



EB-2011-0260

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 74 of the *Ontario Energy Board Act*, 1998,
S.O. 1998, c. 15, Schedule B to amend electricity
transmission licence ET-2010-0324

BEFORE: Paula Conboy
Presiding Member

Cynthia Chaplin
Vice-Chair

DECISION AND ORDER

BACKGROUND

On June 22, 2011, the Ontario Energy Board granted a five year electricity transmission licence (ET-2010-0324) to TransCanada Power Transmission (Ontario) L.P. ("TransCanada Transmission") for the purpose of enabling it to participate in future transmitter designation processes held by the Board.

On July 8, 2011, TransCanada Transmission made an application to the Board, under section 74 of the *Ontario Energy Board Act*, 1998, for an order amending its licence to change the effective date from June 22, 2011 to a later date upon which TransCanada Transmission applies to the Board to provide prospective transmission services. In the application, TransCanada Transmission stated that a "prospective transmission service" would include applying to be designated under a transmission designation process conducted by the Board or applying to own or operate a transmission system.¹

¹ TransCanada Power Transmission (Ontario) L.P. Licence Amendment Application (EB-2011-0260), page 1

On August 26, 2011, the Board issued a Notice of Application and Written Hearing. In the notice, the Board sought submissions from interested parties on the advantages and disadvantages of the following potential dates upon which TransCanada Transmission's licence could be made effective:

1. June 22, 2011;
2. The date that TransCanada Transmission registers its interest in a designation process (no later than September 21, 2011);
3. The date that TransCanada Transmission files evidence in a designation proceeding;
4. The date that TransCanada Transmission applies to own or operate a transmission system outside a designation proceeding.

TransCanada Transmission filed its submission in chief on September 6, 2011. On September 13, 2011, the Board received submissions from the following parties: Board staff, AltaLink Ontario, L.P., Association of Major Power Consumers in Ontario ("AMPCO"), Hydro One Networks Inc. ("Hydro One"), Independent Electricity System Operator (the "IESO"), Power Workers' Union ("PWU") and Upper Canada Transmission Inc. TransCanada Transmission filed its reply submission on September 16, 2011.

The full record of this proceeding is available for review at the Board's offices.

Board Policy on the Licensing of New Entrant Transmitters

The Board's policy entitled *Framework for Transmission Project Development Plans* (EB-2010-0059) states that a new entrant transmitter cannot participate in a transmitter designation process held by the Board without first obtaining an electricity transmission licence from the Board. In developing the policy, the Board considered it reasonable to use the licensing process as a means for evaluating the financial viability and technical capabilities of new entrant transmitters.

In its licensing decisions, the Board has also made it clear that the licensing process could be used as a means of addressing the treatment of confidential information shared during the designation process (by requiring licensees to comply with confidentiality-related terms and conditions contained in their licences and in the Board's codes).

TransCanada Transmission's Request for Temporary Exemptions from Section 2.2.3 of the ARC (EB-2010-0324)

In its original application for an electricity transmission licence, TransCanada Transmission requested a temporary exemption from section 2.2.3 of the Affiliate Relationships Code for Electricity Distributors and Transmitters ("ARC"). This exemption request was denied by the Board. In making its decision, the Board considered the submissions made by Hydro One and the IESO regarding the protection of confidential information during the designation process and as part of the ongoing business of operating a transmission system. The Board stated:

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 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.²

The Board agreed that confidential information of the type referred to by the IESO and Hydro One is "deserving of a very high degree of protection" and stated:

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)..."³

² Decision and Order in an application by TransCanada Power Transmission (Ontario) L.P. for an electricity transmission licence, (EB-2010-0324), June 22, 2011 ('Decision'), pages 9-10

³ Decision, page 10

The Board also indicated that:

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.⁴

The East-West Tie Line

On August 22, 2011, the Board sent a letter to all licensed electricity transmitters, and all applicants and potential applicants for an electricity transmission licence, inviting each of them to register their interest in filing a plan for the development of a certain transmission project, the “East-West Tie Line”, by September 21, 2011. In the letter, the Board gave direction on how those parties could access the Ontario Power Authority’s (the “OPA”) *Long Term Electricity Outlook for the Northwest and Context for the East-West Tie Expansion* and the IESO’s *Feasibility Study* in relation to the East-West Tie Line, both of which are public documents.

In the August 22nd letter, the Board stated:

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 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

⁴ Decision, page 11

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.⁵

PARTIES' SUBMISSIONS

In this application to the Board, TransCanada Transmission requested that the effective date of its licence be amended from June 22, 2011 to the date upon which TransCanada Transmission applies to be designated under a transmission designation process conducted by the Board or applies to own or operate a transmission system. However, in its subsequent submissions, TransCanada Transmission argued for a different licence effective date, being the earlier of the date upon which TransCanada Transmission applies to own or operate a transmission system (outside of the designation process) and the date upon which TransCanada Transmission is selected as a designated transmitter by the OEB (i.e. "prospective ownership and operation of a transmission system").⁶ The applicant 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. In light of current information respecting the designation process, [TransCanada Transmission] has not identified any reasonable scenario under which this is likely to occur.⁷

The applicant added that each of the OPA report and the IESO feasibility study were filed on the public record and are devoid of customer specific confidential information. The applicant emphasized that:

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,

⁵ Ontario Energy Board Letter dated August 22, 2011(EB-2011-0140), page 2

⁶ TransCanada Transmission Submission (EB-2011-0260), pages 1-2

⁷ TransCanada Transmission Submission (EB-2011-0260), page 2

in preparing additional feasibility studies that it will *ever* be necessary for the IESO to make available market participant confidential information.⁸

AltaLink Ontario, L.P and Upper Canada Transmission Inc. supported TransCanada Transmission's position. Moreover, they argued that if TransCanada Transmission's application results in a change in the effective date of the licence, other new entrant transmitters should be afforded similar relief.

Board staff submitted that "each of the original licence date and the date [TransCanada Transmission] registers its interest in the East-West Tie may be considered as too early a date for the licence to be effective."⁹ Board staff suggested that that the Board may consider another licence effective date. Namely, a date to be determined by the Board, but in any event not later than the earlier of:

- the date that all applicants for a transmission licence who registered their interest in filing a plan for the East-West Tie are licensed; or
- the date that any exchange of confidential information occurs for the preparation of plans for a designation application.¹⁰

AMPCO submitted that "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 there should be no issues with confidentiality".¹¹ AMPCO proposed that the Board amend the licence so that the effective date be defined "at a future time".

With respect to the potential effective dates for the licence, the IESO submitted that it does not have a particular position on any of the four dates provided by the Board in its notice. With respect to disclosure of confidential information during the designation process, the IESO confirmed that, while it could not rule out the possibility that confidential information might be required for a subsequent feasibility study, the "published Feasibility Study did not contain any customer specific confidential information".¹² The IESO further stated that:

⁸ TransCanada Transmission Submission (EB-2011-0260), page 6

⁹ Board Staff Submission (EB-2011-0260), page 4

¹⁰ Board Staff Submission (EB-2011-0260), page 6

¹¹ AMPCO Submission (EB-2011-0260), page 3

¹² IESO Submission (EB-2011-0260), page 1

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.¹³

Both Hydro One and PWU opposed TransCanada Transmission's application for a licence amendment. They submitted that the application is a request to review the original decision granting the electricity transmitter licence. With respect to disclosure of confidential information, Hydro One submitted that:

...the nature of any information disclosure will be driven by the transmitter designation process, which is new and largely untested. It is therefore difficult to foresee what confidential information Hydro One or others may be required to produce in the course of the designation process, in relation to the current East-West Tie or any other future projects. It is similarly difficult at this stage to predict what information might come into [TransCanada Transmission's] possession during the designation process.¹⁴

In its reply submission, TransCanada Transmission disagreed with Hydro One and PWU's characterization of the licence amendment application as a motion for review. TransCanada Transmission also submitted that if the Board did, however, apply the criteria pertaining to a motion to review, the case for such a motion is made out. In making this submission, the applicant pointed to the grounds for a motion to review as set out in Rule 44.01 (a) (iii) and (iv) of the Board's Rules of Practice and Procedure. Specifically, the applicant submitted that the following material facts arose after the Board's decision to grant TransCanada Transmission an electricity transmitter licence:

- the IESO's feasibility study released by the Board on August 22, 2011 contained no confidential information;
- the IESO stated that it would not be required to disclose confidential information in conducting assessments of alternative transmission proposals; and

¹³ IESO Submission (EB-2011-0260), page 2

¹⁴ Hydro One Submission (EB-2011-0260), page 1

- Hydro One could not identify any confidential information that it would be required to produce during the designation process.

Citing that 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” and that there is “no evidence that *any* confidential information will be released in that process”, TransCanada Transmission concluded in its reply submission that “there are no advantages to requiring [TransCanada Transmission] to be fully licensed at any of the prospective dates prior to its prospective ownership and operation of a transmission system”.¹⁵

BOARD FINDINGS

Having considered the evidence and the parties’ submissions, the Board is persuaded that it is in the public interest to amend TransCanada Transmission’s electricity transmission licence by changing the effective date of the licence to the earlier of:

- the date upon which TransCanada Transmission is designated as a developer of transmission assets in Ontario pursuant to a Board designation process; and
- the date upon which TransCanada Transmission applies to own or operate a transmission system by seeking to amend schedule 1 of its licence to specify the facilities to be owned and/or operated by TransCanada Transmission.

The licence will be reissued to reflect an actual date when one of the two triggering events occurs.

In reaching this decision, the Board has considered the merits of requiring new entrant transmitters to be licensed during the designation process, the potential for disclosure of confidential information during the designation process and alternative mechanisms to ensure the protection of confidential information that may be disclosed during the designation process.

As indicated above, the Board’s intended purpose in requiring new entrant transmitters to be licensed as a prerequisite to participating in the designation process was to enable the Board to evaluate their financial viability and technical capabilities. In this case, this

¹⁵TransCanada Transmission Reply Submission (EB-2011-0260), page 4

purpose has been satisfied by the hearing of TransCanada Transmission's original electricity transmission licence application, in which TransCanada Transmission did demonstrate the requisite financial and technical competence for the purposes of licensing.

As referred to above, an additional purpose for requiring licensing prior to participating in the designation process was to ensure new entrant transmitters' compliance with the ARC. It should be noted, however, that at the time the Board initially granted TransCanada Transmission's electricity transmission licence, the details of the Board's designation process were still being developed. Moreover, it was not clear whether disclosure of confidential information would be necessary or unavoidable during the designation process. The Board's caution was bolstered by the arguments made by Hydro One and the IESO with respect to the possibility that confidential information would be required to be disclosed to participating transmitters during the designation process.

In this licence amendment proceeding, however, neither the IESO nor Hydro One could provide any evidence confirming that confidential information will be required to be disclosed during the designation process. Indeed, two key pieces of analysis, the OPA's *Long Term Electricity Outlook for the Northwest and Context for the East-West Tie Expansion* and the IESO's *Feasibility Study* in relation to the East-West Tie Line have both been made available publicly. As well, the IESO suggested that alternative means of protecting confidential information from disclosure could be applied should further feasibility studies be required. The Board concludes that the original concern has been diminished sufficiently to warrant a different approach to balancing the considerations of ensuring appropriate protections through licensing requirements and the desirability of reducing unnecessary barriers to entry for prospective transmitters.

However, the Board does remain committed to protecting confidential information. If it becomes necessary to provide confidential information to potential transmitters through the designation process, the Board will address that issue in the context of the specific circumstances. It may be that the Board's Form of Declaration and Undertaking, which is Appendix C to the Board's Practice Direction on Confidential Filings, is sufficient to protect the information. However, the Board will also consider other mechanisms if appropriate.

Finally, some parties argued that if TransCanada Transmission's application results in a change to the effective date of its licence, other new entrant transmitters should be afforded similar relief. The Board agrees. A new entrant transmitter who has already been licensed, or whose application is before the Board, may choose to seek the same relief granted in this Decision and Order by way of application (or amendment to its application), referencing its licence or application number and this Decision and Order. It is the Board's expectation that applications by those already licensed may be considered without the requirement for a hearing, as contemplated in section 21(4)(b) of the *Ontario Energy Board Act, 1998*.

THE BOARD ORDERS THAT:

1. TransCanada Transmission's licence ET-2010-0324 is amended by changing the effective date of the licence to the date upon which TransCanada Transmission is designated as a developer of transmission assets in Ontario pursuant to a Board designation process or the date upon which TransCanada Transmission applies to amend schedule 1 of the licence to specify the facilities to be owned and/or operated by TransCanada Transmission, whichever is earlier.

DATED at Toronto November 2, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary