

VIA RESS, EMAIL AND COURIER

November 13, 2017

Ms. Kristi Sebalj
Registrar
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

**Re: EB-2017-0182 – Upper Canada Transmission, Inc. (UCT or NextBridge)
Application for Leave to Construct a Transmission Line
Hydro One Networks Inc. (Hydro One) – Intervenor Status Request
NextBridge Response**

I. Introduction

On July 31, 2017, NextBridge filed a Leave to Construct application (LTC) for the East-West tie transmission line project between Thunder Bay and Wawa (EWT Line Project) (the Proceeding). On October 12, 2017, the Ontario Energy Board (OEB or Board) directed NextBridge to provide notice of the LTC proceeding to interested parties.¹ On October 23, 2017, Hydro One filed an Intervenor Status Request in which it stated:

As the new proposed East-West Tie line will connect to transmission assets and facilities owned and operated by Hydro One, and Hydro One will also be required to upgrade associated transmission stations to accommodate the line, Hydro One has significant interest in this Application.²

On September 22, 2017, without notice to NextBridge, Hydro One advised the Board that Hydro One was prepared to submit an alternative leave to construct application for the EWT Line Project (Competing LTC).

On November 2, 2017, the OEB issued a letter to Hydro One requesting Hydro One clarify the nature of its interest in the Proceeding, as well as the nature and scope of its proposed participation. On November 6, 2017, Hydro One responded that one of the

¹ Ontario Energy Board Letter of Direction to NextBridge dated October 12, 2017.

² Hydro One Intervenor Status Request letter dated October 23, 2017 (Intervener Request Letter), at p.1.

reasons for the intervention was to “. . . receive information that will be considered for Hydro One’s own intended s. 92 application for leave to construct the line.”³

NextBridge appreciates that the OEB inquired further into Hydro One’s interests in relation to the Proceeding, and, thereby, brought this issue to light.

In response to the OEB request, Hydro One has, among other things, clarified what was apparently its intention all along to use the Proceeding to benefit its own Competing LTC for the EWT Line Project. With respect, this is not appropriate. NextBridge was not aware of Hydro One’s intention until it was revealed by the Board, and, as a result, NextBridge did not address it in considering the appropriateness of Hydro One’s initial Intervention Request.⁴

NextBridge, therefore, submits that the OEB should strictly limit Hydro One’s intervenor status in the Proceeding to matters related to interconnection of the NextBridge EWT Line Project to Hydro One transmission facilities and to ensure that Hydro One does not use its status as the province’s incumbent transmitter to compete unfairly against NextBridge’s LTC.

Further, NextBridge emphasizes the importance of the Board expeditiously considering NextBridge’s LTC application, and that neither Hydro One’s intervention nor any other potential intrusion distract from the consideration of the LTC.

Each of these points is developed further below.

II. Hydro One Rights of Participation Should Be Limited

Rule 22.02 of the Board’s Rules of Practice and Procedure provides:

22.02 The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross examining a witness.⁵

This rule thus requires that the person seeking intervenor status show it intends to “. . . participate . . . responsibly in the proceeding. . . .” Responsible participation means contributing to the record in a way which permits the Board to make a reasoned decision in an efficient manner. As the Board recently stated in refusing an intervention request in a rates application, “. . . a distribution utility’s rate case is not a research forum and it is important for the OEB to ensure that the time and resources allocated to

³ Hydro One Intervenor Status Request clarification letter dated November 6, 2017 (Clarification Letter), at p.2.

⁴ In providing this response, NextBridge acknowledges that it is not within the strict time limit provided in the Board’s Rules of Practice and Procedure. NextBridge did not object to Hydro One’s proposed intervention when it was filed on October 23, 2017 because it was not aware at the time that Hydro One intended to file the Competing LTC. NextBridge confirms that this response to the Clarification Letter is within the time limit prescribed by the rules.

⁵ Ontario Energy Board Rules of Practice and Procedure (Board Rules), Rule 22.02 at p.19.

a rate case are as time and cost efficient as possible.”⁶ The same considerations apply in leave to construct applications.

Hydro One’s own statements indicate that it intends to participate not simply as an intervenor with an interest in how the EWT Line Project interconnects to its stations (which NextBridge agrees constitutes a legitimate, albeit narrow, interest in the NextBridge LTC proceeding), but, additionally, as a competitor that is intent on using, and potentially disrupting, slowing, and undermining the NextBridge LTC proceeding for the purpose of assisting it in relation to a Competing LTC. To intervene for purposes of seeking to elicit competitive information is not appropriate in that Hydro One’s stated purpose is inconsistent with the purpose of the NextBridge LTC proceeding, which is to determine if the NextBridge LTC satisfies the applicable statutory criteria of the *Ontario Energy Board Act, 1998*, S.O. 1998 (Act).

Hydro One’s intervenor status should, therefore, be conditioned on the requirement that its intervention be restricted to matters for which it has an interest as an interconnecting utility (i.e., how the EWT Line Project interconnects to its stations). The Board should further rule that Hydro One is not permitted to disrupt, slow, or undermine this proceeding nor shall it be allowed to use the proceeding to leverage its incumbent status to further its competitive position.

To achieve this end, it is requested that the Board also direct Hydro One to comply with requirements established by the OEB in the Designation Proceeding.⁷ These requirements are addressed below.

III. Ensuring that Hydro One does not abuse its status as incumbent transmitter

Hydro One, as the incumbent transmitter owning the vast majority of existing transmission facilities in Ontario, is in a position of advantage as compared to other parties seeking to develop transmission facilities in Ontario. Indeed, Hydro One acknowledges these circumstances, advocating that it is “uniquely positioned to provide a cost-effective alternative”.⁸ It remains unclear whether the unique position that Hydro One comments about enables it to capitalize on its incumbent status, or otherwise leverage its position in a way that is not available to others, for example through limiting access to existing facility corridors.

In the EB-2011-0140 Designation Proceeding, the Board acknowledged that “the position of HONI is unique”:

HONI has information critical to the proposed East-West Tie line, as it owns the assets to which the East-West Tie line will connect...[No other transmitter] has the advantage of owning and operating an existing line in this specific

⁶ EB-2017-0049 Procedural Order No. 1, p 6 August 30, 2017 (Revised August 31, 2017).

⁷ EB-2011-0140 Phase 1 Decision and Order dated July 12, 2012, at Appendix A (EWT Designation Filing Requirements).

⁸ Hydro One Letter of Intent to file Leave To Construct Application – East-West Tie Line dated September 22, 2017 (Intent Letter).

area, or of determining the conditions and costing related to connection of the new line to the existing transmission system.⁹

The Board, therefore, ordered that Hydro One be subject to specific restrictions on how it uses its staff and information to preserve “. . . the legitimacy and integrity of the process.”¹⁰

In the Designation Proceeding, the Board noted that Hydro One had established internal protocols that it proposed to use to govern its participation in preparing for a competitive transmission proceeding whether directly or through a third party.¹¹ Attached hereto at Schedule A is an excerpt from Hydro One’s submission providing a summary of the protocols in place as of January 9, 2012.

The Board reviewed the protocols and found that they were inadequate. It therefore imposed the following additional protections on the competitive process with respect to the relationship of Hydro One and EWT LP, the entity through which it decided to participate in Phase 2 the Designation Proceeding, i.e., the Phase where competitive options were to be evaluated:

. . . in order to avoid any real or perceived informational advantage, the Board will require that EWT LP make arrangements to ensure that no individual will be performing work concurrently for HONI and EWT LP during Phase 2 of this proceeding.

...

Employees engaged by EWT LP must be placed in the position where they cannot inadvertently acquire advantageous information from employees currently employed by HONI, and, therefore, the work location of EWT LP must also be physically separated from the HONI offices until the record is closed in Phase 2 of this proceeding. This means, at a minimum, that HONI and EWT LP must not share a computer system or other data management system, and must occupy separate premises.¹²

At this time, Hydro One has not declared an intent to use an associated entity/affiliate to submit the identified Competing LTC. NextBridge submits that whether it be a Hydro One affiliated entity or Hydro One itself developing the Competing LTC, the above-referenced findings are directly applicable.

Just as the Board would not permit Hydro One to use its incumbency for its competitive advantage in the Designation Proceeding, it should not permit Hydro One to use that advantage in other contexts either.

⁹ EB-2011-0140 Phase 1 Decision and Order dated July 12, 2012 (Phase 1 Decision), at p. 23.

¹⁰*Id.*

¹¹ Hydro One letter to OEB Designation Process Information Request - Hydro One Protocols dated January 9, 2012 (Protocol). NextBridge notes that Hydro One instituted additional directives subsequent to January 9, 2012.

¹²Phase 1 Decision, *supra* note 9, at p. 24.

Given that Hydro One intends to effectively engage in a new competitive process through filing a Competing LTC, then the rules of competition that the Board set out to govern Hydro One's activities in the Designation proceeding should also apply to Hydro One's preparation of a Competing LTC. It is critical that Hydro One demonstrate that it has addressed and complied with all relevant requirements outlined during the designation process in this regard, and that appropriate steps are taken to manage information flow and avoid both the appearance and creation of conflicts of interest. Specifically, NextBridge submits that Hydro One be required to institute measures to withhold information regarding Hydro One in its role as incumbent transmitter from persons within Hydro One involved in preparing Hydro One's Competing LTC. NextBridge requests that, going forward, the OEB manage all inquiries regarding information associated with the EWT Line Project from Hydro One employees developing a Competing LTC.

The Board's protections should, therefore, apply from this day forward in relation to Hydro One's preparation of a Competing LTC. If Hydro One has developed a Competing LTC without respecting these protections, it should be required to start over in a manner that does comply with these protections.

In addition to the above protections, additional safeguards are required given Hydro One's recent revelation of its intentions.

As Hydro One acknowledges in its leave to construct application for the EWT station work, NextBridge, IESO and Hydro One worked together to design a transmission solution to meet the transmission needs in northwestern Ontario by 2020.¹³ Over the course of this collaborative development work, Hydro One has requested non-public information from NextBridge. In the interests of efficiency, cooperation and in order to facilitate EWT Line Project and station work development, NextBridge in some instances provided non-public EWT Line Project information to Hydro One that, had it known it was engaging with a direct competitor, it would not have provided. In the circumstances, NextBridge requests the Board direct Hydro One to immediately:

- a. identify any and all records received from NextBridge containing non-public NextBridge information and any records created by Hydro One incorporating non-public NextBridge information related to the EWT Line Project;
- b. prepare a list of all identified records, and provide a copy of this list to NextBridge and the Board; and
- c. after providing the list of identified records to NextBridge and the Board, promptly destroy all listed records, and provide confirmation of such destruction to NextBridge and the Board.

Consistent with Board practice, NextBridge further requests that all information that is of a competitive nature in the future be provided only to Hydro One's counsel on the understanding that it will not be shared with others at Hydro One.

¹³ EB-2017-0194 Hydro One Application for Leave to Upgrade Existing Transmission Station Facilities in the Districts of Thunder Bay and Algoma at p.2, lines 3-5.

Additionally, as further protection to ensure that Hydro One's participation in this proceeding is responsible, NextBridge requests that all information requests that Hydro One submits be vetted by the Board to ensure that they only address information that is necessary for Hydro One's legitimate participation in this proceeding.

Finally, NextBridge requests the Board expressly require Hydro One continue to engage and work cooperatively and in a timely manner with NextBridge in furtherance of all matters related to EWT Line Project development including right-of-way access, crossings and interconnection.

IV. Expeditious Consideration of NextBridge LTC Application

NextBridge filed its LTC application for the EWT Line Project on July 31, 2017. With that filing, the Board has before it an application that meets all of the OEB filing requirements in relation to a project that has been designated by Order in Council as a priority project with an in service date of 2020. Hydro One may or may not submit an alternative s.92 application for the EWT Line Project.¹⁴ It is incumbent on the OEB to respect the Order in Council designating the EWT Line Project as a priority project and proceed to consider NextBridge's application expeditiously so as not to jeopardize the 2020 in-service date, among other reasons. If and when a Competing LTC is filed for the EWT Line Project by Hydro One or another party, NextBridge expects the OEB will ensure that any such application meets all relevant requirements and is subject to rigorous scrutiny and assessment as is the typical practice of this Board.

V. Critical Components of a Competing LTC

NextBridge has been diligently developing the EWT Line Project since 2013, and in that time has completed extensive development work, including First Nations and Métis engagement, environmental study, identification and assessment of alternatives, land investigation and acquisition, detailed design and stakeholder engagement. NextBridge also engaged in competitive procurement processes so that the construction of the EWT Line Project is at a competitively developed cost.

In the interests of ensuring the OEB and interested parties have the necessary information to appropriately assess a Competing LTC, NextBridge recommends inclusion of the below-referenced elements which arise out of NextBridge's direct experience in relation to the EWT Line Project over the last 4 years, and the broader project development experience of the NextBridge partner entities. Further, given that Hydro One stated it will provide a "not-to-exceed price", NextBridge offers specific criteria that the OEB may wish to use to assess such a price, both on its own merits and in relationship to NextBridge's LTC. Without the adoption of the below guidance on how a Competing LTC will be considered and evaluated, NextBridge is concerned that Hydro

¹⁴ In its first statement declaring an intent to file a Competing LTC application for the EWT Line Project, Hydro One qualified its intent as being "... dependent upon the IESO's updated needs assessment." See Intent Letter, *supra* note 8.

One will submit a Competing LTC that will result in inefficient use of resources, including diverting time and resources away from a review of the NextBridge LTC. The key recommended Competing LTC elements are as follows:

- 1. Demonstration that Hydro One can meet the identified in-service date:** The Order in Council 326/2016 identifies December 2020 as the date by which the EWT Line Project is needed. Hydro One's September 22, 2017 letter clearly indicates that it will not be in a position to meet the 2020 in-service date, stating only that it expects to "substantively" meet the timeline needs for the EWT Line Project.¹⁵ To submit an alternative s.92 LTC for the EWT Line Project that does not meet a fundamental project requirement is not consistent with the Order and Council, and, therefore, not in the public interest. Any Competing LTC by Hydro One (or any other party) should be required to demonstrate that it can meet the Order in Council in-service date and include all necessary information related to having obtained conditional approval to connect from the Independent Electricity System Operator (IESO). Specifically, Hydro One would need to show that it has the necessary connection assessments from the IESO, which historically take many months to complete. As at September 11, 2017, there is no evidence on the IESO website that a connection assessment for an alternate to the NextBridge EWT Line Project has been initiated by Hydro One. To meet the timely in-service date, Hydro One must also complete much more than the LTC and connection assessment. For example, since 2013 NextBridge has been executing critical path activities, such as public consultation and the filing of an Environmental Assessment, engaging 18 indigenous communities identified by the Crown in its delegation of the procedural elements to the Duty to Consult, completion of economic participation agreements with the proximate First Nations, advancing negotiations with the Métis Nation of Ontario, and working with various ministries to advance the permitting process.
- 2. Compliance with EWT Line Project Filing Requirements:** The process that resulted in NextBridge being selected as the most-qualified transmitter to develop the EWT Line Project by the Board involved adoption of specific filing requirements that each transmitter seeking designation was required to comply with.¹⁶ NextBridge submits that any Competing LTC must also adhere to and provide the information required in the EWT Designation Filing Requirements. Additionally, any Competing LTC application should explain how the Competing LTC meets the identified need in a better way than the NextBridge LTC and why the Competing LTC should be approved for construction and operation.
- 3. Cost estimate quantification and clarity:** Hydro One provides that, depending on the outcome of the IESO needs assessment, it intends to submit a Competing LTC application for the EWT Line Project that is a cost-effective transmission solution incorporating a "not to exceed price".¹⁷ Unlike NextBridge, which has spent 4 years

¹⁵ *Id.*

¹⁶ EWT Designation Filing Requirements, *supra* note 7.

¹⁷ Intent Letter, *supra* note 8.

diligently developing and refining its cost estimates, Hydro One's November 6, 2017 letter mentions a not to exceed proposal: (1) for the first time and with no understanding if it has completed any diligence on its part regarding the costs and work required to complete the EWT Line Project, and (2) with no detail of what is meant by a "not to exceed price" and the foundation for its development. The OEB may wish to consider applying the following additional filing requirements to any not to exceed price proposal to facilitate a clear understanding of any such proposal:

- a. **Mechanism** — Specifics of the not to exceed price cost-containment mechanism; e.g., whether it is a firm cap on the total cost of construction and development, or something else;
- b. **Exclusions** — Clarification and quantification of which project costs are included and which costs will be excluded per the not to exceed price mechanism, accounting for all project costs for which recovery may ultimately be sought in either one bucket or the other;
- c. **Certainty** — Explanation of any adjustments, qualifications, conditions, and/or disclaimers related to the not to exceed price, including key definitions and assumptions;
- d. **Recovery** — Details regarding how the proposed not to exceed price proposal would translate into revenue requirement adjustments in future transmission rate applications;
- e. **Abandonment** — Identification of proposed mitigation for the customer risk that Hydro One could abandon the project if it is trending substantially over-budget, rather than incur the financial penalty prescribed by its cost-containment mechanism;
- f. **Carrying Charges** — Disclosure of whether Hydro One is prepared to waive interest during construction until it has delivered the project at its promised "not to exceed" price;
- g. **Inflation** — Confirmation that the not to exceed price proposal includes the cost of all material, labor and services at the time such expenditures will be made;
- h. **Development** — Certification that Hydro One intends to undertake its own development work, and that it will not seek recovery from customers for these costs; and
- i. **Authority** — Confirmation that the "not to exceed price" proposal has all required internal and board approvals, and that Hydro One is prepared to be bound by it.

VI. Conclusion

In closing, NextBridge reiterates that, pursuant to its role as the designated transmitter to develop the EWT Line Project, NextBridge has developed and prepared a complete LTC for the EWT Line Project. NextBridge remains ready and willing to support the OEB's consideration of that application, submitted over three months ago. NextBridge respectfully requests that the OEB: (1) appropriately limit Hydro One's request for intervener status as set forth above; (2) issue guidance on the elements that a Competing LTC for the EWT Line Project must contain in the event Hydro One or another party seeks to submit a Competing LTC for the EWT Line Project; (3) direct

Hydro One to destroy all NextBridge non-public information received by Hydro One in the course of NextBridge's development of the EWT Line Project; and (4) proceed to expeditiously consider the NextBridge LTC for the EWT Line Project currently before the Board.

Yours very truly,

AIRD & BERLIS LLP

(Original Signed)

Fred D. Cass

Encls.

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Upper Canada Transmission, Inc.

Attachment

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Susan Frank

Vice President and Chief Regulatory Officer
Regulatory Affairs

BY COURIER

January 9, 2012

Ms. Kirsten Walli
Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

EB-2011-0140 – East-West Tie - Designation Process Information Request – Hydro One Protocols

In a letter dated December 22, 2011, the Ontario Energy Board (“Board”) requested Hydro One Networks Inc. (“Hydro One”) to provide a description of the protocols in place to ensure that any information and resources that have been developed or acquired, relevant to the development of the East-West Tie Line, cannot be accessed by any registered transmitter. Additionally, the Board asked Hydro One to describe the protocols developed (or proposed to be developed) regarding the sharing, with all registered transmitters, of information necessary to prepare an application for designation.

Hydro One has identified specific employees to work on the Application for Designation and has issued a mandatory Directive to those employees. The Directive instructs that all inquires are to be made through the Board and not through the normal internal resources. A second mandatory Directive was sent to all other relevant employees that will be working on inquires from all registered transmitters. The second Directive instructs internal resources to direct all inquires to the Board – even if the inquiry originates from Hydro One. Both Directives outline the requirement for all Hydro One employees to follow the Directives and avoid providing EWT LP with any unfair advantage throughout the process for East-West Tie Designation. Both Directives (and an errata sheet) are attached with this response.

Furthermore, all Hydro One employees are bound by the Corporate Code of Conduct. One of three core principles of the Code of Conduct is Integrity. Along with various other obligations, the section states that all employees

“Recognize the value of competition and to not engage in practices that seek to reduce the openness and fairness of competition. We do not prevent others from competing freely and fairly with us, except when constrained by law.”

Hydro One will provide all registered transmitters with equal access to information for the East-West Tie Designation process.

Sincerely,

ORIGINAL SIGNED BY SUSAN FRANK

Susan Frank



Joseph Agostino
General Counsel

DIRECTIVE

September 20, 2011

To: Myles D'Arcey; Nairn McQueen; Wayne Smith; Mike Sheehan; Rick Stevens; Laura Cooke, Susan Frank; LeeAnne Cameron; Bing Young; Ian Bradley; Randy Church; Andrew Skalski

Re: East-West Tie Designation Process—Handling of Inquiries by Persons Seeking Designation

Ontario's Long-Term Energy Plan, published November 23, 2010, identified the need to build the "East-West Tie", a new transmission line along the northern shore of Lake Superior. Pursuant to the Plan, the OEB is conducting a designation process (which it initiated on August 22, 2011) to select the most qualified and cost-effective licensed transmission company to develop the project. As the owner/operator of the transmission system to which the new line will connect (a.k.a. the "incumbent" transmitter), Hydro One can expect to receive requests for information from parties preparing applications for designation. Hydro One itself may seek to be designated to develop the East-West Tie. You are receiving this directive because the nature of work in your area suggests that you may receive requests from internal or external parties for incumbent transmitter information or advice.

To avoid having an unfair advantage in the designation process and to avoid even the appearance that its role as incumbent transmitter gives it an unfair advantage in the designation process, Hydro One is instituting measures to withhold information regarding Hydro One in its role as incumbent transmitter and information related to queries from competitors in the designation process from persons within Hydro One involved in preparing Hydro One's own application for designation. To ensure transparency, the OEB has agreed to manage all inquiries to the 'incumbent' transmitter regarding information associated with the East-West Tie project. Therefore, if you or any of your staff are contacted directly on a matter of this nature, please redirect the inquirer to the OEB, **even if the inquiry originates within Hydro One**. The OEB will then redirect inquiries to Hydro One, as appropriate, and determine whether to disseminate, to all participants, the queries and the responses. Hydro One has designated Philip Poon of Regulatory Affairs to receive all such inquiries redirected by the OEB.

Your cooperation is required to avoid the sharing of any incumbent transmitter information relevant to this initiative, with anyone (including Hydro One staff) participating as an applicant in the East-West Tie transmitter designation process. You must direct everyone in your respective groups who is in a position to provide such information to follow this protocol. If you are unsure whether certain information falls into this category, please contact Philip Poon at (416) 345-5064.

A handwritten signature in cursive script, appearing to read "Joseph Agostino".

Joseph Agostino
General Counsel

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Upper Canada Transmission, Inc.
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Joseph Agostino
General Counsel



DIRECTIVE

September 20, 2011

To: Peter Gregg; Sandy Struthers; Carmine Marcello; Mike Penstone; Rhonda Wise

Re: East-West Tie Designation Process—Maintaining Separation of Roles as Applicant for Designation and Incumbent Transmitter

As the incumbent transmitter, Hydro One can expect to receive requests for information from parties preparing applications for designation. To avoid giving ourselves an unfair advantage in the designation process, and to avoid even the appearance that our role as incumbent transmitter gives us an unfair advantage, we have suggested, and the OEB has agreed, that the OEB manage all inquiries to the 'incumbent' transmitter. Hydro One personnel responding to such redirected inquiries are being instructed not to share such information with you.

For this separation to work, you are asked to make inquiries relating to our existing transmission assets, and the work associated with them, to the OEB, rather than from an internal resource as you would normally. You must direct anyone gathering information on your behalf to follow this protocol as well. The OEB will then redirect all inquiries to Hydro One, as appropriate, through Philip Poon in Regulatory Affairs.

Thanks for your co-operation.

A handwritten signature in cursive script, appearing to read "Joseph Agostino".

Joseph Agostino
General Counsel