

**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.

**REPLY SUBMISSIONS OF TRANSCANADA POWER TRANSMISSION (“TPT”)**

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## Introduction

1. These submissions reply to EWT's arguments addressing the relevance of Interrogatory Requests (IR's) filed by TPT. TPT's IR's seek information that relates to TPT's submission that, if the Board does grant EWT a licence, that licence should impose conditions similar to those found in the Affiliate Relationships Code for Electricity Distributors and Transmitters (the "ARC").
2. EWT's main arguments opposing the IRs are as follows:
  - "...the Moving Parties would not be subject to the same level of disclosure [as EWT]. This departs from the Board's principle of treating participants in the designation process ("**Designation Participants**") fairly, equally and in a non discriminatory manner;" – this will be called the "Same Treatment Argument";
  - "...the Moving Parties have incorrectly asserted that the ARC applies to EWT by mischaracterizing the Designation Process as a competitive unregulated market or contestable business activity instead of its legislatively correct characterization as a regulated process under the full control of the Board in which there are multiple applications;" – this will be called the "Non-Contestability Argument"; and
  - "...EWT is no different from any other Designation Participant regarding its ability to access information under the Information Protocols established by HONI and GLPT and recover its development costs;" – this will be called the "Information Sharing Argument".
3. Each of these arguments will be addressed in turn. At the outset, it should be noted that, in this motion, the Board does not have to determine the conditions that it may ultimately apply, only whether the consideration of these conditions may be relevant to the issuance of a licence. Further, the Board does not now have to address other issues in this proceeding (including whether a licence should be granted at all); these issues will be addressed in final argument.

## The Same Treatment Argument

4. The Same Treatment Argument is that the Board should disregard the relationship between EWT and the Incumbent Utilities and, instead, treat EWT as if it were a new entrant transmitter, just like the other new entrant transmitters in this proceeding. In this regard, EWT argues that the criteria that the Board has applied to other licence applicants – a review of technical and financial capability - should apply to EWT as well. However, TPT's submission is that the criteria for EWT should be different because it is in different position than other licence applicants. It is in a different position for two reasons. First, unlike other new entrant transmitters, EWT has sought to structure itself to be exempt from the ARC; it is therefore necessary to ensure that ARC-like protections are not avoided – licence conditions are an effective way to do this. Second, unlike other transmitters, EWT is related to the two dominant incumbent transmitters. This raises issues that simply do not arise in other licence applications.

5. As for the first reason why the Board should apply different criteria to EWT's licence, EWT unlike new entrants, has attempted to structure itself to be beyond the reach of the ARC. Every other applicant, if designated, will be subject to the ARC requirements as a consequence of being designated. However, if EWT is designated, it will not be. The protections provided by the ARC will therefore have to be addressed through licence conditions. The IRs provide a factual basis to make this argument and are therefore relevant to this application.
6. With respect to the second point, the Incumbent Utilities, between them, have a 66 and 2/3% interest in EWT. EWT is the vehicle through which the Incumbent Utilities are seeking to participate in the designation process. It is not in the public interest for the Board to ignore this reality and simply treat EWT as if it were a stand alone licence applicant.
7. The legislative framework respecting permissible transmission activities treats the business activities of utilities as the same as business activities of affiliates; as a result, it is expected that the Board will cut through corporate structures and focus on substantive regulatory purposes. For example, section 71 of the *OEB Act, 1998* provides that "a transmitter or distributor shall not, except through one or more affiliates, carry on any business activity other than transmitting or distributing electricity."<sup>1</sup> The *OEB Act, 1998* thus treats business activities carried on by affiliates to be business activities "carried on" by transmitters. In other words, for regulatory purposes (if not for corporate law purposes), there is a unity of interest between a utility and its affiliate. It is therefore inconsistent with this approach to treat the business activities of associated entities as unconnected to the business activities of the Incumbent Utilities.
8. An additional point in response to EWT's argument that it is unfair to treat it differently than unaffiliated new entrant transmitters is that the Board has always treated public utilities and their associated entities differently than non-utilities. The fact is that public utilities have a privileged status as regulated monopolies and are always subject to regulatory oversight and expectations in a way that non-utilities are not. As the Board stated: "The Board has an overriding obligation to ensure that the utility acts in the public interest."<sup>2</sup> Similarly, in its Notice of Proposal to Amend the Affiliate Relationships Code, , the Board stated<sup>3</sup> (at p. 4):

"Under the Act, the Board has broad authority to prescribe conditions under which a person may engage in transmission or distribution activities. This specifically includes a similarly broad authority to prescribe rules governing the conduct of a transmitter or distributor as that conduct relates to its affiliates. This latter authority is not limited to the conduct of utilities in relation to affiliates that are electricity retailers or gas marketers, nor is it limited to conduct that has or can have a specified effect (such as cross-subsidization). The Board also has as a statutory objective to promote economic efficiency and cost effectiveness not only in relation to the transmission, distribution and sale of electricity, but also in relation to electricity generation and demand management. The Board cannot

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<sup>1</sup> The Incumbent Utilities' compliance with this provision is a matter to be addressed in final argument.

<sup>2</sup> Decision with Reasons setting rates for Enbridge Gas Distribution, December 13, 2002 (RP-2001-0032), p. 171.

<sup>3</sup> September 19, 2007 (RP-2007-0662), at p. 4 (emphasis added).

agree that preventing transmitters and distributors from using their monopoly position in a manner that is or can be harmful to the interests of customers is beyond the scope of its authority. Harm in this context can take a variety of forms, from customer confusion to reducing alternative competitive offerings available to (and increasing prices payable by) ratepayers for different products or services. In the more specific context of affiliate relationships, the Board therefore believes that its role encompasses, at a minimum, regulating utility conduct that can provide an unfair business advantage to an affiliate that is involved in energy or energy-related market activities.”

9. As a result, a consequence of public utility status is that public utility companies, including the Incumbent Utilities, are subject to business restrictions that non-utility companies are not. Requiring EWT to provide information about this relationship and how rate payer funded information and other resources are being made available to them is not unfair or discriminatory, it is a characteristic of utility regulation and it is frankly surprising that the Incumbent Utilities (through EWT) are resisting this requirement in this case. This information can be relied upon in final argument in support of licence conditions that address this relationship.

### **The Non-Contestability Argument**

10. The Non-Contestability Argument is that the Board should not treat EWT’s participation in the designation process as raising issues of fair competition or contestability. EWT argues: “Purported analogies to competitive or contestable businesses are inapposite.”<sup>4</sup>
11. This submission is both directly counter to the Board’s characterization of this process and sheds light on the behaviour of the Incumbent Utilities in this process (and concomitantly, the Board’s need to regulate this behaviour.).
12. The Board has characterized the purpose of the designation process as a way to bring contestability to transmission. In establishing the designation process, the Board stated:<sup>5</sup>

“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.”
13. The Board’s expectation that applying for designation is to be contestable could not be stated more clearly. Despite this, EWT argues that contestability is inapposite because “the Designation Process is a regulated process available only to regulated entities as licenced transmitters, and established so that the Board may direct and evaluate the development plans

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<sup>4</sup> EWT Submissions, p. 16.

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

of licensed transmitters. All aspects of the process are under the control of the Board and only by virtue of Board policy is the process made competitive.”<sup>6</sup>

14. The meaning of these statements is difficult to follow. However, to the extent that EWT is attempting to argue that OEB licensing and oversight is inconsistent with a contestable activity, it is clearly wrong. Regulatory oversight and contestability are not mutually exclusive. For example, gas and electricity retailing are subject to Board licensing requirements and very extensive oversight by the Board under the *OEB Act, 1998* and the *Energy Consumer Protection Act, 2010*. This regulatory presence does not mean that electricity and gas retailing is not contestable.
15. Finally on this point, EWT argues against the relevance of the NGEIR decision. TPT submitted that the NGEIR decision was relevant as an example for the general proposition that “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.” EWT does not appear to challenge this statement with respect to utility participation in the contestable activities of suite metering and construction of connection facilities; it also appears to acknowledge that the NGEIR decision led to restrictions on information sharing on incumbent utilities with respect to their participation in the contestable gas storage market. However, EWT states that the NGEIR decision “has nothing to do with cost allocation.”<sup>7</sup>
16. In fact, cost allocation was a major component of the NGEIR decision, taking up much of two chapters – one each for Union and Enbridge.<sup>8</sup> The Board specifically concluded that “The allocation of costs to rate classes will continue to be consistent with existing fully allocated cost allocation principles.”<sup>9</sup>
17. As a result, TPT’s request for information on the resources that the Incumbent Utilities made available to EWT is relevant to the issue of the fairness and transparency of the competitive designation process, which will be addressed in final argument.

### **The Information Sharing Argument**

18. The Information Sharing Argument is that information obtained by the Incumbent Utilities in the course of providing utility services is proprietary to them and their only obligation in this regard is to direct all *specific requests* for information from EWT in the same way as requests from new entrant transmitters. EWT addresses this point as follows:

“...the information in the Designation Proceeding could be divided into three parts: (i) historical documentation on the existing East-West Tie line; (ii) documentation generated as part of the analysis done by the OPA and the IESO

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<sup>6</sup> EWT Submissions, p. 14.

<sup>7</sup> EWT Submissions, p. 16.

<sup>8</sup> Natural Gas Electricity Interface Decision, November 7, 2006, p. 75 (EB-2005-0551): see sections 5.2.5 and Chapter 7.

<sup>9</sup> Natural Gas Electricity Interface Decision, November 7, 2006, p. 75 (EB-2005-0551), P. 8 (emphasis added).

for purposes of the Designation Proceeding; and (iii) proprietary documentation generated to prepare a development plan for purposes of designation in respect of the new East-West Tie line.

With respect to categories number (i) and (ii), as established in recent all transmitter meetings chaired by Board Staff, in which HONI, OPA and IESO participated, all of these parties were prepared to disclose information related to categories (i) and (ii) and respond to additional questions.

Although guised in an overarching question for information relevant to the Licensing Proceeding, the real focus of the Moving Parties is the information which falls into category number (iii), since this information will advance the interests of the Moving Parties and assist in the preparation of their development plans. However, information of this kind is proprietary regardless of whether it is generated by a rate recovering entity such as HONI and GLPT or by an ordinary designation participant such as EWT -- or TransCanada, UCT or AltaLink for that matter.

19. Using these categories, as for (i) and (ii), TPT has participated in the informal meetings facilitated by Board staff among designation applicants, the Incumbent Utilities and the public agencies. It has not had any indication that either of the Incumbent Utilities have been prepared to provide any of the information in categories (i) and (ii). The Board's standard practice is for applicants to seek information from affiliates. In this case, it is submitted that EWT should be directed to request the Incumbent Utilities to answer the questions raised in the IRs included in categories (i) and (ii). In the absence of this, there is no assurance that this information will be provided.
20. As for category (iii), EWT's assertion is that the information will assist TPT in the preparation of development plans. Assuming this to be true, then the information developed by the Incumbent Utilities is clearly relevant to the designation process and its use is a proper category for IRs. The effect of EWT's position is that the Incumbent Utilities should be entitled to share this information with EWT on an exclusive basis because that information is proprietary to the Incumbent Utilities, regardless of how it was collected and paid for.
21. TPT is not questioning the ownership of information. The issue is not who owns the information, but how it is used. The Board has never held that utilities do not have to provide information to the Board and intervenors simply because a utility owns the requested information -- in other words, the issue of who owns the information is irrelevant. The issue is how the information will be used. The Board always regulates and controls the use of information obtained in the provision of utility service. Its standard requirement is that information used in the provision of utility service should not be used for the private benefit of utility shareholders. EWT is proposing a dramatic departure from this practice.
22. EWT also makes much of the fact that the Incumbent Utilities have adopted an information protocol under which they have centralized answering information requests in the designation proceeding.

23. The Incumbent Utilities have been investigating the East West Line for several years and have expended millions of dollars of rate payer funds in this enterprise. EWT's key personnel in this case includes executives of the Incumbent Utilities, and its claim that new entrants will rely on this information to prepare development plans makes it clear that this information is relevant. It is asserting that the Incumbent Utilities should be able to make any use of this information that it considers appropriate (presumably including providing this information exclusively to EWT) while new entrants should get access to a call in help desk. This falls far short of the OEB's requirements in the ARC and amounts to self-regulation of utilities in an area where the Board is attempting to facilitate competition.

### **Conclusion**

24. For the foregoing reasons, TPT submits that the Interrogatories address issues of relevance to the EWT licence application and should be responded to.

### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Date: February 7, 2012

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Attention: Board Secretary

AND TO:

All Parties