EB-2011-0140

ONTARIO ENERGY BOARD

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

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

TRANSCANADA POWER TRANSMISSION (ONTARIO) L.P. ("TPT")

Phase 1 Reply Submissions

George Vegh
Kristyn Annis

McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Suite 5300, Box 48
Toronto, ON M5K 1E6

gvegh@mccarthy.ca
kannis@mccarthy.ca

Tel: (416) 601-7709
Fax: (416) 868-0673

Counsel for TransCanada Power Transmission (Ontario) L.P.

This process relates to a proposed double circuit 230 kV line. This is not however, the first time that a 230 kV transmission line has been designed, constructed and put into service in Ontario. The Board has issued approvals for hundreds of kilometres of rate-regulated transmission line projects. Each approval was based on development work that was carried out by the proponent transmitters without ongoing Board oversight. Rather, transmitters incorporated development costs into overall project costs, which were reviewed at a leave to construct hearing or a rate hearing.

1. The current designation proceeding (the "Designation Process") for the East-West Tie line (the "Project") is therefore not a departure, but an addition to the Board's existing approval process for transmission lines. The Designation Process is the first step in a longer approvals process ultimately leading to construction of the Project. Specifically, the Designation Process is based on the Board's *Framework for Transmission Project Development Plans*, which outlines how transmission project development planning will work in conjunction with existing Board processes for licensed transmitters as well as other approval processes, such as environmental assessments.[1]

2. The fact that the Designation Process forms part of the existing regulatory approvals process leads to an important point: the Designation Process is limited to considerations related to development work. Issues that fall outside of development work can and should be reviewed at the appropriate stage in the approvals process, whether a leave to construct, a rate hearing or an environmental assessment. TPT agrees with the Board that "avoiding duplication of regulatory review [of rate regulated transmission lines] is critical."

3. TPT respectfully submits that, based on the Phase 1 submissions of the Applicants and intervenors, it would be helpful for the Board to confirm the overriding regulatory context for the Designation Proceeding. Within that context, and based on TPT's review of the Phase 1 submissions, there appears to be four contestable Phase 1 Issues that require resolution before proceeding to Phase 2, namely (i) participation by First Nations and Métis groups (the "Project FNM") affected by the Project (Issue 2), (ii) consultation with the Project FNM (Issue 3), (iii) regulatory oversight of the Designated Transmitter by the Board (Issues 9, 10 and 11) and (iv) the application of the Affiliates Relationship Code to Hydro One Networks Inc. and Great Lakes Power Transmission Ltd. (collectively, the "Incumbent Utilities") (Issue 22). Before providing reply submissions on each of these issues, it is helpful to set out the regulatory approvals context in further detail.

Regulatory Context for Designation

4. Given that the Designation Process is part of a larger approvals process, TPT submits that the Board's role in the Designation Process is fairly limited – that is, to choose the transmitter that is in the best position to carry out planning, designing and constructing the Project within the Board's prescribed mandate.[2] Choosing a designated

[1] Ontario Energy Board, *Framework for Transmission Project Development Plans*, dated August 26, 2010, at p. 1.

[2] Section 1(1) of the OEB Act states that the Board's mandate with respect to electricity is, among other things, to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity services" and "promote economic efficiency and cost effectiveness in the generation, transmission, distribution,

transmitter (the "Designated Transmitter") to carry out development work will be accomplished by evaluating the Applicants' applications (the "Applications") submitted in Phase 2. The "testing of the more detailed information developed after designation will take place in the next stage of the process, likely a leave to construct hearing."[3] As a result, TPT submits that Applications should be evaluated by reference to their ability to successfully carry out development work that is required to prepare a leave to construct application.

5. The established leave to construct proceeding is set out in the Board's *Filing Requirements for Transmission and Distribution Applications* in Chapters 4 and 5.[4] In particular, Chapter 5 outlines the filing requirements (the "Filing Requirements") for rate-regulated transmitters. The Filing Requirements include options and cost benefit analyses, such as demonstrating that the preferred option has the highest net present value as compared to the other viable alternatives. Importantly, if the preferred route or alternatives are expected to have significant qualitative benefits that cannot reasonably be quantified, evidence about these qualitative benefits are to be provided (the "Qualitative Benefits Filing Requirements").

6. The Designated Transmitter will also be required to file, in a leave to construct Application, detailed Project costs including the impact on the transmission rates.[5]

7. Once the Project has been constructed and brought into service, the Designated Transmitter will be required to seek cost recovery for the facility in a rate hearing, during which the reasonableness of the transmission rates will be determined by the Board. The Designated Transmitter may also seek to have any Project construction costs that were included in the deferral account confirmed.

8. The Board has noted the importance of avoiding duplication of regulatory review at p. 32 of the Filing Requirements:

> Avoiding duplication of regulatory review is therefore critical. The conclusions of the Board specific to a project that are made in one regulatory setting will not be re-evaluated in another setting. The reasonableness of incurred costs for a project may be reviewed in the transmitter's rate case. In this case the need and rate impact of that project would not be addressed in the leave to construct proceeding. The review would be limited to issues not addressed in the other forums such as the System Impact Assessment (SIA) carried out by the Independent Electricity System Operator (IESO) and the Customer Impact Assessment (CIA) carried out by the relevant licensed transmitter as specified by the Transmission System Code.

---

sale and demand management of electricity and to facility the maintenance of a financially viable electricity industry".

[3] Ontario Energy Board, Filing Requirements for Transmission and Distribution Applications, dated November 14, 2006, as amended, at p. 32.

[4] *Ibid.*, (Filing Requirements), .

[5] *Filing Requirements*, Section 5.3.4, 5.3.5 and 5.3.6.

9. The approval of transmission projects has proceeded efficiently under the Board's current process, which assesses costs and reliability throughout. The addition of a designation process at the front end of the approvals process does not mean that the Board should depart from current processes. Rather, the Board's approval process should be integrated and coherent.

10. This means that approval criteria in the designation process must be informed by the approval criteria in the leave to construct process.

Phase 1 Issues

11. As stated above, TPT submits that, based on its review of the reply submissions, there are four principal contestable issues. Each will be addressed in the context of the above-noted regulatory framework.

(i) Participation by Project FNM (Issue 2), and (ii) Consultation (Issue 3)

12. The parties have had especially divergent views regarding participation ("Participation") of First Nations and Métis communities, particularly as to the method and timing to evaluate Participation. Rather than address each argument of the Applicants and intervenors, the timing and method to evaluate Participation should be addressed in the context of the overall regulatory proceeding for the Project.

13. TPT submits that, while the Board may assess the ability of the Applicant to enter into Participation arrangements in the Designation Process, the leave to construct proceeding provides the appropriate context for such a review. The scope of the Board's review must be governed by the criteria outlined in section 92 of the OEB Act, which provides:

> In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
>
> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.[6]

14. Participation arrangements will have been concluded for the most part by the time a leave to construct is applied for by the Designated Transmitter and should be assessed by the Board on a costs and reliability basis.

[6] Paragraph 2 is not applicable here in that the transmission facility is related to reliability, not facilitating renewable energy.

15. In addition to assessing any proposed or confirmed Participation arrangements from a costs/reliability perspective, the Qualitative Benefits Filing Requirement also provides the Board with latitude to assess any significant qualitative benefits of the Participation arrangements that cannot reasonably be quantified.

16. The Board will also have the benefit of the environmental assessment ("EA") process by the time a leave to construct is submitted. In the event the Designated Transmitter does not have its environmental approvals in hand, at the minimum, studies being submitted as part of the EA will have been completed. As noted by TPT in its Phase 1 submissions, the EA process is generally the regulatory process in which the procedural aspects of consultation that have been delegated are assessed. The Board has consistently limited the scope of its leave to construct hearings to issues that fall within its prescribed mandate[7], and TPT sees no reason as to why this should be changed for a Designated Transmitter. To be clear, TPT believes that an assessment of aboriginal consultation and accommodation is absolutely required, however that the Ministry of Environment, which assesses the impact of the Project on the natural environment, is better equipped to carry out this assessment since aboriginal and treaty rights are linked to the land.

17. Although Participation should not be linked with consultation and accommodation stemming from the Project FNM's protected aboriginal and treaty rights, a holistic view of the Project and its impact on aboriginal and treaty rights will benefit the Board when assessing the qualitative benefits of Participation arrangements.

(iii) Board's regulatory oversight of the Designated Transmitter (Issues 9-12)

18. TPT appreciates that the Board will require a sound basis for approving a plan to conduct development work and ultimately apply for leave to construct. It is also important to bear in mind however, that the point of this exercise is to designate a *transmitter* to manage this work; the Board is not itself managing the project. Further, as indicated above, the Board has approved many leave to construct applications. Those applications were preceded by the completion of development work. The Board did not actively insert itself in the project management aspects of that development work and is not particularly well placed to do that. It is important to bear this in mind when considering submissions addressing potential imposition of obligations and milestones (Issues 9-12). In TPT's view, some of those submissions suggest a proactive project management role for the Board which is not a helpful or realistic expectation, especially in light of the Board's more recent pronouncements that it seeks to be more outcome based, and less input based.[8]

19. By way of example TPT has concerns with the submissions of SEC, which provide the most articulate expression of this point of view. SEC argues that the Board should:

- "be kept abreast of any factors that may lead to a project not going forward". One reason for this is so that the Board "has maximum ability to

[7] See section 92 of the OEB Act.

[8] See, for example, Renewed Regulatory Framework for Electricity Stakeholder Conference, Transcript, March 28, p. 6 (EB- 2010-0377, 0378, 0379, 0004, and 0043).

make changes that will keep the project moving forward." (paras. 5.1.4-5.1.5).

- Develop "specific obligations and milestones tailored to [a transmitter's] strengths and weaknesses and to the details of their development plan." (para. 5.2.2); and

- Use "sanctions that penalize unjustified delays and failures" (para. 5.3.1).

20. The skill of a project developer is to deal with unexpected issues that arrive in project development and manage them. The Board, as a regulator, does not have the mandate or institutional ability to manage projects. The Board has never sought to exercise this ongoing oversight over development work and there is no reason why it should do so now.

(iv) Application of the Affiliates Relationship Code ("ARC") (Issue 22)

21. The issue here is whether the Incumbent Utilities should be required to comply with the substantive requirements that apply to utilities in their relationship with competitive energy service providers, specifically, those in the ARC. The obligation, if imposed, is imposed on the Incumbent Utilities, not EWTLP.

22. Neither Incumbent Utility addressed this point in their submissions. Given that this issue has been discussed at stakeholder meetings, argued at length in EB-2011-0350 (EWTLP's transmission licence application), and specifically added by the Board as a Phase I Issue in Procedural Order No. 2 in this proceeding, the Incumbent Utilities are well aware of this issue and their lack of obligation to this proposed approach can be taken as at least tacit acceptance of it. It is submitted that the Board should not consider any submissions filed by the Incumbent Utilities on this point as it would constitute inappropriate reply argument.

23. The main objection to the proposed restrictions on the Incumbent Utilities came, not surprisingly, from the entity that would benefit from not having those restrictions in place: EWTLP.

24. EWTLP makes three arguments against restricting the Incumbent Utilities.

25. First, it argues that it is technically not an affiliate of the Incumbent Utilities and therefore the ARC does not apply. However, the issue here is not whether the ARC applies – the Incumbent Utilities structured EWTLP so that the ARC would not apply. The issue is whether, as a policy matter, the types of restrictions in the ARC should apply. The Board has applied these types of restrictions in non-affiliate contexts[9] so this technical argument is not convincing.

[9] For example, the Board has taken the status of related companies into account for rate making purposes even where those companies are not technically affiliates. Thus, for example, in a Board policy document accompanying the release of the Affiliate Relationships Code for Gas Utilities, the Board stated:

26. Second, EWTLP argues that these restrictions should not apply because EWTLP is a "relationship between arm's length partners." (p 29). In other words, it points out that the members of EWTLP are not, themselves, Incumbent Utilities and are arm's length *from each other*. This is true, but this arrangement is aimed at managing potential conflicts among the parties to their commercial arrangement. The regulatory challenge that the ARC is meant to address does not arise by reference to whether affiliates or near affiliates are arm's length to *other commercial parties*; it arises because they are *not arm's length to the Incumbent Utilities*.

27. Finally, EWTLP argues that it should not be treated as a competitive energy service provider under the ARC because it is not analogous to an energy service provider participating in a competitive business. But this ignores the fact that the designation process is, by definition, a competitive one.

28. The issue here is whether the Incumbent Utilities should be able to leverage their information and resources that were obtained in the provision of utility services to provide a competitive advantage to a related company that is competing with others to be designated. True, the designation process is overseen by the Board, but that, in itself, does not mitigate EWTLP's competitive advantage in that process The Board's oversight provides it with the authority to mitigate the competitive advantage; the issue is how the Board exercises that authority. If the Board does impose ARC like obligations, it will mitigate that competitive advantage; if it does not, then it will not mitigate that advantage. In that scenario, the Board will have, for the first time, permitted a utility to leverage its information and resources that were obtained in the provision of utility services to provide a competitive advantage to a related company. EWTLP has provided neither an example where the Board has permitted that to occur nor any public interest reason why the Board should allow that to occur in this case.

29. Further, on a more technical point, EWTLP argues that, unlike EWTLP "energy service providers are not regulated by the Board." (p. 29). This is incorrect. The Board exercises extensive regulatory authority over gas marketers and retailers – which are paradigmatic examples of energy service providers under the ARC. [10] EWTLP also argues that smart metering (another activity of an energy service provider) is not

---

"For rule-making purposes, "affiliate" is defined in the Act, but not for rate-making purposes. As part of its prudence review, the Board will pay close attention in rate hearings if the utility or affiliate outsources to a third-party who is not technically an affiliate of the utility but is still economically related to the same corporate group." (Understanding the proposed amendments to the Affiliate Relationships Code for Gas Utilities: An OEB Background Policy Paper (Draft) March 15, 2004).

In a letter accompanying the release of the Gas ARC, the Board stated:

"The Board notes that some stakeholders raised questions or concerns over the discussion in the draft Policy Paper about review, in future rates cases, of transfer prices paid to non-affiliates that have economic links to the utility. The Board believes that concerns over possible non-arm's length terms remains a potential rates issue in such circumstances." Letter dated September 3, 2004 (RP-2004-0140).

Similarly, the Board has imposed ARC like requirements on utilities to enter into competitive activities directly, and without an affiliate. See decisions referred to in TPT Submissions in Chief, i.e., Hydro One Rates Decision, May 26, 2000. (RP-1999-0044); Natural Gas Electricity Interface Decision, November 7, 2006, p. 75 (EB-2005-0551);and Power Stream distribution rates for 2009, July 27, 2009 (EB-2008-0244).

[10] See, among other specific provisions: OEB Act, Parts IV and V.1.

regulated by the Board. This is also incorrect. The Board clearly regulates suite metering activities by both utilities and non-utilities.[11]

All of which is respectfully submitted.

George Vegh and
Kristyn Annis

[11] See OEB Act, ss. 70(2)(d), and Energy Consumer Protection Act, Part III.