IN THE MATTER OF Section 70 and 78 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B);

AND THE MATTER OF a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

MÉTIS NATION OF ONTARIO

REPLY SUBMISSION ON PHASE I

1. Terminology: "Aboriginal" Versus "First Nations and Métis"

At page 3 of their Written Submissions, the Ojibways of Pic River First Nation ("PRFN") submit that the Decision Criteria should be modified to include "aboriginal participation" and "the capacity to carry out the procedural aspects of aboriginal consultation." PRFN further submits that the term "aboriginal" should be used in preference to "First Nations and Métis communities" because it is "consistent with the language contained in the Minister's March 29, 2011, letter" and "[i]t is also the term most often used in other policies and legislation." The MNO notes that no other applicant or other intervener suggested using the term "aboriginal" in preference to "First Nation and Métis communities."

While the MNO's supports the addition of "First Nation and Métis participation" and "the capacity to carry out the procedural aspects of First Nation and Métis consultation" to the Decision Criteria, the MNO submits that using the generic term "aboriginal" in these proceedings would be inconsistent with applicable law and policy, and would be an inaccurate descriptor of the communities identified by the Crown for participation and consultation.

Section 35 of the *Constitution Act, 1982* reads,

> *35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*
>
> *Definition of "aboriginal peoples of Canada"*
>
> *(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.*

The term "aboriginal" includes all three constitutionally recognized aboriginal peoples – Indians (First Nations), Inuit and Métis. It is often used in a generic sense to be inclusive all of Canada's indigenous peoples, but its use does not acknowledge or respect the unique identities, histories, cultures and rights of those three distinct peoples, which is one of the underlying purposes of s. 35.[1]

Recently, in *Cunningham v. Alberta*, the Supreme Court of Canada re-affirmed the importance of s. 35 in recognizing the unique identity, culture and governance of the Métis – as distinct from other aboriginal peoples.

> *The history of the Métis is one of struggle for recognition of their unique identity as the mixed race descendants of Europeans and Indians. Caught between two larger identities and cultures, the Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance. The constitutional amendments of 1982 and, in their wake, the enactment of the MSA, signal that the time has finally come for recognition of the Métis as a unique and distinct people.*[2]

The use of the term "aboriginal" does not acknowledge the fact that there are two distinct aboriginal peoples – First Nation and Métis – whose communities will be affected by the East-West Tie project. As such, the MNO submits the use of the term "aboriginal" is inaccurate, overbroad and disrespectful in the context of this proceeding.

Moreover, the Crown has <u>not</u> directed participation and consultation with "aboriginal" communities generally. On the contrary, the Crown has specifically identified a total of 18 First Nations and Métis communities.[3] This does not include direction to engage with Inuit or other "aboriginal communities." Nor does the Crown's direction require aboriginal participation and consultation to be the same for all 18 First Nation and Métis communities. As such, in the specific context of the East-West Tie project, the use of the terminology "First Nation and Métis" is legally accurate and required.

The MNO notes that the Ontario Government has consistently recognized the need to acknowledge and respect the differences between First Nations and Métis communities in implementing the province's energy related policies and initiatives.[4] This comes from the reality that while the term "aboriginal" may be suitable at a general policy level, the ongoing use of a one-size-fits-all "aboriginal" approach becomes unworkable due to practical differences between First Nation and Métis communities.

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[1] R. v. Sparrow, [1990] 1 S.C.R. 1075.

[2] Cunningham v. Alberta, [2011] 2 S.C.R. 670 at par. 70.

[3] In the Ministry of Energy's letter to the Ontario Power Authority ("OPA") dated May 31, 2011, the Crown states it is delegating some procedural aspects of consultation related to the East-West Tie project to the OPA and attaches a "FIRST NATION AND MÉTIS COMMUNITY CONSULTATION LIST". In referencing this letter, the MNO makes no submissions on whether this letter effectively delegated procedural aspects of the Crown's duty to consult and accommodate to the OPA or whether OPA or the Crown has met this duty in relation to the East-West Tie project.

[4] For example, see OPA's Feed-In-Tariff Rules, Version 1.5.1, Section 9, which set out aboriginal community participation requirements specific to First Nation and Métis communities. See also the distinct approach to Métis consultation supported under the New Relationship Fund, the creation of Métis Voyageur Development Fund to support Métis entrepreneurs and business participation in resource sector development, including, energy related projects, etc.

The recognition of "First Nation and Métis communities" enables responses to specific energy related projects, initiatives and policies to be tailored to the unique needs, interests and rights of these communities, rather than trying to find elusive "aboriginal" solutions. This approach is reflected in the Long-Term Energy Plan. The terminology of "First Nations and Métis communities" is used throughout the plan, along with the recognition that implementation of the plan will vary between First Nations and Métis:

> *Ontario recognizes that successful participation by First Nation and Métis communities will be important to advance many key energy projects identified under a Long-Term Energy Plan. The path forward needs to be informed by regular dialogue with First Nation and Métis leadership through distinct processes. Working with First Nation and Métis leadership, Ontario will look for opportunities to promote on-going discussion on these issues.*[5] *[emphasis added]*

In addition to the MNO's submission that the use of the terminology "First Nation and Métis communities" is consistent with and required by law and policy, the MNO is very concerned that the use of the term "aboriginal" in the context of this proceeding could result in discrimination and exclusion towards the Métis.

Unfortunately, it has often been the MNO's experience, that a lack of knowledge, willful blindness or an overt desire to ignore or exclude Métis communities, results in some parties attempting to equate the term "aboriginal" solely with First Nations.

Notably, in this proceeding, the MNO has already been witness to this type of exclusion, inadvertent or otherwise. For example, at the all parties meeting on the Issues List held on March 23, 2012, counsel for several prospective transmitters and interveners solely referred to First Nations in the context of "aboriginal" participation and consultation. Intervener written submissions have also excluded Métis communities in the context of "aboriginal" participation and consultation.[6]

The MNO submits that in order to avoid this type of exclusion throughout the proceedings, the use of the terminology "First Nation and Métis communities" is necessary.

As well, the MNO is concerned that the use of the term "aboriginal" could allow for a potential approach by a prospective transmitter that the inclusion of one aboriginal people (i.e., First Nation or Métis) to the exclusion of the other could be sufficient to meet "aboriginal participation" in the context of the East-West Tie project.

The MNO submits that such an interpretation and result would be inconsistent with the policy of the Ontario Government, which the Board is mandated to implement through this designation process. Specifically, the Long-Term Energy Plan states:

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[5] Ontario's Long-Term Energy Plan, pp. 48-49.

[6] For example see the Written Submission for Phase I of the Northwestern Ontario Associated Chamber of Commerce and the Northwestern Ontario Municipal Association, combined with the City of Thunder Bay, which completely exclude any reference to Métis communities in the context of the intervener's submissions on aboriginal participation and consultation.

> *There are a number of ways in which First Nation and Métis communities could participate in transmission projects. Where a transmission line crosses the traditional territories of aboriginal communities, Ontario will expect opportunities to be explored:*
>
> - *Provide job training and skills upgrading to encourage employment on the transmission project development and construction.*
> - *Further Aboriginal employment on the project.*
> - *Enable Aboriginal participation in the procurement of supplies and contractor services.*
>
> *Ontario will encourage transmission companies to enter into partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest. The government will also work with the OPA to adjust the Aboriginal Energy Partnerships Program – currently focused on renewable energy projects – to provide capacity funding for aboriginal communities that are discussing partnerships on future transmission projects.*[7] *[emphasis added]*

The MNO submits that the terminology "First Nation and Métis communities" will make it clear to all prospective transmitters that they must seek to achieve participation with both First Nations and Métis communities in relation to transmission projects, including the East-West Tie project.

Based on the above, the MNO submits that the use of terminology "First Nation and Métis communities" in the Decision Criteria with respect to participation and consultation is necessary.

2. Decision Criteria must be Generally Applicable and Durable

Various intervenors have argued that prospective transmitters should not be required to engage with First Nation and Métis communities on participation related issues until after they are designated.[8] These applicants argue against effective "pre-designation" engagement on the basis that such engagement would be inefficient, reduce competition and discourage new entrants. Respectfully, the MNO submits that these arguments (1) run counter to Ontario law and policy requirements, and (2) encourage the Board to set its Decision Criteria based on the unique circumstances of the East West Tie Project, rather than establish generally applicable and durable Decision Criteria.

Ontario law and policy requires early engagement

The designation process has as its goal to select the best plan from among the various applicants for a transmission project. The Decision Criteria must set out how the Board

[7] Ontario's Long Term Energy Plan, p. 49.

[8] For example, see Written Submissions of TransCanada and Iccon. Other applicants (i.e. Upper Canada) have also made this point, but it is not clear whether it is only in relation to the current East-West Tie designation process or all future transmission designation processes as well.

will structure its decision in a manner consistent with its mandate, law and policy. As stated in our Written Submissions, Ontario law and policy require that the Decision Criteria include provisions that will promote aboriginal participation and partnership in future transmission projects.

The effect of the inclusion of aboriginal participation in the Decision Criteria promotes Ontario policy in two ways. First, it encourages prospective transmitters to engage, and potentially partner, with willing First Nation and Métis communities at the earliest stages of project planning and prior to designation. The Long Term Energy Plan clearly contemplates partnership in new transmission projects rather than mere Impact and Benefits agreements or other forms of financial participation. This is a purposive and constructive development in Ontario policy aimed at ameliorating past energy development practices where Aboriginal peoples were shut out of planning decisions and project ownership but "paid to get out of the way". Partnership reflects a new model that brings transmitters and affected communities together in a way that ties their interests and builds projects that are commercially viable, sustainable and consistent with Aboriginal and treaty rights and interests. In promoting such change, Ontario policy is a welcome and positive step towards reconciliation. To achieve these goals, it is critical that prospective transmission proponents and communities engage at the earliest possible time to explore opportunities for project development.

Second, including aboriginal participation in the Decision Criteria ensures that the Board has complete applications before it in the designation process. The Board is required to select the best plan from among the applicants. All applicants must set out their plans to carry out the project in a manner that achieves all requirements, including aboriginal participation and aboriginal consultation. Those applicants who have undertaken early and meaningful engagement with affected communities and have developed comprehensive, well-articulated and credible plans in these areas will have stronger applications for the Board to consider. A complete application in this regard ensures that the plan adequately addresses the history, rights, land use, interests, capacities and goals of the communities, and allows the Board to assess whether the applicant is, in fact, capable of carrying out the project in a manner that meets all technical, financial and policy requirements.

The alternative proposed by some intervenors, that engagement should only be required after designation, is a return to the old, colonial ways of doing business and undermine the positive developments of Ontario policy. It will encourage unilateral decision-making by energy proponents, in their design and construction of projects, and by government regulators, by making decisions without full information and input from those whose Rights and interests stand to be affected. If this approach were to be adopted, it would once again alienate First Nation and Métis communities from the fundamental decisions affecting their future.

Decision Criteria must be generally applicable

This designation hearing is the first of its kind and will establish criteria and process for future designation hearings for all other transmission projects in Ontario, including those on First Nation and Métis traditional territories. The Decision Criteria established must

be generally applicable to all future designation processes, and must act to promote decisions that comply with law and Ontario's energy policy objectives. The Board's decision with respect to setting Decision Criteria must apply to the current East-West Tie project designation but cannot be made only in response to it and its unique circumstances.

In the specific context of the East-West Tie designation, the MNO submits that since the Decision Criteria have not yet been determined by the Board, and were consequently not clearly known to all applicants in advance of the designation process, the Board should not, *prima facie*, favour an applicant who has already concluded agreements with First Nation or Métis communities. Consistent with submissions above, the Board should view such agreements as evidence of a credible plan to achieve aboriginal participation and consultation, but should give equal consideration to applications that set out credible and viable aboriginal participation and consultation plans that are not based on extensive "pre-designation" engagement. In Phase II, the Board and First Nation and Métis communities will have the opportunity to question, test and make submissions on the quality of all applicants' plans respecting aboriginal participation and consultation. The Board can take the unique circumstances of the East West Tie into consideration when it weighs the evidence and makes its decision.

The MNO believes that this approach would alleviate any suggestion of unfair advantages being provided to pre-existing partnerships, but would ensure that transmitters are aware that in future designations First Nation and Métis community participation will be a criteria equal to all others, and that existing arrangements or agreements with affected aboriginal groups will make for a more favorable application.

3. Métis Communities Are Parties In The Designation Process

At page 3 of its Written Submissions, TransCanada submits "[f]urthermore, with the exception of Pic River First Nation, the First Nation and Métis communities that may wish to participate in the Project are not party to the designation proceeding."

TransCanada is wrong in this submission, and fails to understand the unique governance structure of the MNO and Métis in Ontario. As set out in the MNO's intervention letter to the Board, the Greenstone Métis Council, Superior North Shore Métis Council and Thunder Bay Métis Council (i.e., the MNO Community Councils that have been identified for Crown consultation) are all participating in this proceeding as a part of the MNO's intervention. The MNO is also representing the Historic Sault Ste. Métis Council and the North Channel Métis Council in its intervention.

These Métis Community Councils are not separate legal entities, but are all a part of the MNO's overall governance and corporate structure. As such, they are all collectively participating through the MNO's intervention in order to achieve a consolidated and cost effective intervention in the East-West Tie project designation process.

4. Government Intention Versus Government Policy

At pages 5 and 6 of its Written Submissions, TransCanada attempts to draw a comparison between the Minister's Letter on the East-West Tie project dated March 29, 2011 (the "Minister's Letter) and previous government statements made in 2008 in relation to the Bruce to Milton Line, which the Board only regarded as "government intentions" versus "government policy".

The Minister's Letter March 29, 2011 letter is not simply "intention", it is a re-statement and reminder to the Board of clearly articulated government policy on these issues, as set out in the Long-Term Energy Plan, issued in November 2010. Moreover, the Board now has new legal obligations under section 1(1)5. of the *Ontario Energy Board Act* to operate in a manner consistent with the policies of the Ontario Government in relation to the timely expansion or reinforcement of transmission systems.

The MNO submits that submissions by TransCanada in this regard fail to consider the legal and policy changes that have occurred in Ontario since the Bruce to Milton proceedings in 2008.

5. Consultation Is Not Limited to Environmental Impacts

At page 5 of its Written Submissions, TransCanada submits that "the Board does not have the expertise to carry out a proper assessment of the actual consultation that is carried out." TransCanada goes on to argue that "[a]boriginal consultation is generally delegated to a proponent through the environmental assessment process" because "[b]y their very nature, Aboriginal rights are related to the natural environment and specifically, land."

With respect, this is a superficial and impoverished analysis of the Crown's duty to consult and accommodate. It is also inconsistent with recent decisions from the Supreme Court of Canada on the duty. In *Rio Tinto v. Carrier Sekani Tribal Council*, the Court rejected arguments that the duty was only engage when land is directly impacted.

> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights.[9] [emphasis added]

This principle has been applied by the courts in the context of regulatory proceedings similar to the one before the Board.

> [66] The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to

[9] Rio Tinto Alcan Inc. *v.* Carrier Sekani Tribal Council, [2010] 2 S.C.R. 650, par. 44.

> hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.[10]

In its Written Submissions, the MNO has taken the position that the Board is not required to make any assessment of the adequacy of consultation as part of Phase I as the goal of Phase I is to set generally applicable criteria and process, and will not result in a designation. However, MNO disagrees with the submissions by TransCanada respecting the Board's obligation to consider the adequacy of consultations as part of its process, and will make further on the issue in Phase II of the proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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[10] Kwikwetlem First Nation v. British Columbia (Utilities Commission), 2009 BCCA 68 at par. 62.