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COURIER and RESS

December 12, 2011

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

Dear Ms Walli:

**Re: Board File No. EB-2011-0350
EWT LP Transmission Licence Application
Notice of Motion of TransCanada Power Transmission**

Please find enclosed two copies of the Notice of Motion of TransCanada Power Transmission in the above-noted proceeding.

An electronic version of same will be filed today through the Board's Regulatory Electronic Submission System.

Yours very truly,

McCarthy Tétrault LLP

Per: ***signed in the original***

George Vegh

GV/ps
Enc.

cc: Intervenor

IN THE MATTER OF the Ontario Energy Board Act, 1998,
S.O. 1998, c.15, Schedule B (the “Act”);

AND IN THE MATTER OF an application under section
60 of the Ontario Energy Board Act, 1998
for an electricity transmission licence.

NOTICE OF MOTION

The Moving Party, TransCanada Power Transmission (“TPT”) will bring a motion to the Board for an order:

(i) requiring the Applicant EWT LP to answer Interrogatories 1-15 filed by TPT in this application; or

(ii) In the alternative (and to the extent that the presiding panel is in a position to do so), that the Board direct that the issue of how the information and resources respecting the East-West Tie that the Incumbent Utilities (as defined below) acquired in the process of providing utility services are to be made available for use by the Board and other parties in the East West Tie-Line Designation Process (EB-2011-0140) (the “Designation Process”).

In summary, the Grounds for this Motion are that this licence application will determine the terms upon which the Incumbent Utilities (Hydro One Networks Inc. (“HONI”) and Great Lakes Power Transmission (“GLPT”) may participate in the Designation Process. The Interrogatories address how the information and resources respecting the East-West tie that the Incumbent Utilities acquired in the process of providing utility services are to be used in the Designation Process – for the exclusive commercial benefit of the Incumbent Utilities’ nominee, on the one hand, or for the use and benefit of rate payers, on the other. This issue can be addressed in licence conditions that the Board may seek to impose on EWT in this application, including conditions under s. 70(1)(f) of the *OEB Act, 1998*. It is therefore relevant to this application and a proper subject matter of interrogatories.

The Materials used for this Motion are the Application materials filed by the Applicant and the Interrogatory responses provided by the Applicant on December 5, 2011.

The Grounds for this Motion are further elaborated and organized under the following headings:

1. The applicant EWT was created and funded by and under the control of the Incumbent Utilities.
2. The Incumbent Utilities have been using rate payer funded resources to acquire information and resources respecting the East-West transmission project for several years and have refused to answer any interrogatories that asked about how the Incumbent Utilities intend to share that information and resources with EWT or any other party.
3. The Board has structured the Transmission Designation Process to be a fair and open competition among potential transmitter providers. This necessarily involves addressing the treatment of utility information, resources and services that the Incumbent Utilities acquired in the course of providing utility services.
4. The Incumbent Utilities have structured EWT to be beyond the reach of the Affiliate Relationships Code for Electricity Distributors and Transmitters (the “ARC”). However, consistent with the Board’s practice of imposing preconditions respecting the participation of utilities in contestable businesses, the Board can meet the purposes of the ARC by imposing conditions on TPT’s transmission licence, including those enumerated in s. 70(1)(f) of the *OEB Act, 1998*.

This is set out in greater detail below.

The applicant EWT was created by, funded by and under the control of the Incumbent Utilities.

1. EWT’s evidence respecting its technical and financial expertise is entirely based on the “combined expertise, experience and resources...through its limited partners and their respective affiliates.”¹
2. The Key Individuals in the EWT licence application include several executives of the Incumbent Utilities. Although the Incumbent Utilities have refused to provide mandatory information about those key individuals on the public record, these individuals are well known to the Board as the regulator of the Incumbent Utilities.²

The Incumbent Utilities have acquired Information and Resources respecting the East-West Transmission Project in the course of Providing Utility Services

¹ Application, cover letter p. 2.

² Application Form, s. 10. TPT Interrogatory 15.

3. It is not clear for how long the Incumbent Utilities have been using rate payer funded resources to acquire information and resources respecting the East-West transmission project. EWT refused to answer that question.³
4. What is known from the public record is that the Incumbent Utilities have been recording some of their development costs respecting the EWT in OEB authorized deferral accounts since at least early 2010.⁴
5. In authorizing Hydro One's deferral account, the OEB emphasized the public interest nature of the development work whose costs were being recorded in these accounts:⁵

An important consideration in this specific request is that Hydro One's activities are clearly driven by current Ontario energy policy. Hydro One itself is not the driver behind these expenditures; as the largest transmission utility in the Province, it is responding to the policy drive by the Ontario government to meet certain objectives regarding new generation.

6. Despite the public interest nature of the work that the Incumbent Utilities were carrying out under the auspices of their licenced transmission responsibilities, they now take the position that they, through EWT, are entitled to commercially exploit the fruits of that labour. EWT thus refuses to answer any questions about the information, resources and services that the Incumbent Utilities will provide to them.⁶
7. As a result, it is not clear when the Incumbent Utilities started conducting development work on the East West Tie, how their costs were determined and allocated, and the extent of rate payer subsidies respecting these costs. In short; there has effectively been no regulatory oversight on the use of the information and resources that were created by that development work.

Addressing the Competitive Advantage of the Incumbent Utilities is Relevant to the Designation Process in which the EWT was created to participate.

³ TPT Interrogatory 3.

⁴ See (for Hydro One) EB-2009-0416 a

⁵ EB-2008-0272 Decision with Reasons, issued May 28, 2009, p. 59.

⁶ The answers which the Incumbent Utilities, through EWT, refused to provide in this category are TPT #1, 2, 3, 4, 5, 6, 9 and 10.

8. One of the key purposes of the designation process is to bring about competition in the development of transmission. In establishing the designation process, the Board stated:⁷

“The Board believes that this policy will:

- allow transmitters to move ahead on development work in a timely manner;
- encourage new entrants to transmission in Ontario bringing additional resources for project development; and
- support competition in transmission in Ontario to drive economic efficiency for the benefit of ratepayers.”

9. As a result, encouraging new entrants into a competitive environment was central to the development of the designation process.
10. In every area where the Board has permitted incumbent utilities to participate in contestable businesses, it has required compliance with rules respecting cost allocation and information sharing limitations. Thus, these rules were imposed on utilities seeking to engage in contestable activities, such as electrical contracting⁸, natural gas storage,⁹ and smart metering.¹⁰
11. Indeed, if this Board grants EWT a transmission licence authorizing it to participate in the East-West Tie designation proceeding without addressing this issue, it will be the first time that the Board has allowed a utility to enter into contestable business without regulatory restrictions on cost allocation and information sharing.

The Incumbent Utilities have structured EWT to be beyond the reach of the Affiliate Relationships Code for Electricity Distributors and Transmitters.

12. In the normal course, the Board’s oversight over utility participation in contestable activities is engaged through utility compliance with the ARC. Indeed, the purposes of the ARC are expressly aimed at preventing competitive advantages attributable to the position of a utility. The purposes of the ARC are set out in s. 1.1 as follows:

“Purpose of this Code

⁷ Board Policy Framework for Transmission Project Development Plans (OBE EB-2010-0059), at p. 1.

⁸ Hydro One and Great Lakes Power Connection Procedures, September 7, 2007 (EB-2006-0189; EB-2006-0200).

⁹ Natural Gas Electricity Interface Decision, November 7, 2006, p. 75 (EB-2005-0551).

¹⁰ 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).

This Code sets out rules that govern the conduct of utilities as that conduct relates to their respective affiliates, with the objective of:

- a) protecting ratepayers from harm that may arise as a result of dealings between a utility and its affiliate;
- b) preventing a utility from cross-subsidizing affiliate activities;
- c) protecting the confidentiality of information collected by a utility in the course of provision of utility services;
- d) ensuring there is no preferential access to utility services;
- e) preventing a utility from acting in a manner that provides an unfair business advantage to an affiliate that is an energy service provider; and
- f) preventing customer confusion that may arise from the relationship between a utility and its affiliate.”

13. However, in this case, the Incumbent Utilities have structured EWT so that they can conveniently avoid compliance with the ARC. According to EWT:¹¹

EWT LP is controlled by its general partner East-West Tie Inc., which is an Ontario corporation. East-West Tie Inc. has no affiliates, as that term is used in the ARC. The ARC adopts the definition of —affiliate from the *Business Corporations Act* (Ontario). Under that Act, one body corporate shall be deemed to be affiliated with another body corporate if, but only if, (i) one of them is the subsidiary of the other or (ii) both are subsidiaries of the same body corporate or (iii) each of them is controlled by the same person. East-West Tie Inc. is not an affiliate of Great Lakes Power Transmission Inc., Hydro One Inc. or Bamkushwada Inc. (the —Shareholders□), as it is not a subsidiary of or controlled by any of these entities. This is because each of the Shareholders holds only 33.33% of the outstanding shares in East-West Tie Inc., meaning that no subsidiary or control relationship arises under the *Business Corporations Act* (or the ARC) vis-à-vis the Shareholders and East-West Tie

14. As a result, according to this theory, if each of the Incumbent Utilities had created a separate affiliate, then their relations with their respective affiliate would be governed by the ARC. However, by *combining* their efforts, the Incumbent Utilities are not bound by the ARC’s restrictions on sharing information, resources and services. The structure is

¹¹ AltaLink Interrogatory, 2(d)

therefore aimed at a *diminution* of the Board's regulatory authority brought about by *increasing* the dominant position of the Incumbent Utilities.

15. As a consequence of this structure, EWT has refused to answer questions which would be relevant if the ARC applied.¹²
16. It is submitted that the Incumbent Utilities' design of EWT to avoid ARC compliance does not prevent the Board from ensuring that the *purposes* of the ARC continue to guide the relationship between the Incumbent Utilities and EWT. In this regard, the Board's powers to add conditions on EWT's transmission licence are relevant and properly a part of this proceeding. Section 70 of the *OEB Act* provides:

“(1) A licence under this Part may prescribe the conditions under which a person may engage in an activity set out in section 57 [including transmission] and a licence may also contain such other conditions as are appropriate having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*.

...

(2) The conditions of a licence may include provisions,

...

(f) requiring the licensee to maintain specified accounting records, prepare accounts according to specified principles and maintain organizational units or separate accounts for separate businesses in order to prohibit subsidies between separate businesses.”

17. Thus, the Board may, in this application, impose licence conditions that impose the same obligations on the relationship between EWT and the Incumbent Utilities as inform the purposes of the ARC.
18. These purposes can inform licence conditions on EWT that will have the same effect as if the ARC applied. TPT proposes to submit in this application that these conditions should be imposed with respect to TPT. The Interrogatories are therefore relevant to those submissions.

¹² The answers which the Incumbent Utilities, through EWT, refused to provide in this category are TPT # 6, 7, 8, 11,

All of Which is Respectfully Submitted

Date: December 12, 2011

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Attention: Board Secretary

TO:

All Parties