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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

These are the Reply submissions of TPT in relation 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" a number of potential effective dates for the [transmission] Licence.

Before responding to the specific positions of parties, it is helpful to provide some context to TPT's submissions and the information that has now become available.

TPT's submissions in chief were that, in light of the purposes of requiring entrant transmitters to be licenced, it does not appear that there are any advantages to requiring TPT to be fully licenced at any of the prospective dates prior to its prospective ownership and operation of a transmission system. TPT submitted that 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.

TPT's reference to the timing and management of confidential information was in response to the following statement in the Board's Decision in TPT's transmission licence application:

"The Board will remain mindful of the IESO's and Hydro One's concerns [respecting confidential information] 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.”

In response to TPT’s submissions in this application, the IESO and Hydro One provided necessary clarification about what confidential information would be released to new entrant transmitters in the designation process.

The IESO’s initial submission in the TPT licence application was that “TransCanada will be in a rather unique position to potentially access or will be the recipient of a significant amount of market participant confidential information, including financial, planning and operational information and data.”

To investigate the relevance of the various prospective dates considered by the Board in this application, TPT requested the IESO to specify the information that would be provided in the designation process and how that information could be managed to ensure confidentiality. In response, the IESO clarified that, although the IESO may have to make use of confidential information to carry out assessments of transmitter proposed alternatives, *transmitters themselves* are not required to have access to confidential information in the designation process. According to the IESO:

“If an applicant requires a feasibility study as part of the designation process and if that study requires confidential information as an input, the applicant can request the IESO to conduct that study and *provide the results to the applicant absent any confidential information*” (emphasis added).

TPT submits that the IESO’s more refined approach to this matter provides a meaningful basis upon which the Board may consider the actual advantages and disadvantages of an effective licence date in light of the purposes of the Board’s licensing of new entrant transmitters that participate in the designation process. TPT appreciates the IESO’s commitment to managing the integrity of confidential information while, at the same time, thoughtfully addressing how it can provide information and analysis that is relevant to the Board in a designation process.

Hydro One, who is likely to compete with TPT in the designation process, alleged in TPT’s licence application that it would be “required” to provide participants in the designation process with “confidential and commercially sensitive technical and commercial information”. TPT’s submissions in this application requested Hydro One to specify what confidential information would be disclosed. Hydro One was not able to identify any.

Indeed, AMPCO, as the representative of the only participants in this proceeding who actually have any confidential information to be protected, was also unable to identify any real risk of information being disclosed in the designation process:

“Unless the IESO or Hydro One can substantiate concerns about the need to provide and protect customer specific information in the designation process, we believe that there should be no issue with confidentiality...”

We see no benefit to imposing additional requirements on TPT or another transmitter to comply with codes or rules that have no practical effect (such as setting up an affiliate to accommodate the unsubstantiated potential that some as yet unknown information might be made available to them in an unspecified manner that would cause some as yet undefined harm to an incumbent).”

This more recent and specific consideration of confidential information provides important context to TPT's reply to the specific submissions of participants in this proceeding.

TPT's position was opposed by Board Staff and by Hydro One and its employees, the Power Workers Union ("PWU")

Board staff's submissions continued to state that there is a risk of disclosure of confidential information in the designation process. These submissions were presumably drafted without benefit of the submissions of the IESO and Hydro One which did not identify *any* confidential information that would be disclosed in the designation process. In light of this, staff's argument that "The protection of the ARC is therefore necessary before an application for designation is filed, as information exchange could occur during the preparation of evidence for such an application" is entirely unsubstantiated. There is simply no factual basis for this assertion.

Hydro One/PWU have not offered a substantive basis for arguing that there is an actual risk of disclosure of confidential information. They both therefore resort to technical, process arguments. Their position is that this licence amendment application is inappropriate because it effectively requests a review of the Board's decision in the initial TPT licence application.

This fails to appreciate at least three fundamental points.

First, if this argument is correct, then every application to amend a licence can be characterized as a proposed review of the decision that initially granted the licence. This cannot be the case. Otherwise, the Board's power to amend a licence under s. 74 of the *Ontario Energy Board Act, 1998* is rendered meaningless. Subsection 74(2) provides that the Board may amend a licence "if it considers it to be...in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*." The only issue here is thus whether the amendment is in the public interest in light of the information before the Board. TPT is not aware of any licence application amendment where the Board applied the standard of reviewing the original decision that granted the licence.

Second, if the Hydro One/PWU argument is correct, then the Board cannot consider the licence becoming effective under *any* of the potential dates posed in the Board's Notice of Application other than the date of the order granting the license to TPT or any other transmitter. A consequence of this is that the Board would be precluded from considering the policy implications of this question despite its determination (as stated in the Notice of Proceeding) that the issue raised in the application "is of potentially broad interest amongst licensed transmitters and those applying for a transmission licence."

The Board's observation that the issues raised in this application raise sector wide questions that should be addressed is supported by the fact that both new entrant transmitters who made submissions in this application supported TPT's position and no new entrant transmitter opposed TPT's position. It would therefore be unusual for the Board to determine that it cannot answer the questions posed in the Notice of Proceeding.

Third, although for the reasons indicated, it is inaccurate to characterize this amendment application as a motion for review, the Board may take note of the fact that one of the grounds for reviewing a prior decision is whether "new facts that have arisen" or there are "facts that were not previously placed in evidence in the proceeding and could not have been discovered

by reasonable diligence at the time.”¹ The new facts that have arisen since the Board’s decision on TPT’s licence application are:

- The Board’s release of the IESO’s “Assessment of the Westward transfer capability of various options for reinforcing the East–West Tie” (the “Assessment”) on August 22, 2011. The Assessment was provided without disclosing any confidential information; and
- The new information in this proceeding that the IESO will not be required to disclose confidential information in conducting assessments of alternative transmission proposals; and
- Hydro One’s concession that, despite its earlier statements, it could not identify any confidential information that it would be “required” to produce.

None of this information was or could have been made available in TPT’s license application. It was either produced too late (the IESO’s Assessment”) or not open to challenge because they arose from final submissions of the IESO and Hydro One in the TPT licence application. There was thus no opportunity in that process to question the assertions of disclosing confidential information.

As a result, if the Board does apply the criteria that would apply for a motion to review here, then the case for such a motion is clearly made out.

The PWU/Hydro One technical process arguments are thus both flawed and do not stand in the way of the Board making a decision based on the information that is currently before it.

It is submitted that the issue in this proceeding is a substantive one, not a procedural one. In the Notice of Application the Board asked for submissions on the advantages and disadvantages of transmission licences for new entrant transmitters coming into effect at various stages in the designation process. The only reason that the Board has considered the effective date being triggered prior to the selection of a transmitter in a designation process was to protect the integrity of confidential information that may be released in that process. There is no evidence that *any* confidential information will be released in that process. TPT therefore respectfully submits that there are no advantages to requiring TPT to be fully licensed at any of the prospective dates prior to its prospective ownership and operation of a transmission system.

All of which is respectfully submitted.

[Signed in the original]

George Vegh

c: Brian Kelly
Electricity Transmitters and Applicants

¹ OEB Rules of Practice and Procedure, Rule 44.01 (a) (iii) and (iv).