TPT Licence Decision.

It is therefore worth looking at the Board’s treatment of this issue in some detail in light of the information before it at that time. Two parties in that proceeding – the IESO and Hydro One - claimed that licensing was necessary to provide protection against the disclosure of confidential information. According to the Board:<sup>5</sup>

“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.”

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<sup>4</sup> Board Policy: Framework for Transmission Project Development Plans, August 26, 2010 (EB-2010-0059), p. 15.

<sup>5</sup> TPT Licence Decision, at p. 10.

A few points should be made about this part of the decision.

First, it is not clear whether the IESO's submissions argued that the designation process *itself* would expose TPT to confidential information that could only be managed by imposing a licensing requirement or whether that risk arose only upon TPT's operation of a transmission system. This is because the IESO's submission more generally was that licensing rights and obligations should only arise *after* the designation process and that the Board's grant of a transmission licence "would not include the authority to also own and/or operate transmission facilities that may be constructed, modified or acquired by TransCanada in the future."<sup>6</sup> In other words, the IESO did not argue that the protection of confidential information from unauthorized disclosure was required in the designation hearing process.

TPT invites the IESO to clarify this point and to clearly state whether it believes that licensing is required during the designation hearing process in order to protect customer specific confidential information. In doing so, if the IESO believes that licensing is required to protect the integrity of any confidential information it produces in the designation proceeding, TPT requests that the IESO indicate why its own protocols respecting the release of information, combined with the Board's rules respecting confidentiality, would be inadequate to protect customer specific information. TPT requests the IESO state this position clearly so that TPT may respond to it on the public record.

A second important factor is that, at the time of TPT's licence application, there was very little information about the nature of the designation proceeding, what information would be developed for that proceeding and how parties would participate in that proceeding. As a result, and as indicated from the above quotation, those concerns were, at the time of the Licensing Decision, somewhat speculative. The Board commented on this as follows:<sup>7</sup>

"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."

There is now a much clearer picture of how the designation process will work generally and the type of information that the Board will rely upon in that process in particular.

On August 22, 2011, the OEB launched the designation process. In doing so, it released reports provided to the Board by the OPA ("Long Term Electricity Outlook for the Northwest and Context for the East-West Tie Expansion") and the IESO ("An assessment of the westward transfer capability of various options for reinforcing the East - West Tie"). The Board described the role and function of these reports as follows:

"The OPA Report defines a specific solution as its preferred option but acknowledges that it may be possible for other solutions to meet the requirements for the line as

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<sup>6</sup> IESO's submissions, EB-2010-0324, para. 9, February 23, 2011.

<sup>7</sup> TPT Licence Decision, at p. 11.

described in the project scope criteria of the OPA Report. The Board will call the OPA's solution, with the additional requirements from the IESO Feasibility Study, the "Reference Option". Transmitters may propose alternative solutions that meet the requirements. A transmitter proposing a solution different from the Reference Option will bear the onus of proving that the alternative is the equivalent, in terms of performance, reliability, cost, etc., of the Reference Option. This would include a feasibility study prepared by the IESO or prepared by the transmitter to the IESO's requirements."

Both of these reports are filed on the public record and do not contain any customer specific confidential information. It is thus not at all clear that the hypothetical concerns about controlling confidential information that were raised by the IESO and Hydro One are likely to be triggered in the hearing process at all.

Specifically, the IESO's feasibility study has been prepared without including the type of "market participant confidential information" that it was concerned about releasing. Further, it is not clear that, in preparing additional feasibility studies that it will ever be necessary for the IESO to make available market participant confidential information. Again, TPT invites the IESO to advise whether it believes that it will be necessary to release market participant confidential information in the course of this proceeding.

As for Hydro One, TPT can understand why Hydro One would seek to increase the burden for new entrants to participate in the designation process. Hydro One's participation in this proceeding is as a competitor, not an enabler of new entrant transmission providers. It is within that context that one should consider Hydro One's statement that there is "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."<sup>8</sup> In fact, it is not apparent why Hydro One will be required to provide customer specific confidential information. To the contrary, and perhaps in recognition of Hydro One's conflict of interest on this point, the Board has required independent agencies – the OPA and the IESO – to provide it with information on the East-West Line and has *not* asked Hydro One for this information. TPT submits that this is the appropriate course for the credibility of this process. Provided that the OPA and the IESO can find the factual basis for this proceeding, then there is no need for Hydro One to disclose or rely upon customer specific confidential information.

TPT invites Hydro One to clarify this point and to clearly state whether it believes that licensing is required during the designation hearing process in order to protect customer specific confidential information. In doing so, if Hydro One believes that licensing is required to protect the integrity of any confidential information it produces in the designation proceeding, TPT requests that Hydro One indicate why it is impossible for Hydro One to follow the normal process and aggregate information and why such aggregated information, combined with the Board's rules respecting confidentiality would be inadequate to protect customer specific information. TPT requests Hydro One to state this position clearly so that TPT may respond to it on the public record.

For all these reasons, it is not at all clear that there are any advantages to requiring TPT to be fully licensed at any of the prospective dates prior to prospective ownership and operation of a transmission system. The only reason why such licensing would be required prior to that date would be to prevent the sharing of customer specific confidential information that arises in the designation hearing process and would be incapable of being protected in the normal course through the Board's practices and procedures. In light of current information respecting the

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<sup>8</sup> Hydro One's Submissions, EB-2010-0324, p. 2, February 23, 2011

designation process, TPT has not identified any reasonable scenario under which this should occur.

The next part of this submission addresses the disadvantages of having an effective date at the hearing stage (Potential effective dates #1-#3) as opposed to the post-designation stage.

### **Disadvantages of Licensing Prior to Designation**

The disadvantage of having an effective date prior to designation is that requiring new entrant transmitters to bear the cost of setting up stand alone transmission companies for the *possibility* of being designated as a transmitter results in both inefficiency and unfairness. This is elaborated upon below.

With respect to inefficiency, it should be borne in mind that, apart from the incumbent utilities (Hydro One and Great Lakes Power), TPT does not currently engage in the transmission business in Ontario. Requiring it to set up a stand-alone transmission company in Ontario with the sole purpose of protecting customer confidential information just to participate in the designation process would be incredibly inefficient. It would involve moving staff to work exclusively in that entity at significantly diminished capacity. Given that other potential transmitters are in the same position, requiring all of them to replicate this would amount to the establishment of a reasonably large number of transmission companies – all staffed and operating at less than full capacity. Those transmission companies would have to maintain stand alone staff during the designation process because of the *possibility* that they may be designated as a transmitter. Further, it is not clear what happens after the designation process is completed. For the candidate that is designated, it will go on to carry out development work. As for the other candidates, if they are required to establish stand alone transmission companies to participate in the designation hearing, then those companies would presumably have to be maintained or dismantled until the next designation process where they can reapply for designation. Neither of these outcomes would further any of the Board's statutory objectives.

While TPT has no argument with the proposition that promoting economic efficiency and cost effectiveness is not the primary purpose of the ARC, those objectives remain relevant to the Board. Given that the Board identified one of the objectives of seeking to attract new transmitters to the province is to “drive economic efficiency for the benefit of ratepayers”<sup>9</sup>, imposing all of these additional costs would seem counterproductive.

With respect to fairness, the incumbent utilities have years of experience in engaging in development work. They have engineering and regulatory infrastructure available to provide transmission services, conduct development work, and participate in the designation proceeding. The costs of this infrastructure have been borne by ratepayers. This rate payer funded experience, knowledge, and infrastructure provides a considerable competitive advantage when compared to new entrants such as TPT. Although incumbent transmitters have recently opened deferral accounts to record preliminary planning costs, it is not clear how these costs are determined and whether there has been sufficient focus on removing rate payer subsidies.<sup>10</sup> This approach may be contrasted with the Board imposed cost allocation and information sharing limitations on other utilities that also engage in competitive activities, such as electrical contracting<sup>11</sup>, natural gas storage,<sup>12</sup> and smart metering.<sup>13</sup>

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<sup>9</sup> Board Policy: Framework for Transmission Project Development Plans, August 26, 2010 (EB-2010-0059), p. 1.

<sup>10</sup> See (for Hydro One) EB-2009-0416 and (for Great Lakes Power) EB-2009-0409).

<sup>11</sup> Hydro One and Great Lakes Power Connection Procedures, September 7, 2007 (EB-2006-0189; EB-2006-0200).

TPT, by contrast, is required to absorb all of its costs invested in pre-designation activities. Increasing these costs to account for the regulatory burden of compliance while other competitors are entitled to recover their compliance costs from rate-payers will not lead to a level playing field and creates potential barriers to entry for new entrants which is an important objective in the whole designation process.

### Conclusion

In conclusion, TPT submits that the consideration of the advantages and disadvantages of the effective date of the transmission licence should be evaluated by reference to the purpose of requiring transmitters to be licensed in the designation process.

In light of those purposes, it does not appear that there are *any additional* advantages to requiring TPT to be fully licensed at any of the prospective dates prior to option (4) – upon prospective ownership and operation. The only reason why such licensing would be required prior to that time would be to prevent the sharing of customer specific confidential information that both (i) arises in the designation hearing process; and (ii) would be incapable of being protected in the normal course through the Board's practices and procedures. In light of current information respecting the designation process, TPT has not identified any reasonable scenario under which this is likely to occur.

Any further advantages of making licence requirements effective prior to designation are therefore speculative and uncertain. By contrast, the disadvantages of doing so are significant and clear. Requiring TPT (and other new entrant transmitters) to set up a stand-alone transmission company in Ontario just to participate in the designation process would be incredibly inefficient. Further, unlike incumbent transmitters, TPT is not in a position to recover the costs of a stand alone transmission company from transmission rate-payers. TPT would therefore face a competitive disadvantage in comparison to incumbent transmitters if it was required to incur those costs.

All of which is respectfully submitted



George Vegh

c: Electricity Transmitters and Applicants

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<sup>12</sup> Natural Gas Electricity Interface Decision, November 7, 2006, p. 75 (EB-2005-0551).

<sup>13</sup> See: Power Stream distribution rates for 2009, July 27, 2009 (EB-2008-0244) and Toronto-Hydro distribution rates for 2011, Procedural Order 3, December 10, 2010 (EB-2010-0142).