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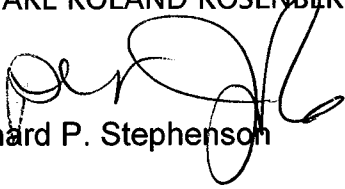
Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli

**Re: TransCanada Power Transmission (Ontario) L.P.
Application for an Amendment to its Transmission Licence
Board File No. EB-2011-0260**

Attached please find the Power Workers' Union's submission with regard to TransCanada Power Transmission (Ontario) L.P.'s application to the Ontario Energy Board to amend the effective date of its Electricity Transmission Licence EG-2011-0324.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP


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RPS:jr

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**TransCanada Power Transmission (Ontario) L.P.
Electricity Transmission Licence Amendment Application**

Submission of the Power Workers' Union

A. The Application

1. On July 8, 2011 TransCanada Power Transmission (Ontario) L.P. ("TPT") filed an application with the Ontario Energy Board ("OEB" or "Board") to amend its Electricity Transmission licence ET-2011-0324 ("Licence") by changing the effective date of the licence from the date of which the Board issued its decision on TPT's transmission licence application (i.e. June 22, 2011) to "the date upon which TPT applies to the Board to provide a prospective electricity transmission service." In its application, TPT states that a prospective transmission service would include "applying to be designated under a transmission designation process conducted by the OEB" or applying to own or operate a transmission system.

B. Board Notice

2. The Board's August 26, 2011 Notice of Application (the "Notice") states that amending the effective date of the licence would mean that TPT is not permitted to own or operate an electricity transmission system in Ontario, and would not be bound by the conditions of the licence, until it applies to provide prospective transmission service and the licence is reinstated. Further, the Board states that the application is of potentially broad interest to licensed transmitters and to those applying for a transmission licence and makes provisions for written submissions on the advantages and disadvantages of the following potential effective dates for TPT's 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; or
4. The date TransCanada Transmission applies to own or operate a transmission system outside a designation proceeding.

C. TPT's Written Submission

3. In response to the Board's Notice, TPT filed a written submission, taking a different position than set out in its application. In particular, if the threshold event were, as stated in TPT's application "applying to be designated under a transmission designation process conducted by the OEB", then logically, TPT's position should be in favour of either Option 2, or, at the very latest, Option 3. Instead, in its written submission, TPT supports Option 4.

D. Power Workers' Union Submission

I. The True Nature of TPT's Application

4. PWU submits that TPT's Application should be denied. Although framed as an application to amend the terms of its licence, it is in substance a motion to vary the Board's Decision of June 22, 2011 granting TPT a transmission licence (the "TPT Licensing Decision"), including the conditions contained in the reasons for that decision. However, TPT has neither complied with the procedural requirements to bring a motion to vary the TPT Licensing Decision, nor has it met the threshold to any party is required to meet in order to have the Board vary a prior decision.

5. It is apparent that the reason that TPT is seeking to "amend" its licence is to avoid the obligation under its licence to comply with its obligations under the Affiliate Relationships Code ("ARC") until such time as TPT applies to the Board to own or operate a transmission system. However, the issue of TPT's obligation to comply with the ARC, and the timing of such compliance was an issue that was dealt with directly by the Board in the TPT Licensing Decision. It is clear that TPT does not agree with that aspect of the TPT Licensing Decision. However, rather than appealing the TPT Licensing Decision to the Divisional Court, or by

bring a motion to vary to the Board itself, TPT seeks to defer and delay its obligation to comply through this amendment application.

6. In its submissions to the Board in its licencing application, TPT sought to be exempted from section 2.2.3 of the ARC, "primarily on the achievement of cost efficiencies".¹ The Board rejected TPT's position, noting that:

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 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 of cases where the risk of harm is slight. *The Board does not believe that this threshold has been met in this case.*

....

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 nature, restrict utility behaviour rather than facilitate it, sometimes at the expense of utility efficiency.² (emphasis added)

7. In its submission to the Board on the TPT Licencing Decision, TPT also specifically requested that:

TPT is also asking that the ARC not be made applicable to TPT until such time as TPT is successfully designated as a transmitter (or until TPT otherwise purchases or operates a transmission system in Ontario).³

8. In other words, in the TPT Licencing Decision case, TPT made the precise request to the Board it is making here. The Board did not accept that request. The Board dealt directly with this issue, in the following terms:

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

¹ OEB Decision and Order EB-2010-0324, p. 9

² OEB Decision and Order EB-2010-0324, p. 9

³ TPT Reply Submission, para. 7, EB-2010-0324

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.⁴ (emphasis added)

9. TPT also sought a temporary exemption from s. 3 of the RRR. In considering (and rejecting) that request, the Board specifically referenced TPT's obligation to ensure its compliance with the ARC, in advance of its participation in any designation process:

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.⁵

10. In summary, TPT specifically requested that it be exempted from certain obligations under the ARC, and that any such obligations be deferred until it was actually designated as a transmitter, or otherwise came to own or operate a transmission system. The Board considered these submissions, rejected them, and ruled to the contrary. No appeal or motion to vary was taken from this decision.

11. TPT's motion to vary is simply an attempt to re-litigate issues already decide against it in the TPT Licencing Decision. There is no basis for the Board to do so.

⁴ OEB Decision and Order EB-2010-0324, p. 10

⁵ OEB Decision and Order EB-2010-0324, p. 10

12. Even if the Board was prepared to entertain TPT's application as an application to amend, rather than a motion to vary, there is no reason why it should be held to a lower threshold, or a lower standard of proof. The test on a motion to vary is that set out by the Board in the *NGEIR* case:

- a. the grounds must raise a question as to the correctness of the order or decision;
- b. the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- c. there must be an identifiable error in the decision, as a review is not an opportunity for a party to merely reargue the position it took in the original case; and
- d. in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, or that the panel failed to address a material issue. The applicant must be able to show that the panel made findings that were inconsistent with the evidence, not merely that the Board interpreted evidence in a manner that was different than was urged upon it by the applicant in the original case.⁶

13. No aspect of this threshold is established in the circumstances of the present case.

14. Finally, the PWU notes that, although the TPT transmission licence application was clearly made in the specific anticipation of a future transmitter designation process, and with full knowledge of the Board Policy with respect to the Framework for Transmission Development Plans and the Board's Filing Requirements document (G-2010-0059). Notwithstanding this information (all of which requires a transmission licence to participate in the transmitter designation

⁶ NGEIR Motion to Review EB-2006-0322/0338/0340, p. 18

process), TPT did **not** request in its transmission licence request that the Board defer the effective date of any licence that it saw fit to issue. As a result, it is clear that the present application is simply an attempt by TPT to:

- a. Achieve indirectly there very thing that the Board denied when it was sought directly (i.e. deferral of the obligation to comply with the ARC); and
- b. Obtain relief that could have been, but was not requested in TPT's transmission licence application.

II. Application Challenges

15. In addition to the Board's ruling in the TPT Licence Decision, it is also apparent that, in the context of a licence amendment application, TPT is seeking the revision and reversal of established and express Board policy with respect to the transmitter designation process. In particular, in 2010, the Board developed and issued a specific Policy to establish a framework for new transmission investment in Ontario.

16. In the EB-2010-0059 decision, the Board described the background and purpose of its development of the new Policy in the following terms:

The policy describes how project development planning will work in conjunction with existing Board processes for licenced transmitters.

This policy is the end result of a consultation on facilitation of the timely and cost effective development of major transmission facilities that may be required to connect renewable generation in Ontario. The goal is the implementation of a process that provides, among other things, greater regulatory predictability in relation to cost recovery for development work.⁷

17. With regard to the licensing requirement for new entrant transmitters who want to participate in the Board's designation process, the Board's Policy states:

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 transmitters. The Board would need to evaluate these items regardless of whether it was done in a licensing

⁷ Ontario Energy Board. EB-2010-0059. Board Policy: Framework for Transmission Project Development Plans. Page 1

process or another type of pre-qualification process. The Board's licensing process is neither unduly onerous nor time consuming.⁸

...

Transmitters will need a transmission licence from the Board to participate in the designation process.⁹

18. TPT's challenge with regard to the licensing requirement for participation in the transmitter designation process is summarized in the Conclusion section of its submission as follows:

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 licenced in the designation process.¹⁰

19. In the PWU's view, it is not appropriate to review the Board's Policy on an *ad hoc* basis in a proceeding on a transmission licence amendment. Should the Board believe that such a review is timely it should make it the matter of a distinct Board initiated stakeholder consultation that allows for comprehensive examination and discussions by a wide range of stakeholders on all issues and relevant research related to the policy under review. Indeed the current Board Policy is the outcome of such a consultation. The Board therefore ought not to consider TPT's argument on the Board Policy in its deliberations on the requested amendment given that TPT's application, rather than seeking exemption from the Policy based on extraordinary circumstances, challenges the Board Policy. As such, approval of the requested amendment would essentially negate the Board Policy.

III. "A Prospective Electricity Transmission Service"

20. The PWU notes that "a prospective electricity transmission service" is not defined in the ARC, Transmission System Code, or the *Ontario Energy Board Act*

⁸ Ontario Energy Board. EB-2010-0059. Board Policy: Framework for Transmission Project Development Plans. Page 5, Paragraph 5.

⁹ Ontario Energy Board. EB-2010-0059. Board Policy: Framework for Transmission Project Development Plans. Page 6, Paragraph 4.

¹⁰ September 6, 2001 TransCanada Power Transmission LP Submission. EB-2011-0260. Page 8, Paragraph 1.

as a type of transmission service. In its July 8, 2011 licence amendment application TPT gives the following meaning to the term:

A prospective transmission service would include applying to be designated under a transmission designation process conducted by the Ontario Energy Board (the “OEB” or the “Board”) or applying to own or operate a transmission system.¹¹

21. In the PWU's view there is risk in the use of a term in a Board Order that lacks legal definition and is therefore subject to unintended interpretations that inadvertently results in questionable industry practice and restructuring. Therefore, the PWU submits that in the absence of a legal definition and stakeholder consultations on such a definition, this term ought not to be used in a Board Order, especially where the Board Order is, as stated in the Board's Notice, of “potentially broad interest amongst licensed transmitters and those applying for a transmission licence”.

22. The following illustrates how the lack of a legal definition for “a prospective transmission service” might be defined inappropriately. In its Decision on TPT's licence application, the Board states that the Board's Policy¹² does not contemplate different “types” of transmission licences as between existing transmitters and new entrants. However, the wording “a prospective transmission service” as used by TPT in its proposed effective date appears to denote a corollary transmission service. The word “prospective” used as an adjective in the definition of “confidential information” in the ARC does not denote a corollary transmission service:

“confidential information” means information the utility has obtained relating to a specific smart sub-metering provider, wholesaler, consumer, retailer or generator in the process of providing current or prospective utility service;¹³

23. Therefore, should the Board consider an option other than option 1, despite the Board Policy and the Decision, the PWU submits that the amended effective date ought not to include TPT's requested wording “a prospective

¹¹September 6, 2001 TransCanada Power Transmission LP Submission. EB-2011-0260. Page 1, Paragraph 1.

¹² Ontario Energy Board. EB-2010-0059. Board Policy: Framework for Transmission Project Development Plans.

¹³ Ontario Energy Board. Affiliate Relationships Code. Page 3.

transmission service". As the Board stated in the Decision, Board's Policy does not contemplate different "types" of transmission licences as between existing transmitters and new entrants and should an amendment be approved, it should refer to "transmission service".

IV. Rescind and Reinstate Licence

24. It is apparent from TPT's submissions on this application that its motivation in bringing the application is its desire to avoid (or at least defer) the incurrance of costs associated with achieving compliance with the ARC prior to being designated or otherwise becoming the owner or operator of a transmission system.

25. Implicit in this submission is an acknowledgment by TPT that it is not presently in compliance with the obligations under its existing licence. Assuming that is the case, the PWU notes that TPT has not brought any application seeking interim relief from these licence obligations.

26. In the circumstances, it is submitted that, in the event TPT is unable, or unwilling, to comply with its existing obligations under its existing licence, the appropriate course of action of the Board is rescind TPT's licence, without prejudice to TPT's right to re-apply for a licence at a future date, at such time as TPT is willing and able to comply with the conditions that the Board sees fit to impose.

All of which is respectfully submitted.