

January 15, 2013

Minister Chris Bentley  
Ministry of Energy  
900 Bay Street, 4th Floor  
Hearst Block  
Toronto ON M7A 2E1

Dear Minister Bentley,

**RE: MÉTIS CONCERNS ON EAST-WEST TIE DESIGNATION PROCESS**

I write on behalf of the Métis Nation of Ontario (“MNO”) to bring to your attention our concerns respecting how Ontario Government policy is being implemented and understood in the context of the Ontario Energy Board (“OEB”) designation process for East-West Tie Transmission Line (the “EWT”),

As you know, the current designation process is the first of its kind for Ontario. It is the first application of Ontario Government policy as set out in the Long Term Energy Plan (“LTEP”) with respect to encouraging aboriginal partnerships in new transmission projects. It is also the first time in which the OEB will exercise its new mandate pursuant to section 1(1)5 of the *Ontario Energy Board Act* to promote Ontario Government policy with respect to a major transmission project.

As I have indicated in previous letters and public statements, the MNO is very supportive of the Ontario Government’s agenda to build a green economy and increase renewable energy production. The MNO is also very supportive of the Ontario Government’s commitment to increasing aboriginal community involvement in energy planning as well as aboriginal community participation and partnerships in both energy generation and transmission. As such, we have a common goal in seeing the policy objectives of the LTEP being achieved.

The MNO is increasingly concerned, however, that the implementation of the LTEP’s policy commitments, in the context of the current EWT designation process, run the risk of being compromised and falling short of the promise Métis communities have relied upon. This would be a truly unfortunate result and I am writing in an attempt to avoid such a situation from arising.

The starting point for the MNO is the LTEP, which was released on November 23, 2010. The LTEP is the Ontario Government's clearest articulation of its policy with respect to energy planning and development, including, new transmission, in the province. It is intended to guide the decisions and actions of the Ministry of Energy, along with Ontario's energy related agencies, authorities and corporations such as the Ontario Energy Board, the Ontario Power Authority, Hydro One, Ontario Power Generation and the Independent Electricity System Operator. The MNO, along with other aboriginal communities, provided input into the LTEP's development and rely on its commitments in relation to our participation in Ontario's energy sector. Specifically, in relation to new transmission, Ontario makes the following policy commitments with respect to First Nations and Métis communities in the LTEP:

Where new transmission lines are proposed, Ontario is committed to meeting its duty to consult First Nation and Métis communities in respect of their aboriginal and treaty rights and accommodate where those rights have the potential to be adversely impacted. Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of this interest may vary between communities.

There are a number of ways in which First Nation and Métis communities could participate in transmission projects. Where a new transmission line crosses the traditional territories of aboriginal communities, Ontario will expect opportunities be explored to:

- 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. (emphasis added)

In March 2011, your predecessor, Minister Duguid, wrote to the OEB asking the Board to initiate a designation process for the EWT “consistent with the intents identified in the Long-Term Energy Plan”. In that same letter, Minister Duguid reminded the OEB of the LTEP's policy commitments to aboriginal communities in the context of the EWT. Based on this direction, the OEB initiated a proceeding to designate a transmitter for the EWT in February 2012. At that time, the Board also invited submissions on the appropriate criteria for the designation process.

It is worthwhile to note that in the Board's consideration of the criteria for designation, a number of intervenors and prospective transmitters made submissions that would have minimized the significance of the LTEP's policy commitments to aboriginal communities in relation to the EWT. Notably, OEB staff submissions argued that aboriginal participation in the EWT should only be a filing requirement, as opposed to a designation criterion. The MNO made submissions seeking to rectify this confusion, and ultimately, the Board's decision of July 12, 2012, stated clearly that aboriginal participation was, in fact, a distinct designation criterion.

The designation process has moved on to a next phase. All prospective transmitters have now filed their proposals to build the EWT with the OEB. Unfortunately, it appears that some potential transmitters continue to misunderstand or ignore the commitments made to First Nation and Métis communities in the LTEP. Some prospective transmitters have proposed “aboriginal participation models” that effectively preclude any potential for commercially feasible partnerships with Métis communities whose traditional territories will be physically crossed by the EWT.<sup>1</sup> Specifically, some prospective transmitters have set out fixed EWT partnership arrangements with First Nations that expressly exclude even the potential of Métis community partnerships, or they propose to offer EWT partnership opportunities only to First Nations.

**These exclusionary approaches to EWT partnership opportunities are fundamentally inconsistent with Ontario policy.**<sup>2</sup> As set out above, the LTEP commits that Ontario will “encourage transmission companies to enter into partnerships with aboriginal communities” where: (1) the aboriginal communities have expressed an interest in partnership, and, (2) the new transmission project crosses the traditional territories of those aboriginal communities. Importantly, this policy commitment is made to all “aboriginal communities” who meet the abovementioned conditions, including, First Nation and Métis communities. Logically, this policy commitment is not made to aboriginal communities whose traditional territories would not be crossed by the new transmission project.<sup>3</sup>

In the context of the EWT, we have Métis communities that meet these conditions. Firstly, the MNO has “expressed an interest” to partner on the EWT. This has been conveyed in meetings with government officials as well as to prospective transmitters that have been willing to meet with the MNO. Also, as you are well aware, the \$30 million Métis Voyageur Development Fund was created to facilitate these types of equity partnerships with Métis communities in resource related projects. Secondly, the EWT will be “crossing through [the] traditional territories” of recognized rights-bearing Métis communities. These communities meet the legal test set for establishing Métis rights set out by the Supreme Court of Canada in *R. v. Powley*, [2003] 2 S.C.R. 207 (“*Powley*”). Notably, Ontario has already identified Métis communities in the areas the EWT will directly pass through for the purposes of Crown consultation.<sup>4</sup> This identification was based on the actual knowledge Ontario has with respect to Métis rights claims in this region as well as discussions and negotiations between Ontario and the MNO on Métis rights issues.<sup>5</sup> Further, Ontario has already accommodated Métis harvesting rights in this region through a negotiated harvesting agreement with the MNO.

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<sup>1</sup> The MNO notes that in the LTEP the commitment to potential “partnership” (i.e., ownership) with aboriginal communities whose traditional territories are crossed by new transmission is different from “participation”, which may include training, employment, contract opportunities, etc. “Partnership” provides the opportunity for an aboriginal community to share in the earnings from the project, whereas “participation” is temporal and usually limited to pre-development and construction phases. “Partnership” is more fitting for a project that will remain on an aboriginal community’s traditional territory for generations, enabling the community to share in benefits for the project’s lifetime.

<sup>2</sup> The MNO notes that the exclusion of Métis communities from partnership opportunities is inconsistent with the implementation of other aspects of the LTEP. For example, in the recent call for small Feed-In-Tariff (FIT) projects (which includes a 25 MW set aside for aboriginal community partnership projects) a total of 8.3 MW of this set aside is for Métis communities.

<sup>3</sup> For example, for the purposes of Crown consultation, Ontario may identify a larger number of First Nation and Métis communities who require consultation in relation to the project, but the line may not directly cross the traditional territories of those First Nations or Métis communities, thereby not triggering this policy commitment.

<sup>4</sup> Letter from Ministry of Energy to Ontario Power Authority re: aboriginal consultation dated May 31, 2011.

<sup>5</sup> For historic research on Métis claims see: <http://www.metisnation.org/registry/historicresources>.

The law is clear that Métis communities have traditional territories, similar to First Nations. Specifically, in *Powley*, the Supreme Court upheld expert evidence that concluded “[i]n the mid-19th century, the Métis way of life incorporated many resource harvesting activities. These activities, especially hunting and trapping, were done within traditional territories located within the hinterland of Sault Ste. Marie.”<sup>6</sup> Further, the Supreme Court has confirmed there is no hierarchy between First Nation treaty rights and aboriginal rights *qua* Métis that are protected by s. 35 of the *Constitution Act, 1982*.<sup>7</sup>

While the law as it relates to Métis rights provides important context for the MNO’s concerns, I want to make it clear that the concerns raised in this letter are not grounded in a rights claim. The government’s LTEP policy commitments as they relate to new transmission seek to remedy part of the difficult history of energy development in Ontario and its disproportionate impacts on First Nations and Métis communities. This policy (along with other aboriginal participation policies set out in the LTEP) are now stand-alone policy goals and operate independently of any other legal obligations of the Crown respecting the duty to consult and accommodate or other constitutional duties.

The Ontario Government, through its clearly stated policy objectives, has obligated itself to ensure these commitments can be realized through the processes it uses to operationalize the LTEP generally and the EWT’s transmitter designation specifically. The MNO acknowledges that this policy commitment does not require partnership agreements be reached with all eligible aboriginal communities. However, at the very least, the policy requires the opportunity for partnership be provided to all eligible aboriginal communities. A course of action that renders these LTEP commitments meaningless to either First Nations or Métis communities cannot be pursued. Put simply, a process that could result in the selection and designation of a transmitter whose proposal completely forecloses opportunities for eligible aboriginal communities would be a breach of current Ontario policy.

Consistent with other government policy commitments made in a wide array of areas to Ontarians generally or aboriginal communities specifically, these policies must be implemented and applied fairly and in a non-discriminatory manner. The LTEP’s aboriginal partnership policy objective with respect to new transmission was created for First Nations and Métis communities. The LTEP does not support an interpretation that aboriginal partnership opportunities on new transmission are to be limited to First Nations. If this policy was to be implemented in a manner that completely excludes Métis communities from potentially benefiting from it, such a result would be discriminatory.<sup>8</sup> Further, a government decision that permits or promotes such an exclusion would clearly be unreasonable.

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<sup>6</sup> *Powley*, para. 43. See also *Powley*, para. 20.

<sup>7</sup> *Powley*, para. 50.

<sup>8</sup> The MNO notes that this policy was created for the benefit of First Nations and Métis communities. While section 15(2) of the *Canadian Charter of Rights and Freedoms* allows for governments to create distinct programs and policies for First Nations or Métis communities that would not amount to discrimination, this policy was created for the benefit of both First Nations and Métis communities. It was not targeted solely to First Nations. As such, the exclusion of Métis communities would not fall within the protection of s. 15(2).

In addition, since this is the first designation process in Ontario, the improper interpretation and application of policy now is particularly damaging as it will set a precedent that will remain a detriment to aboriginal communities as well as the development of a new and competitive energy sector. If an established designation process permits prospective transmitters to arbitrarily exclude eligible aboriginal communities from economic partnership opportunities, it will create a dangerous situation where companies can “pick and choose” among aboriginal communities with whom to partner, rather than providing equal opportunity to all that are eligible. In the future, transmitters may “game” the process by making excessive or commercially unfeasible offers to only a few aboriginal communities in order to “lock up” designation based on a participation proposal that excludes many eligible aboriginal communities who should benefit from a transmission project on their traditional territories. Such outcomes will only sow seeds of inequity and discontent among neighbouring aboriginal communities, undermine the laudable objects of the LTEP and frustrate energy sector efficiency.

Based on the points outlined above, it is clear that the policy commitments set out in the LTEP with respect to EWT aboriginal partnership must be facilitated by both the Ontario Government as well as the OEB in this designation process. These policy objectives will be undermined if a transmitter is designated who has refused to engage in or even consider the possibility of a commercially feasible partnership with relevant Métis communities. Such a result would constitute a breach of the commitments in the LTEP owing to Métis communities, and discrimination against Métis communities.

It is clear to the MNO that Ontario policy requires, at a minimum, that a designated transmitter must be willing to engage in partnerships discussion with aboriginal communities whose traditional territories will be crossed by the EWT. In its future submissions to the OEB, the MNO will take the position that the Board should not even allow a prospective transmitter to proceed with a proposal that is destined to run afoul of the commitments in the LTEP without fair notice to that transmitter and an opportunity to clarify or remedy their proposal. In the meantime, the MNO is bringing this issue to your attention, as your Ministry has an interest and responsibility to ensure that the policy objectives and commitments in the LTEP are met.

Sincerely yours,



Gary Lipinski  
President

c.c. Ontario Energy Board  
Parties to EB-2011-0140  
Cam Burgess, MNO Regional Councilor  
Trent Desaulnier, President, Superior North Shore Métis Council  
Jean Carmirand, President, Thunder Bay Métis Council  
William Gordon, Greenstone Métis Council