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June 06, 2018

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

Attn: Ms. Kirsten Walli, Board Secretary

Dear Ms Walli:

**Re: NextBridge motion for the dismissal of Hydro One's Lake Superior Link
Application**

OEB File No. EB-2017-0364

Written Submissions of the Batchewana First Nation

Further to Procedural Order No. 2 dated May 18, 2018, and with the consent of the Board to file these written submissions on this date, I attach the Written Submissions of the Intervenor Batchewana First Nation. Copies are being sent to the Parties by e-mail simultaneously.

Please contact me with any questions or concerns. I do wish to express my personal appreciation to the panel and to counsel for the consideration shown by consenting to this late filing.

Yours very truly,

A handwritten signature in black ink, appearing to read 'W.B. Henderson', written in a cursive style.

Bill Henderson

cc. All Parties Listed in Procedural Order No. 1 dated April 27, 2018.

**Filed: 2018-06-06
EB-2017-0364
Written Submissions,
Batchewana First Nation**

ONTARIO ENERGY BOARD

EB-2017-0364

**RE: NEXTBRIDGE MOTION TO DISMISS HYDRO ONE'S APPLICATION FOR
LEAVE TO CONSTRUCT THE EAST-WEST TIE/LAKE SUPERIOR LINK PROJECT**

**WRITTEN SUBMISSIONS OF THE INTERVENOR
BATCHEWANA FIRST NATION**

To:

Ontario Energy Board

P.O. Box 2319

2300 Yonge Street, 27th Floor

Toronto ON M4P 1E4

Attn: Ms. Kirsten Walli, Board Secretary

Introduction

1. The **Batchewana First Nation (“BFN”)** supports NextBridge’s motion to have the Application of Hydro One Networks Inc. (“**HONI**”) for Leave to Construct the East-West Tie/Lake Superior Link Project (“**LTC**”) dismissed.

2. BFN’s traditional and current use of its Original Reserve is described in the Affidavit of Chief Dean Sayers together with a Schedule showing that approximately 100 km of the Lake Superior Link crosses within the approximate boundaries of the Original Reserve.¹ There is no evidence before the Board that HONI has ever consulted with BFN about the nature and extent of its s. 35 rights within the Original Reserve.

3. In his oral evidence given at the Technical Conference, Chief Sayers described BFN’s internal procedures to address proposed developments and to serve as a basis for consultation, engagement and accommodation discussions with proponents.²

4. Chief Sayers also described the First Nation’s consultations with NextBridge and its imminent conclusion of a Relationship Agreement with the designated transmitter, NextBridge.³ These established relationships will be disrupted and, at a minimum, First Nation benefits deferred, if the present Motion is not granted.⁴ Complete disruption will ensue if HONI is granted LTC in place of NextBridge.

5. Overall, BFN’s concerns about HONI’s Application for LTC, relate to its assumptions and contingent strategies to meet the “**HONI In-Service Date**” of December, 2021, and HONI’s ability to engage in proper consultation and accommodation as required by section 35 of the *Constitution Act, 1982*.

¹ Affidavit of Chief Sayers, BFN Evidence, filed May 7, 2018, paras. 8 – 16, and Exhibits “A” to “D”.

² Transcript of Technical Conference, May 16, 2018, at pp. 153-54.

³ Counsel was able to clarify the next day that BFN has a Capacity Funding Agreement already in place with NextBridge: Transcript of Technical Conference, May 17, 2018, at p. 89. A general description of such agreements is included in MNO Evidence, filed May 7, 2018, para. 41 at p. 15.

⁴ Chief Sayers describes economic impact of delay in the Transcript of Technical Conference, May 16, 2018, at pp. 158-59. Other Indigenous organizations have made the same point and, in some instances, in greater detail; e.g., Evidence of Chief Collins, Transcript of Technical Conference, May 16, 2018, at pp. 9-11; MNO Evidence, *supra*.

6. In BFN's estimation, NextBridge's Application for LTC advances a realistic plan to achieve an In-Service Date that is one year earlier than HONI's date and that includes the all-important completion of Indigenous Consultation and Accommodation prior to construction.

7. BFN is aware of the Board's position that it has limited jurisdiction to consider the issue of Indigenous Consultation in an application for LTC.⁵ The issue here, however, is not the adequacy of such consultation as a question of law before this panel, rather recognition of the fact that all antecedent and prospective processes do require Indigenous Consultation as a matter of law and dealing with the question of whether those processes, as they relate to the HONI application, can or will be completed in a timely manner⁶ and with minimal risk of legal challenge by First Nations and Metis.⁷

8. It is BFN's position that HONI's proposed schedule for Indigenous Consultation is unrealistic and that its end-date, 2021,⁸ is unacceptable in its own right and pales in comparison to the efforts and success of NextBridge to date in relation to its own Application for LTC.

The NextBridge Motion

9. In its Motion to Dismiss, NextBridge points to the following assumptions HONI asserts in its application, described as "critical" to meet the HONI In-Service Date:

⁵ OEB, *Filing requirements for electricity transmission projects under Section 92 of the Ontario Energy Board Act ("the Act")*, July 31, 2014, 4.3.8 *Exhibit H: Aboriginal Consultation* (p. 17) citing, at fn. 3, EB-2009-0120, Decision on Questions of Jurisdiction and Procedural Order No. 4, issued November 18, 2009 ("Yellow Falls").

⁶ See also BLP Written Submissions, filed June 1, 2018, at paras. 3, 4.

⁷ It may be noted here that one Intervenor, MNO, has already threatened litigation with respect to the HONI Application: MNO Letter to HONI, filed May 14, 2018, at p. 2.

⁸ See HONI Response to Undertaking JT2.9: HONI Response to Undertakings, filed May 25, 2018, Exhibit JT2.9 (p. 201).

(a) that the Ministry of Environment and Climate Change (“MOECC”) will work collaboratively with Hydro One “to implement a regulatory measure, such as a Cabinet exemption” to typical Environmental Assessment (“EA”) requirements;

(b) that NextBridge’s “EA-specific development work” will be made available to Hydro One, which Hydro One says is “critical to mitigate ratepayer costs and ensure a timely in-service date for the Project”; and

(c) that its Application is conditional on it finalizing agreements with directly impacted indigenous communities to be established on mutually agreeable terms “within a short period of time” from receipt of OEB approval.⁹

10. NextBridge also notes the additional assessments approvals and consultations necessitated by HONI’s reference route through Pukaskwa National Park.¹⁰

11. BFN agrees that each of these assumptions is problematic and there is serious doubt whether the steps proposed by HONI to address them can be implemented in a timely and appropriate manner to meet the HONI In-Service Date.¹¹

THE MOECC ISSUE

12. The HONI Application implicates several EA processes, including:

- (a) An individual EA as a “new” project proposal;¹²
- (b) A waiver or declaration relieving HONI of an individual EA;¹³
- (c) The NextBridge EA Approval, to the extent HONI might rely on it; and

⁹ NextBridge Notice of Motion, filed February 27, 2018, at para. 13.

¹⁰ *Ibid.*, at paras. 15, 16.

¹¹ In response to Undertaking JT2.9, HONI provided an updated schedule and GANTT chart for its plan to proceed through to the In-Service Date: HONI Response to Undertakings, filed May 25, 2018, Exhibit JT2.9 (p. 201).

¹² MOECC Evidence, filed May 7, 2018, at p. 2, Issue 1F.

¹³ *Id.*; also pp. 3, 4 re Alternative regulatory measures.

(d) Indigenous proprietary documentation as to traditional use and TK.¹⁴

13. With respect to the option of a declaration, MOECC has provided a list of 10 examples of similar orders and times between request and approval.¹⁵ BFN's review of these precedents indicates that none is analogous to HONI's request, which must leave the panel with considerable uncertainty as to whether such a request would be granted and the time that might be consumed by that process.¹⁶

14. Apart from noting the inherent unfairness of HONI, as an applicant, being able to rely on NextBridge's EA, BFN takes no position on that issue. BFN does assert, however, that its own internal processes, results and reports in relation to the NextBridge Application are proprietary and not available to HONI, by direction of the Board or otherwise, without the prior consent of BFN.¹⁷

15. In sum, it is the position of BFN that HONI's proposed EA measures, assessed on the totality of evidence before the Board, is unrealistic, uncertain and bound to result in more cost and delay than HONI anticipates. Further, to the extent that conditions are added down the road as to Indigenous Consultation and Accommodation by other authorities, those will tend to be untimely and dilatory with respect to what could be known prior to LTC, and is known in regard to the NextBridge Application.

¹⁴ This list does not include the EA required for HONI's reference route through Pukaskwa National Park, which is discussed below.

¹⁵ MOECC Response to Undertaking JT1.30, Parts 1 & 2, filed May 25, 2018.

¹⁶ MOECC's uncertainty as to feasibility and timelines are stated in the Transcript of Technical Conference, May 16, 2018, at pp. 181-84.

¹⁷ See, e.g., the similar position taken by MNO: MNO Evidence, filed May 7, 2018, at p. 9ff. Generally, MOECC has indicated that there are no policies or precedents on these matters: Transcript of Technical Conference, May 16, 2018, at p. 184.

Pukaskwa National Park¹⁸

16. HONI's most recent Schedule, and appended GANTT chart,¹⁹ do not include specific provision for securing a new licence for its right of way through the Park and approval of its replacement infrastructure. HONI has, however, provided a separate schedule for that process in its response to Undertaking JT2.5.²⁰ The anticipated date for such approval and licence renewal is July of 2019, long after HONI's anticipated LTC date.

17. Parks Canada requires a new EA pursuant to federal law and that the duty of Indigenous Consultation and Accommodation be discharged.²¹ The schedule provided in response to Undertaking JT2.5 makes no provision for such consultation and it may be that the issue of consultation and accommodation will be punted down the road as a condition subsequent to Parks Canada's decisions.²²

18. BFN also notes that the HONI reference route includes two legs on either side of the Park that are not covered by existing EAs, and that western leg is subject to court proceedings based on a claim of Aboriginal title.²³ For these reasons, the Pukaskwa Park routing and infrastructure issues introduce several elements of uncertainty that go directly to the feasibility of the HONI In-Service Date.

19. The failure to address adequately Indigenous Consultation and Accommodation, or to be forthright about HONI's intentions with to consultation and accommodation with

¹⁸ See Procedural Order No. 1 dated April 27, 2018, Schedule A, Issue h (Indigenous Consultation).

¹⁹ Footnote 11, *supra*.

²⁰ HONI Response to Undertakings, filed May 25, 2018, Exhibit JT2.5 (p. 96).

²¹ Letter from Parks Canada to HONI, November 27, 2017: NextBridge Book of Documents, filed February 15, 2018, Tab 25 (p. 446).

²² While the matter is far from clear, see, e.g., Transcript of Technical Conference, May 17, 2018, at pp. 51-53.

²³ See BLP Written Submissions, filed June 1, 2018, at para. 9.

respect to the Park and contiguous legs is a serious flaw in HONI's Application and in its evidence on this Motion.

Indigenous Consultation and Accommodation

20. Given the breadth and depth of information the panel has received on the constitutional duty,²⁴ and the self-limited scope of consideration the Board will give to the adequacy of consultation,²⁵ BFN need only stress the importance discharging the duty in terms of timeliness in relation to the feasibility of HONI's Application and proposed schedule. BFN's position is that HONI's Application is woefully deficient on both aspects.

21. The reality is that from this date forward, there could be three distinct time intervals:

(a) Dead Time – the interval between submissions and decision where a First Nation or Metis community might reasonably discern no advantage to any engagement with HONI until it is determined whether HONI's Application for LTC will proceed;

(b) Double Dating – the interval between a decision that HONI's Application can proceed and a decision on which Applicant will get LTC, noting that several First Nations – especially the BLP First Nations – are constrained by existing contractual arrangements to addressing accommodation issues with HONI during this period;

(c) HONI Time – the interval commencing with a decision of the Board to grant HONI the LTC for the Lake Superior Link, which is the realistic date when all Indigenous communities would be notionally free to engage in full negotiations and consultation with HONI.

While this overview is neither applicable nor binding on any Indigenous community, it is certainly realistic and even inevitable with respect to a significant number of them. On the most optimistic view, HONI Time could not commence for another 4-6 months, if it

²⁴ See, e.g., BLP Book of Authorities, filed June 1, 2018, *passim*.

²⁵ See para. 7, *supra*.

commences at all. Against that delay which is readily foreseeable, must be measured the time estimates provided by Intervenor to engage in their own internal processes²⁶ to address a new HONI Application and to complete a full process of engagement and agreement. As Chief Sayers has noted, BFN's obligations to its own lands and its own peoples come before any obligation to participate in a process directed by other governments.²⁷

22. BFN adheres to and advances the principle of free, prior and informed consent as reflected in its Notice of Assertions²⁸ and in [the United Nations Declaration of the Rights of Indigenous Peoples](#). For present purposes, the emphasis is on the word "prior", which means purposeful and meaningful consultation and engagement before major decisions are made. This, in the view of BFN, might well be considered and applied by the Board in relation to its ultimate decision on LTC the Lake Superior Link; if so, the deficiencies of the HONI Application in that regard stand out in relief.

23. The panel will appreciate the reluctance of any First Nation to jettison the relationship and progress made with NextBridge, and to face the daunting prospect of starting over with another Applicant at a stage too late in the process to have meaningful consultation. Because for many, starting over means starting at HONI Time, if the LTC were to be awarded to HONI, that is by definition too late; *a fortiori* when the Board has the example of NextBridge's engagement with Indigenous communities at hand.

24. For all these reasons, BFN submits that HONI's Application for LTC should be dismissed. From its perspective as a First Nation, HONI's Application holds out the prospect of losing a relationship with NextBridge that has been successful, deferring any economic or other advantages currently on offer until they are, if they are, replaced

²⁶ See, e.g., Chief Sayers description of BFN processes: Transcript of Technical Conference, May 16, 2018, at pp. 156-58.

²⁷ *Ibid.*, and see also last para. on p. 154.

²⁸ BFN Evidence, filed May 7, 2018, Exhibit "D" to the Affidavit of Chief Sayers.

by others to be negotiated at some future and uncertain date, and to import uncertainties as to routing and timing decisions that would require First Nations to make assumptions that, on the evidence, are overly optimistic in favour of HONI, if justified at all.

25. There is much more at stake on this Motion than the issue of whether a delay of one year for in-service of the Lake Superior Link is in the public interest. The incipient harm to Indigenous communities is palpable.

Order Requested

26. The Batchewana First Nation respectfully requests an Order granting the NextBridge Motion to dismiss the HONI Application for Leave to Construct the East-West Tie Line/Lake Superior Link.

Costs

27. As noted in its intervention request, the BFN will be requesting an award of costs for its participation in this proceeding. In the Board's Practice Direction No. 1 dated April 27, 2018, at p. 2, BFN was found eligible to apply for an award of costs pursuant to applicable procedures and a further ruling by the Board. BFN therefore requests the assistance of the Board in advising what information will be required for such an order of costs and when it will be appropriate to apply for it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June, 2018

BATCHEWANA FIRST NATION