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Susan Frank
Vice President and Chief Regulatory Officer
Regulatory Affairs

BY COURIER

July 27, 2012

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2700,
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

EB-2012-0082 – Hydro One Networks' Section 92 – Lambton to Longwood Transmission Upgrade Project– Hydro One Networks Reply Argument

I am attaching two (2) copies of the Hydro One Networks Reply Argument pursuant to Procedural Order 3.

An electronic copy of the complete application has been filed using the Board's Regulatory Electronic Submission System (RESS) and the proof of successful submission slip is attached.

Sincerely,

ORIGINAL SIGNED BY ODED HUBERT FOR SUSAN FRANK

Susan Frank

c. Intervenors (electronic only)

EB-2012-0082

ONTARIO ENERGY BOARD

IN THE MATTER OF *the Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by Hydro One Networks Inc.
for an Order granting leave to construct to upgrade existing transmission line facilities.

REPLY OF HYDRO ONE NETWORKS INC. TO THE SUBMISSIONS OF BOARD STAFF AND THE CHIPPEWAS OF THE THAMES FIRST NATION

Hydro One Networks Inc.("Hydro One") makes these reply submissions in accordance with the Board's Procedural Order No. 3 dated July 17, 2012. Hydro One received written submissions from Board Staff (dated July 12, 2012) and from the Chippewas of the Thames First Nation ("COTTFN") (dated July 20, 2012).

REPLY TO BOARD STAFF SUBMISSION

Board Staff's submission addressed the proposed conditions of the Board's Order. Hydro One has no concerns with Board Staff's proposed list of conditions.

REPLY TO CHIPPEWAS OF THE THAMES FIRST NATIONS SUBMISSION

Summary

Hydro One rejects COTTFN's submission that s. 97 of the *Ontario Energy Board Act, 1998* (the *"Act"*) requires Hydro One to offer COTTFN an agreement as described in that section. Hydro One submits not only that s. 97 does not apply to assertions of Aboriginal and Treaty rights, but also that Aboriginal and Treaty rights are to be dealt with in the context of the Crown's duty to consult.

Hydro One repeats the submissions made by Hydro One in the Application to the effect that the Project is in the public interest as defined by s. 96(2) of the *Act*. Hydro One submits that COTTFN's submission that an applicant must establish that a project satisfies both factors under s. 96(2) is incorrect because s. 96(2) says only that the Board must consider both those factors. However, in any event, Hydro One submits that the Application satisfies both heads of factors because the Project is cost-effective, the Project will not result in a material impact on the price of electricity, and the Project will assist in satisfying government policy by enhancing the deliverability of system resources to enable approximately 500 MW of renewable generation in the west of London transmission area.[1] Furthermore, because the Project will have only minimal, if any, effects on Aboriginal and/or Treaty rights, Hydro One submits that any accommodation measures that may be taken will have no material impact on the overall cost of the Project to consumers.

COTTFN's submission that the Crown has failed to discharge its constitutional duties to consult and accommodate COTTFN in respect of the Project is inaccurate, premature, or both. Hydro One has, in fact, carried out the procedural aspects of consultation with COTTFN; and aside from the allegations in the Affidavit of Joe Miskokomon, Chief of COTTFN, which will be addressed below, COTTFN has not identified any potential impacts on asserted Aboriginal or Treaty rights. Hydro One nevertheless remains willing to hear any concerns about potential adverse effects on COTTFN's Aboriginal or Treaty rights, and if appropriate, to make accommodation.

COTTFN's submission that Hydro One must offer COTTFN an agreement under s. 97 of the *Act* is incorrect because s. 97 does not apply to assertions of Aboriginal and Treaty rights.

1. COTTFN is not an "owner of land" in the Project route within the meaning of s. 97

[1] Exhibit B, Tab 2, Schedule 1, page 2.

of the *Act*. A First Nation arguably has two unique interests in land:

- reserve, and
- traditional territory.

2. In the case of reserve land, under the *Indian Act*, R.S.C. 1985 c. I-5[2], the owner of land is the federal Crown, and the applicable First Nation has a beneficial interest. The appropriate mechanism for fulfilling s. 97 requirements with respect to interests in reserve land is through a federal permit in accordance with s. 28 or s. 35 of the *Indian Act* (filed as Attachment 2), or a use and occupancy agreement with the First Nation, the individual First Nation land holders, or both. However, in the within Application, the proposed Project is not situated on the COTTFN reserve, so the permit process identified under the *Indian Act* does not apply.

3. In the case of COTTFN's non-reserve or traditional territories, its interests or potential interests differ from its interest in its reserve. Hydro One does not dispute that COTTFN may have Aboriginal and/or Treaty rights in the Project area, but Hydro One submits that the nature of such rights is not ownership as contemplated by s. 97. COTTFN's Aboriginal and/or Treaty rights are constitutional rights within the meaning of section 35 of the *Constitution Act, 1982* (filed as Attachment 3), the existence or exact extent of which are undetermined. In relation to the Project, the appropriate means of addressing asserted Aboriginal and Treaty rights is through consultation and, where appropriate, accommodation, rather than through s. 97 of the *Act*. By contrast, if it were the case that COTTFN had an interest in land that is non-reserve (i.e. situated outside their reserve land, whether or not situated within COTTFN's traditional territories), title to such lands would be registered in the provincial land registry office, and COTTFN's registered interest would bring COTTFN into the definition of an "owner of land" that would fall within the meaning of s. 97. COTTFN has not made any allegation of a registrable

[2] "reserve"

(a) Means a tract of land, the title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and … (b) except… includes designated lands (filed as Attachment 1)

interest within the route of the Project.

4. Even if COTTFN were an "owner of land" within the meaning of s. 97 of the *Act*, Hydro One submits that there should be no requirement to offer an agreement in a case where the project scope is such that no new permanent rights in land are required. The subject Application is for only the reconductoring of an existing transmission line, and no new permanent rights in land are required, as indicated in Exhibit B, Tab 6, Schedule 6, page 1.

COTTFN's submission that the Project costs could materially increase as a result of consultation and accommodation is inaccurate because the Project is on an existing right-of-way and will have only minimal, if any, effects on Aboriginal and/or Treaty rights.

5. COTTFN has submitted that Hydro One failed to file the information required for the Board to determine whether the Project is in the public interest, having regard to the interests of consumers with respect to the price of electricity service. In advancing this argument, COTTFN asserts that the Board cannot determine whether the total cost of the Project as submitted by Hydro One is accurate because "good faith consultation would have revealed a duty to accommodate COTTFN, and that sharing revenue generated by the transmission of additional electricity through COTTFN's traditional territory is the most appropriate form of accommodation to minimize the effects of infringement on COTTFN's rights and interests."[3]

6. Hydro One responds that it has, in good faith, consulted with COTTFN, as is shown in the Record of Activities filed in response to COTTFN Interrogatory #2, Attachment 1; and Hydro One has received no information pertaining to the potential impairment of an Aboriginal and Treaty right that would raise the issue of accommodation.

[3] Paragraph 20, COTTFN Written Submission

7. Furthermore, with respect to the within Application, the duty to consult which may give rise to a need for accommodation, relates solely to the Project, which is a reconductoring Project. The duty to consult does not relate to the impacts that were caused by constructing the existing line. The Supreme Court of Canada has stated as follows:

> "The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice."[4]

8. Hydro One submits that the alleged infringements described in paragraphs 28 and 29 of the Affidavit of Joe Miskokomon, Chief of COTTFN, relate to the construction of the existing line, rather than this Project. As such, they are assertions of past wrongs or existing infringements; and Hydro One submits that if COTTFN has a right to assert claims for existing infringements or to seek compensation for the original construction of the line, the proper forum for such claims is a court of law, not an Application before the Board.

9. With respect to potential impacts relating to the existing Application, the Chief states the following at paragraph 32 of his Affidavit:

> First, "construction activities may affect our ability to harvest in our traditional territory. No Traditional Land Use Studies or Traditional Ecological Knowledge Studies have been carried out to determine the extent that construction activities may adversely impact our ability to harvest resources in our traditional territory."

In its response to COTTFN Interrogatory #3, Part 9, Attachment 2 (Environmental Specification, section 2.0), Hydro One described the proposed activities as including minor brush removal and minor excavation around tower foundations to expose footings. Given that all work for this Project will be conducted on the existing right-of-way on

[4] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at para. 45 (found at Volume 2 Tab of COTTFN's Book of Authorities)

towers that are already there, there will be extremely minimal disturbance of land.

10. Although Hydro One is still completing the Stage 2 archaeological study work, the risk of disruption of burial grounds or other important cultural sites is very low because the Project's scope of work involves only minimal ground disturbance. However, as stated in Hydro One's response to COTTFN Interrogatory #3, Part 8, COTTFN was invited to monitor this or any further studies that are conducted. Therefore, COTTFN would be notified if archaeological evidence is uncovered, although the likelihood of uncovering of archaeological evidence is negligible. Of course, Hydro One remains open to addressing any concerns with COTTFN.

11. In paragraphs 34 and 37 of Chief Miskokomon's Affidavit, he refers to Hydro One's capacity to transmit an additional 500 MW of electricity on the Transmission Line following the upgrades. The fact is that although the Project will enhance the deliverability of system resources to enable approximately 500 MW of renewable generation in the west of London transmission area, that does not mean an increase of 500MW of flow on the line. The Ontario Power Authority's ("OPA") evidence (Exhibit B, Tab 1, Schedule 5, page 18) states that the upgrade will benefit the system by increasing the area's transfer capability to deliver peak capacity by approximately 100 MW. It is difficult to provide an exact change in the MW flow on the L24L/L26L line being upgraded, because the increase in capacity is spread along all the lines in the west of London transmission area, as noted in the response to COTTFN Interrogatory #1, part 2. The increase of flow will depend on where the generation is connected and what type of generation is installed.

12. Irrespective of this, the Project involves little more than a small reduction in the conductor size and slight modifications to towers 78, 79 and 80, as indicated in Exhibit B, Tab 2, Schedule 1, page 2. With respect to the conductor size, the proposed ACSS conductor is slightly smaller than the existing conductor, 1.2" versus 1.34" overall diameter. The proposed modifications to the three towers are shown in Hydro One's prefiled evidence (Exhibit B, Tab 2, Schedule 4), and that diagram is provided as

Attachment 4 to this submission. It shows that the modifications involve a change to one mid-arm insulator on those three towers. The new "V"-string modification will be approximately the same vertical distance down as the existing "I" string (~ 8 foot drop from the mid-arm) but will have two strings versus one. Hydro One submits that these changes will have an extremely negligible impact on air space and no discernible impacts on COTTFN's Aboriginal and Treaty Rights.

13. Hydro One therefore submits that COTTFN's submissions show no requirement for accommodation to be made to prevent or minimize the impairment of an asserted Aboriginal or Treaty Right.

COTTFN's submission that the Project will not promote the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario in accurate.

14. Although according to s. 96(2) of the *Act*, one of the criteria that the Board must consider in relation to a leave-to-construct application is the promotion of renewable energy sources, there is no requirement that an applicant prove that a project will promote the use of renewable energy sources.

15. Nevertheless, Hydro One disagrees with COTTFN's submission that the Project will not promote the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario. On the contrary, the Project will significantly promote such use.

16. Government policy mandates an increase in renewable capacity and an expansion of transmission to enable new renewable capacity by, among other things: (i) planning to develop 10,700 MW of non-hydroelectric renewables by 2018; (ii) proceeding with a number of priority transmission projects (including this Project) to incorporate new renewable capacity; and (iii) amending Hydro One's transmission licence to require it to immediately develop this Project and others for the purpose of incorporating new

renewable resources[5]. This Project gives effect to these Government policy objectives. The Project will enhance the deliverability of system resources to enable approximately 500 MW of new renewable generation in the west of London transmission area and will assist in meeting the 2018 non-hydro renewable target. It will also increase transfer capability and enable approximately an additional 100 MW of firm capacity to be delivered from the west of London transmission area to the rest of the Province.

17. COTTFN's submission that, despite the foregoing, the Project does not conform with Government renewables policy because it does not guarantee the set-aside of existing or new transmission capacity for Aboriginal projects, misconstrues the nature and scope of the Minister of Energy's Directive of April 5, 2012 ("the Directive") and the Board's jurisdiction under s. 92 of the *Act*.

18. The Directive is addressed to the OPA, not the OEB. It governs the OPA's obligations in offering future FIT contracts, specifically the preference that the OPA must accord to FIT projects with significant Aboriginal participation; it does not govern the Board's authority in assessing the need for transmission expansion. The obligations outlined in the Directive are also at the overall program or Province-wide level: they are neither area-specific nor location-specific.

19. Further, Hydro One respectfully submits that it is not appropriate for COTTFN, under the auspices of a leave-to-construct application, to ask the Board to indirectly regulate and fetter how the OPA carries out its future FIT obligations.

20. Lastly, Hydro One submits that the granting of leave to construct will not in any way undermine the Minister's direction to the OPA to allocate a portion of future FIT capacity to Aboriginal projects. On the contrary, it will likely facilitate it, for the following reasons:

[5] *Ontario's Long Term Energy Plan,* p. 46; *Minister's Directive to the OEB*, February 17, 2011

(a) The Project will enable the deliverability of system resources to enable approximately 500 MW of renewable generation in the west of London area that, in the absence of the Project, would not exist. This added capacity will be available for all developers, including projects with Aboriginal participation[6];

(b) The OPA has confirmed that it will comply with the Directive's requirement to allocate FIT capacity for Aboriginal projects in the following response to COTTFN's Interrogatories:

> "In accordance with the April 5, 2012, Directive sent to the Ontario Power Authority by the Minister of Energy, the OPA shall amend the FIT program rules to encourage, among others, Aboriginal participation in the program by prioritizing applications through a points system. The OPA will also allocate a minimum of 100 MW of the available capacity to projects with greater than or equal to 50 per cent community or Aboriginal equity participation throughout the province when offering contracts for small and large FIT projects. Additionally, in order to ensure continued Aboriginal participation in the electricity sector, the OPA will amend the Aboriginal Energy Partnerships Program to align with the goal of prioritizing Aboriginal participation in the FIT program, and to expand eligibility to include projects developed pursuant to the Green Energy Investment Agreement. The OPA will amend the Aboriginal Renewable Energy Fund to focus on supporting projects in the design, development and regulatory approvals phases.
>
> These measures, which are available to Aboriginal projects across the province, are also available to Aboriginal projects whose traditional territories are crossed by the proposed upgrade project."[7]

COTTFN's submission that the Ontario Crown has failed to discharge its constitutional duties to consult and accommodate COTTFN in respect of the Project is inaccurate.

21. As set out in Hydro One's Response to COTTFN Interrogatory #4 List One (Exhibit 1-2-4), Hydro One has undertaken consultation activities with COTTFN, including providing notice, information, and meeting with representatives from COTTFN

[6] COTTFN Interrogatory #2, Exhibit I, Tab 2, Schedule 2, Responses #7 and #8
[7] COTTFN Interrogatory #2, Exhibit I, Tab 2, Schedule 2, Response #7

in a manner that corresponds with the strength of the claim and the potential impairment.

22. Hydro One submits that the constitutional duty to consult and, where appropriate, accommodate, corresponds with the potential effect of a project on an Aboriginal claim or right. The Project is only a reconductoring project: as previously noted, the associated work will have extremely minimal impact on the ground and air. There is no evidence or assertion of a causal relationship between the proposed reconductoring and any potential for adverse impacts on COTTFN's pending Aboriginal claims or rights. It is not sufficient for COTTFN to allege past wrongs or previous breaches of the duty to consult, as is seen in the Affidavit of Chief Joe Miskokomon. The Supreme Court of Canada has made clear that the subject of the consultation is the impact on the claimed rights of the current decision under consideration. In the words of the Chief Justice:

> [49]The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy[8].

23. Hydro One submits that since the Project makes no perceptible changes to the existing line, potential impacts on traditional harvesting are extremely minimal; and the constitutional duty of consultation, which will give rise to a duty of accommodation only if a right could be impaired by a project, has been fulfilled. Although Hydro One is prepared to meet further with COTTFN, Hydro One submits that it has satisfied consultation and accommodation requirements.

[8] *Supra footnote 2* at para 49.

Conclusion

24. Hydro One respectfully submits that COTTFN has provided no grounds to justify the delay or denial of the subject Application.

DATED at Toronto this 27th day of July, 2012.

All of which is respectfully submitted.

HYDRO ONE NETWORKS INC.
By its counsel,

ORIGINAL SIGNED BY CAROLANN M. BREWER

Carolann M. Brewer

Indian Act[1]

R.S.C., 1985, c. I-5

INTERPRETATION

"band" means a body of Indians

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty, or

(c) declared by the Governor in Council to be a band for the purposes of this Act;

……

"reserve"

(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands;

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[1] Taken from http://laws-lois.justice.gc.ca/eng/acts/I-5/page-1.html on July 26, 2012.

Indian Act[1]

R.S.C., 1985, c. I-5

INTERPRETATION

POSSESSION OF LANDS IN RESERVES

Grants, etc., of reserve lands void

28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

Marginal note:Minister may issue permits

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

R.S., c. I-6, s. 28.

LANDS TAKEN FOR PUBLIC PURPOSES

Marginal note:Taking of lands by local authorities

35. (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

Marginal note:Procedure

(2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.

Marginal note:Grant in lieu of compulsory taking

(3) Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

Marginal note:Payment

(4) Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

R.S., c. I-6, s. 35.

[1] Taken from http://laws-lois.justice.gc.ca/eng/acts/I-5/page-1.html on July 26, 2012.

CONSTITUTION ACT, 1982[1]

1982, c. 11 (U.K.), Schedule B

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

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.

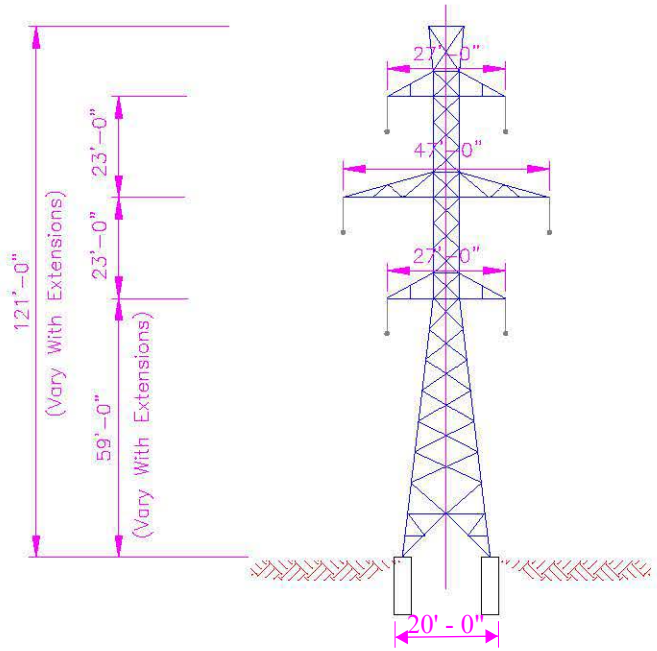
Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

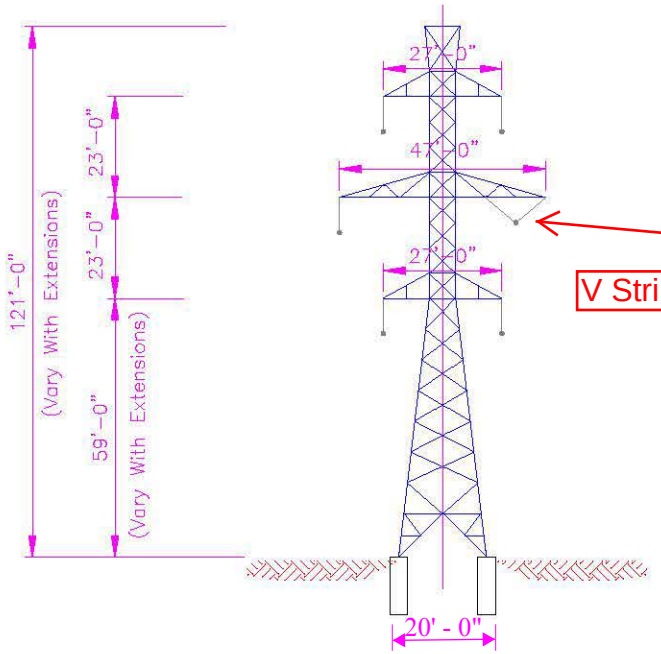
Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (96)

[1] Taken from http://laws.justice.gc.ca/eng/Const/page-16.html#h-52 on July 26, 2012



Existing



Modified

One Mid Arm Insulator Changed to V String
***Towers 78, 79 and 80 only**

CROSS SECTION OF TOWER TYPES