EB-2017-0182/0194/0364

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Upper Canada Transmission, Inc. under section 92 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B) for an Order or Orders granting leave to construct a new double circuit 230 kV electricity transmission line between Thunder Bay and Wawa;

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to s. 92 of the Act for an Order or Orders granting leave to upgrade existing transmission station facilities in the Districts of Thunder Bay and Algoma.

SUBMISSIONS OF HYDRO ONE NETWORKS INC. (NEXTBRIDGE DEVELOPMENT COSTS)

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EB-2017-0182/0194/0364

SUBMISSIONS OF HYDRO ONE NETWORKS INC.

I Introduction and Overview

1. These are the submissions of Hydro One Networks Inc. ("HONI") in the application of NextBridge ("NB") to allow it to recover from ratepayers a portion of its development costs for the East-West Tie ("EWT").

2. In the EB-2011-0140 "*East-West Tie Line Designation Phase 2 Decision and Order*" dated August 7, 2013 (the "Designation Decision"), the Ontario Energy Board ("OEB") approved the recovery by NB of $22.2 million in development costs. NB now seeks the recovery of an additional $17.8 million in development costs, for a total of $40.2 million. We will refer to the $17.8 million hereinafter as the "Excess Development Costs". We will also refer hereinafter to the process leading to the Designation Decision as the "Designation Process".

3. For the reasons set out below, HONI submits that NB should only be able to recover Excess Development Costs that satisfy the following tests:

(1) The Excess Development Costs were caused by circumstances that could not be foreseen at the time of the Designation Decision and were out of NB's control;

(2) There is objective evidence that the Excess Development Costs were prudently incurred; and

(3) The amount of Excess Development Costs that satisfy the first two tests can be precisely determined.

4. In addition, and again for the reasons set out below, HONI submits that the recovery of any Excess Development Costs should be subject to certain conditions.

5. These submissions are in the following parts:

(1) An analysis of the tests which HONI submits the OEB should apply in considering whether to allow the recovery of any portion of the Excess Development Costs;

(2) A description of the context which HONI submits should govern how those tests are applied; and

(3) A consideration of the individual Excess Development Costs.

II The Tests

6. HONI submits the OEB must first determine what tests it will apply in determining how much, if any, of the Excess Development Costs it will permit NB to recover from ratepayers.

7. HONI will divide its consideration of the tests into two parts. In the first HONI will analyse what NB proposes that the tests be. In the second HONI will set out what it submits are the correct tests.

(1) The NextBridge Tests

8. In its Argument-in-Chief ("AIC") NB refers to the decisions of the Supreme Court of Canada ("SCC") in the cases of *Ontario (Energy Board) v. Ontario Power Generation Inc.* 2015 SCC 44 (the "OPG case") and *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)* 2015 SCC 45 (the "ATCO case") and suggests that those cases establish the tests the OEB should apply in deciding whether to allow it to recover the Excess Development Costs.

9. In the OPG case, the SCC distinguished between forecast costs and committed costs. The latter are costs which a utility has already spent, or has entered into a binding commitment or subject to other legal obligations that leave it with no discretion.

10. NB argues that the Excess Development Costs are committed costs. On that basis, and relying on the ATCO case, NB asserts that the OEB should apply what the SCC described as the "no hindsight prudence test" that is a test which turns on the circumstances that existed when the costs were incurred.

11. NB then argues that the circumstances that should govern the consideration of the Excess Development Costs are the following:

(1) Ontario Power Authority's ("OPA") recommendation in September of 2014 that the in-service date be extended;

(2) The extension of the development period from 18 to 48 months;

(3) Unbudgeted costs, consisting of costs for Indigenous participation and land acquisition; and

(4) Denial of access to Pukaskwa National Park and route changes.

12. HONI will, below, address these four circumstances. It is HONI's position that none of these circumstances, whether alone or in combination, allow the OEB to conclude that the Excess Development Costs should be eligible for recovery. In addition, none of these circumstances, alone or in combination, allow the OEB to conclude that the Excess Development Costs were prudently incurred.

13. HONI submits that NB's reliance on the OPG case and the ATCO case is misleading and distorts the tests which HONI submits the OEB should apply in considering the Excess Development Costs.

14. HONI submits that the analysis of costs in the OPG and ATCO cases is not useful in the consideration of the Excess Development Costs. Among other things, those Costs are not committed costs in the sense in which that term is used in those cases.

15. HONI submits that the Excess Development Costs must be considered in the unique circumstances created by the Designation Process. Using the framework created by that Process, the Excess Development Costs must be seen not as committed costs, but as costs which exceeded permitted amounts and which, with the exception of one category, were incurred either because NB had underestimated its development costs in the Designation Process or decided not to include the costs in the Designation Process. HONI submits that the costs in both of those latter categories are solely the responsibility of NB and should not be recovered from ratepayers unless NB led evidence to prove otherwise.

(2) **The Correct Tests**

16. HONI submits that NB's claim for the recovery of development costs should be considered using the following tests:

(1) Whether, and if so to what extent, Excess Development Costs are those which NB underestimated in the Designation Process or failed to include in the forecasts in the Designation Process;

(2) Whether the Excess Development Costs could not have been foreseen at the time of the Designation Process and were out of NB's control;

(3) Whether Excess Development Costs were caused by the extension of the development phase as opposed to being incurred in that phase;

(4) Whether allowing NB to recover Excess Development Costs would be contrary to OEB policy, in that it would undermine the integrity of the competitive Designation Process and be unfair to other parties in that Process;

(5) Whether there is sufficient evidence, or indeed any evidence, upon which the OEB can conclude that the Excess Development Costs were prudently incurred; and

(6) Whether the OEB can identify the precise amount of the Excess Development Costs eligible for recovery.

17. The tests which the OEB applies must consider the impact, on what we will call the integrity of the competitive Designation Process, of allowing NB to recover Excess Development Costs. The parties to the Designation Process were expected to provide their best estimates of their development costs. NB should, barring evidence of exceptional circumstances, be considered to be bound by its Designation Process cost forecasts approved by the OEB.

18. The unique circumstances of the Designation Process and Decision also distinguish this case from the ordinary practice of allowing successful applicants a "band of tolerance" of plus or minus 10% for their estimated costs. Because of the unique circumstances

of this case, NB should be responsible for costs which it failed to include or which it underestimated in the Designation Process. To now allow NB to recover costs that it underestimated or failed to include is unfair to the other parties and undermines not just the integrity of the Designation Process but the OEB's policy of promoting competition in the provision of transmission.

19. HONI submits that NB has filed no evidence upon which the OEB can find that the additional costs have been prudently incurred. HONI acknowledges that there is argument that one category of the Excess Development Costs was caused by a factor that could not have been forecast at the time of the Designation Proceeding and which was beyond NB's control. That category consists of the delay in the in-service date, the consequent need for NB to maintain an infrastructure over the extended development period, and the denial of access to Pukaskwa National Park. However, even for costs in that category, NB has failed to provide evidence by which the OEB can assess the prudence of the amount of the costs. The OEB is not required to, and should not, speculate as to whether all or a portion of the costs, caused by this factor, were prudently incurred. Finally, NB's evidence of the amount of costs in that category is vague and imprecise.

20. Regardless of how the tests which NB must meet are formulated, its overriding obligation is to satisfy the OEB that the Excess Development Costs were prudently incurred. To do so it must provide objective evidence by which the OEB can assess prudence. It is not sufficient for NB to assert that the costs were necessary. It is also not sufficient for NB to assert that it had what it characterizes as rigorous cost controls in place. It is not sufficient, in other words, to make self-referential assertions about the supposed prudence of its expenditures, assertions which NB repeats endlessly, in its pre-filed evidence, in its testimony at the hearing, in its Undertaking responses, and in its AIC.

21. In applying these tests, the OEB must determine what constitutes prudence. In the particular circumstances of this case, and in particular the context created by the Designation Process and the Designation Decision, HONI submits that there should be no presumption of prudence. The Designation Decision effectively put a cap on the development costs NB could recover. There can be no presumption that costs in excess of that cap were prudently incurred.

On the contrary, the opposite presumption should apply. NB must first prove that the Excess Development Costs were caused by circumstances beyond its control, and that because of that, costs could not have been forecast in the Designation Process, and that such costs were prudently incurred.

22. Throughout its pre-filed evidence, and in answers to questions in cross-examination, NB uses the word "prudent" to describe all of its actions in the extended development period. It would appear that NB's use of the work is intended to have the OEB conclude two things. The first is that any actions of NB should be deemed to be prudent. An example of this is the use of the word to describe the decision to use the extended development period to enter into land acquisition agreements. (Exhibit B, Tab 16, Schedule 1, p. 4)

23. The second is to have the OEB conclude that, because NB applied cost controls, the expenditure must, therefore, be deemed to be prudent. The fact of cost controls does not mean that a cost was necessary or prudently incurred. (Exhibit B, Tab 16, Schedule 1, p. 4)

24. Much of what NB suggests is "prudent" is self-referential. An example of this is NB's description of its Indigenous participation agreements. NB describes the context for those agreements as follows:

> And so you can see in this response the extent of experience that both NextEra and Enbridge have in negotiating Aboriginal participation deals and working with First Nations and Métis communities to strike participation deals, and so the collective experience of our organizations went into determining if those costs were prudent. (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 124)

25. A rough paraphrase of that statement is that, if NB deems something prudent, then the OEB must do so.

26. As an aside, the statement that NB has such vast experience in negotiating Indigenous participation agreements gives rise to the question of why NB chose not to include an estimate for the costs of such agreements in the Designation Process estimates. The risk in doing so, of course, is that they would have been bound by those estimates. In addition, they might not have been chosen as the designated developer because their cost estimates were too high.

27. NB suggests that, because the OEB was aware that Indigenous participation costs were not included in its Designation Process forecasts, and yet approved NB for the designation work, implies that the OEB, having been made aware of those costs, must now be taken to have implicitly approved them as reasonable. The OEB did not do so. The correct interpretation is that NB voluntarily assumed responsibility for costs in that category.

28. The OEB, in its Phase 1 Decision and Order, stated that transmitters seeking designation should be aware that development costs in excess of budgeted, Board-approved costs would not necessarily be recovered from ratepayers and would be subject to a prudence review, which will include consideration of the reasons for overages. It was based on this understanding of risks that all transmitters submitted their proposed development budgets as part of the Phase 2 designation proceeding. These words of direction are reiterated by the OEB in its Decision and Order on NB's original application for approval of schedule and costs related to the development of the East-West Tie transmission line. The OEB goes on in that decision to explicitly state the "OEB does not accept that development costs not anticipated as part of the original project premise are automatically afforded the same assurance of recovery as the originally budgeted development costs…". (EB-2015-0216 – *Ontario Energy Board Decision and Order* – November 19, 2015, p. 8)

29. To find otherwise would be to conclude that the OEB granted NB *carte blanche* to spend whatever it wanted. That cannot have been either the OEB's intention or the effect of its decision

III The Context Which Governs How the Tests Should be Applied

30. The context for the application tests of the prudence of NB's Excess Development Costs is established by the following:

(1) The Designation Process, including the Designation Decision;

(2) The change in the in-service date;

(3) The change in the route for the EWT.

(1) The Designation Process

31. HONI submits that the objective of the Designation Process was to encourage competition of the development of the EWT. HONI submits that, in making its decision about whether to allow recovery of some or all of the Excess Development Costs, and indeed in making a decision on NB's leave to construct application, the OEB must give effect to that objective.

32. HONI submits that it is important to keep in mind that, in seeking to recover the Excess Development Costs, NB is going beyond what was contemplated in the Designation Process, that it is operating outside of the rigours of a competitive process. NB had sought to do so for the construction phase as well, by taking the extraordinary step of trying to preclude the OEB from considering a competitive bid for the construction of the EWT.

33. The Designation Decision was the culmination of a process whereby six parties bid on the right to do the development work for the EWT. The parties forecast costs for the development work in specified categories. The successful proponent would be allowed to recover its forecast development costs. The OEB made no provision for a review of the prudence of the forecast development costs. It was the fact of competition that was deemed sufficient to ensure that the forecast costs were reasonable.

34. The importance of competition to the Designation Process was made clear in the Designation Decision when the OEB stated:

> By designating one of the applicants, the Board will be approving the development costs, up to the budgeted amount, for recovery. The School Energy Coalition submitted that there is insufficient information for the Board to determine that the development costs are just and reasonable. The Board does not agree. The Board has had the benefit of six competitive proposals to undertake development work. In the Board's opinion, the competitive process drives the applicants to be efficient and diligent in the preparation of their proposals. (Designation Decision, p. 30)

35. The OEB stated that, in evaluating the applications for designation in the area of costs, it would rank the applications by considering factors which included the "clarity and completeness of the cost estimate" and the "thoroughness of the risk assessment and mitigation

strategy". (Designation Decision, p. 31) That "completeness" was a determining factor dictates that, if for no other reason, the OEB should hold NB to a higher standard in seeking to recover costs which are greater than those approved in the Designation Decision.

36. HONI submits that, because of the competitive process, it would be unfair to the other proponents in the Designation Process, and contrary to the stated objectives of that Process, were the OEB to now allow the successful bidder to recover additional costs.

37. The issue of fairness, and of preserving the integrity of the Designation Process, arises in NB's reliance on the concept of "scope change". NB defines the concept as follows:

> So scope change would be an underlying - we discuss what scope change means in the evidence in our - in our 2015 filing. But we call - scope change would be that there was something incremental above the scope we were originally designated to do, so something above that we intended that we had to do something additional. (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 149)

38. NB uses as examples of "scope change" the requests of the MOECC and the MNRF for alternative assessments (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 150) and increases in the scope of the economic data collection. (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 149)

39. It is clear that NB's use of the term "scope change" attempts to conflate two different things. The first is work, and related costs, for matters which were covered in the Designation Decision but which cost more than NB estimated. NB should not be able to recover costs for such matters.

40. The second are changes in what the project covers, things which could not have been anticipated in the Designation Process and so could not have been included in the approved estimates. HONI submits that NB bears the burden of leading evidence as to the matters and the costs in this second category, in addition to the burden of satisfying the OEB that such evidence demonstrates that the costs were incurred prudently.

41. HONI acknowledges that there may be extraordinary circumstances, which could not have been foreseen at the time of the Designation Process, which might lead to an increase in

development costs, and which might be, for that reason, eligible for consideration of recovery. HONI submits that, on the evidence NB has provided, there are only two matters in this category, namely the need to maintain an office and related infrastructure during the extended development period and the need to find an alternative route around Pukaskwa National Park. HONI submits that NB must satisfy the OEB as to what matters are genuinely new and could not have been anticipated before examining whether Excess Development Costs for those matters were prudently incurred.

42. HONI submits that preserving the integrity of the competitive process requires the OEB to deny, in particular, NB's request to recover the cost of the First Nations and Métis participation.

43. With respect to First Nation and Métis participation, the OEB said the following in the Designation Decision:

> In evaluating the applications in this area, the Board kept in mind the distinction between participation and consultation, and considered the following factors:
>
> - Whether the existing arrangement or plan provides for equity participation by First Nations and Métis communities.
> - The extent to which the existing arrangement or plan provides for other economic participation such as training, employment, procurement opportunities, etc. for all impacted communities.
> - The degree of commitment to the plan.
>
> (Designation Decision, p. 15)

44. As the Designation Decision makes clear, NB had a plan for First Nations and Métis participation, including a plan for "includes economic participation components such as employment, education and training, procurement and contracting, strategic community investment, and access to other supporting programs". (Designation Decision, pp. 17-18) NB chose not to include the costs for that participation in the estimates it filed. Doing so would have put it on the same competitive basis as the other participants, with the attendant risk that its overall costs would have prevented it from becoming the successful developer. It should not now be, in effect, rewarded for doing so.

45. NB argues that the OEB, in approving it as the Designated Developer, by necessary implication allowed NB to recover costs for Indigenous participation, even though the amount of those costs had not been forecast. HONI submits that that is incorrect. The correct interpretation of the OEB's decision is that, by failing to include the costs of Indigenous participation in its forecast, NB was taking responsibility for costs incurred in that category. To find otherwise would mean that the OEB is implicitly acknowledging that its Designation Decision was unfair to the other participants.

(2) The Extension of the In-Service Date

46. At several points in its AIC, NB relies on the argument that the need to meet a 2020 in-service date required the expenditure of additional development costs. For example, NB asserts that "Prudent project management dictates that activities that might have been delayed to the construction phase of the project needed to be pursued prior to the filing of a leave to construct application in order for the 2020 in-service date to be achieved". (AIC, p. 18 of 21)

47. In its AIC, NB continues to suggest that the March 2016 Order-in-Council ("OIC") tied the priority project declaration to a 2020 in-service date. NB knows that that is incorrect. In its *Decision and Order* in EB-2017-0364, dated July 19, 2018, at page 7, the OEB found the exact opposite, namely that the "priority project declaration [in the OIC] is not tied to a 2020 in-service date". NB cannot, in support of its request to recover Excess Development Costs, rely on the OIC as obligating it to meet a 2020 in-service date. NB could not rely on the argument about the status of the 2020 in-service date in support of its attempt to have HONI's LTC application dismissed. It cannot do so with respect to the Excess Development Costs either.

48. In the letter to the OEB dated September 30, 2014, the then-OPA extended the in-service date to 2020. Had the in-service date not been extended, NB would have had to have completed its development work prior to the date of the filing of the LTC application in the early part of 2015. HONI acknowledges there is an argument that NB can recover costs, demonstrated to have been prudently incurred, that were <u>caused</u> by the extension of the in-service date. It is not, however, legitimate for NB to claim costs for activities that could have, and indeed should have, been completed by the date the LTC application was originally to have been filed. Costs incurred after the original LTC application filing date but not caused by the extension should not

be eligible for recovery. A prime example of costs in this category is Indigenous consultation costs, discussed below.

49. In at least one case, NB improperly took advantage of the extended development period to undertake activities and incur costs for doing work which should have been undertaken in the construction phase. NB's evidence is that it "saw the opportunity to gain some benefits from the extension of the development period by prudently taking advantage of additional time available to deal with land acquisition". (Exhibit B, Tab 16, Schedule 1, p. 9) NB acknowledges that certain of these activities were going to be pursued in the construction phase but were "pulled forward into the development phase and started in 2016". (Exhibit B, Tab 16, Schedule 1, p. 9)

50. HONI submits that agreements for land options were premature given that NB had not been granted leave to construct. Costs in this category were not caused by the extension of the in-service date, were not part of the development phase, and should not be eligible for recovery.

51. On September 30, 2014, the OPA informed the OEB that there was merit in delaying the in-service date of the EWT expansion project because to do so would allow for additional time to develop the EWT project, with a focused aim of reducing costs. (EB-2017-0364 – *Hydro One Additional Evidence* – Attachment 15 – May 7, 2018) As noted at the beginning of this section, at several points in its AIC, NB relies on the argument that the need to meet a 2020 in-service date required the expenditure of additional development costs. These additional development costs have not resulted in any reduction to the overall project cost. Despite having 5 years to develop this project, NB has yet to deliver an approved EA, a potential for expropriation remains quite probable, NB has yet to reach an agreement with Hydro One on line-crossing issues and, most likely most important for ratepayers, the NB projected cost estimate has ballooned to almost double the original cost. Needless to say, NB completely missed the target on the focused aim of reducing costs by extending the development period.

(3) Route Change

52. Changes in the routing are an inevitable part of an undertaking such as the EWT. The question for the OEB is whether the route around Pukaskwa National Park was of such a

nature or magnitude to warrant special treatment as a genuine scope change. NB led no evidence in support of that proposition.

III Specific Cost Claims

53. In Exhibit B, Tab 16, Schedule 1, Attachments 1-10 inclusive, NB itemizes the Excess Development Costs for which it claims recovery. Attachment 11 summarizes the claims. HONI will not deal with each of the items set out in those attachments. Instead it will deal with the aggregate amounts in the largest categories of costs, which include the following:

(a) Environmental and regulatory approvals;

(b) Land rights;

(c) First Nations and Métis consultation;

(d) Other consultation;

(e) Project management; and

(f) First Nations and Métis land acquisition and participation.

(a) Environmental and Regulatory Approvals

54. According to Exhibit B, Tab 16, Schedule 1, Attachment 11, the OEB-approved costs, that is the costs approved in this category in the Designation Decision, are approximately $3.6 million. NB states that the extended development period incremental costs in this category are approximately $4.2 million, for a total of $7.8 million.

55. NB attributes these additional costs to two principal factors. The first is unexpected additional requests by the MOECC and the MNRF. The second is the additional work required by route changes, principally that around Pukaskwa National Park. In fact the two factors are related, in that some of the additional requests by the MOECC and the MNRF were related to the original route and some related to the changed route.

56. NB argues that its original estimate for environmental assessment costs was arrived at as follows:

> So in NextBridge's collective experience, so NextBridge and NextEra and the projects we've worked on in North America, we used that extensive experience to put together the budget for the 22.4 million dollars that included the environmental budget. (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 76)

57. HONI notes, in passing, that this statement suggests that the estimate of the environmental budget was based solely on the experience of NB. In a response to an Undertaking, NB disclosed, first, that its estimate was based on the analogue of the Bruce-to-Milton project and, second, on the expert advice from an environmental consulting firm [Dillon Consulting, hereinafter referred to as "Dillon"]. Had those matters been disclosed in testimony, they could have been explored in cross-examination.

58. NB's defence of its environmental budget has changed over the course of the proceeding. In Exhibit JD1.2, a response to an Undertaking given at the July 5, 2018 hearing on the subject of development costs, NB revealed that it had used the HONI Bruce-to-Milton EA "as a template for the designation application EA scope of work, which did not include the need for an alternative assessment".

59. Whether the use of the Bruce-to-Milton EA as a template was reasonable, or prudent, is thus a critical issue. NB defends the use in part by saying that it "received advice from its environmental consultant that it did not anticipate NextBridge would need to prepare an alternative assessment in relation to the EWT Line project". (Exhibit 1.JD1, NextBridge, CCC.1)

60. As noted above, NB's statements, set out in the preceding two paragraphs, were not subject to cross-examination. The statements were made in response to Undertakings. NB could have, but evidently elected not to, produce its environmental consultant to explain, and defend, its advice on this point.

61. When NB was asked, in an interrogatory posed in its first set of interrogatories, to provide "copies of all internal studies, reports and analyses that served as the basis for the decision to use the Bruce-to-Milton EA as a template for the designation EA scope of work", its response was that "NextBridge has not been able to locate copies of any internal written studies,

reports or analyses that served as the basis for the decision to use Bruce-to-Milton as a template for EWT Line Project EA work scope". (Exhibit 1.JD1, NextBridge, HONI.6)

62. That NB cannot find any of its own written material on such an important component of its development phase budget is, frankly, surprising. HONI assumes that, on an issue as important to the forecast cost of the EA, NB would have kept a copy of its own internal analyses. When asked to produce copies of all reports, studies and analyses of the external environmental consultant on the use of the Bruce-to-Milton EA as a template, NB responded that it "has not been able to locate copies of Dillon reports, studies or analyses on the use of Bruce-to-Milton EA as a template". (Exhibit 1.JD1, NextBridge HONI.6) Whether Dillon has such material, and could have produced it if asked by NB to do so, cannot now be known.

63. HONI submits that the last-minute introduction of the reliance on the Bruce-to-Milton EA as an explanation for NB's forecast development phase EA cost, combined with NB's failure to produce evidence on which the OEB can conclude that it was prudent to do so, deprives the OEB of the ability to reach that conclusion.

64. NB argues that it was faced with unexpected requests for more work from the MOECC and the MNRF. NB described the impact of those requests, as follows:

> And so once we began developing the project and having conversations with Ministry of Natural Resources and Forestry and other regulatory bodies, the Ministry of Environment and Climate Change, more and more asks outside of what our experience has been were included. And this is a very large linear infrastructure project in Northern Ontario and one of those has not been undertaken in quite some time. So there was a lot of extra work that the Ministry of Natural Resources and Forestry and the Ministry of Environment and Climate Change had asked for.
>
> And so in our collective experience as NextBridge, both NextBridge and NextEra, we had not seen such a large ask for this amount of permitting to be done prior to permitting in the construction phase -- these amount of field studies, sorry, to be done prior to the construction phase.
>
> (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 76)

65. It is common knowledge that, throughout an EA process, a proponent will receive numerous requests for additional studies and information from the MOECC. This is particularly the case in northern, remote, or sensitive areas. NB, given its claims regarding NextEra's experience and knowledge resulting from past projects, should have and would have been aware that such requests would be received, even if NB had not retained an environmental consultant for the EWT project. However, NB, in its Undertaking response, acknowledged that it relied on the services of recognized and experienced EA experts, Dillon, who presumably would have advised NB to anticipate and budget for numerous requests for additional work that would arise throughout the EA process. Dillon should also have recommended to NB that it provide for a large contingency when estimating EA costs due to the unpredictability of the number and types of studies or information requests that might be made by the MOECC. Whether Dillon provided that advice can now never be known.

66. NB's suggestion that there is something unique or more onerous for EA projects in northern Ontario is also something that NB should have anticipated, especially with the assistance of Dillon. Mining projects in northern communities are as complex, if not more so, than other projects, and it is well-known among environmental EA experts that the EA process in the north will also be more complex than other projects. None of this should have come as a surprise to NB, even without advice from Dillon.

67. HONI submits that NB led no independent evidence to support its claim that the costs associated with the EA process could not have been anticipated or were unexpected. In order to properly substantiate its assertions in this regard, NB could have, and indeed should have, led expert evidence to the effect that this particular EA was unusual and that the requests received by MOECC were highly irregular in number and nature. No such evidence was presented. In fact, NB conceded that comments provided by regulators were not unique or unusual, they were simply not anticipated because the scope had not been required for the Bruce-to-Milton project. (EB-2017-0182 - Exhibit I.JD1.NextBridge.HONI.6 Part d) – August 24, 2018)

68. NB states that it submitted terms of reference for a class environmental assessment but was told that an individual class assessment was required, a change which NB

described as one of the "types of extenuating additional things" that happened during the development phase that caused the increase in costs. (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, pp. 80-81)

69. HONI submits that the requirement for an individual environmental assessment is something NB's expert advisors, Dillon, should have known. There is no explanation provided by NB for its assumption that the EWT was eligible for a class environmental assessment, particularly given that the *Electricity Projects Regulation* (O. Reg. 111/01) specifies an individual environmental assessment for a transmission project of this nature. Even if, astonishingly, Dillon did not know that, a simple check with the MOECC at the outset would have clarified the requirement. Ratepayers should not be required to pay the costs of correcting such an obvious error.

70. Some portion of the additional costs in this category, those arising from the change in the route around Pukaskwa National Park would seem on the surface to be eligible for recovery. However, NB is unable to identify the amount of costs in this category that are attributable solely to the route around Pukaskwa National Park. (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 151.) In one Undertaking response the estimate is arbitrarily computed to be 11% of $15.8M, or $1.7M – based on the increase in distance caused by the re-route, an additional 50 km over a 450km total route. (EB-2017-0182 – NextBridge Undertaking Responses – Exhibit JD 1.6 – July 23, 2018 – p. 3) Conversely, in response to interrogatories (EB-2017-0182 – NextBridge Interrogatory Responses - Exhibit I.JD1.NextBridge.HONI.3 – August 24, 2018), NB clarified that all activities tagged in Exhibit JD 1.2 "Affected by Project Delay" and "Affected by Major Re-Route" meant that the referenced activity was affected by the Project delay and/or a major re-route. (EB-2017-0182 – NextBridge Undertaking Responses – Exhibit JD 1.2 – July 23, 2018 – pp. 7-41)

71. Summing all those activities up results in the re-route either individually, or in combination with the delay, increasing costs by approximately $5.8M alone to a maximum of approximately $12.2M. Whatever that amount is, there is no evidence upon which the OEB can conclude what the costs were, nor if they were prudently incurred

72. HONI submits that there is no basis upon which the OEB can conclude that a portion of the costs in this category are *prima facie* eligible for recovery because they could not be expected. In addition, there is no basis upon which the OEB can conclude that the costs, even if they could not be expected, were prudently incurred.

(b) Land Rights

73. The OEB-approved costs in this category in the Designation Decision were approximately $2 million. The Excess Development Costs in this category are approximately $3.8 million.

74. HONI has noted earlier that the costs in this category were not caused by the extension of the in-service date. By NB's own admission, the costs in this category were moved from the construction phase. HONI notes, in passing, that notwithstanding NB's decision to "pull forward" costs in this category from the construction to the development phase, NB's land rights costs in the construction phase have increased by $5.5 million. (Exhibit 1.B. NextBridge Staff 24)

75. Finally, there is no evidence that the costs incurred in this category are prudent.

76. HONI submits that the costs in this category should not be recovered.

(c) First Nations and Métis Consultation

77. The OEB-approved costs in this category in the Designation Decision are approximately $1.7 million. The Excess Development Costs in this category are $1.5 million.

78. NB acknowledges that the additional costs in this category were not caused by the extension of the in-service date. Rather, NB decided that, in its view, "one of the key things that we deemed was critical and vital for the project was to continue doing Indigenous consultation over the extended development period". (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 103)

79. NB characterized its activities in this category, during the extended development period, as follows:

> So precisely what we did was the same things, just more of it for consultation. There is the same type of activities, but just on a continuum, there was more consultation, more capacity funding, more discussions, more meetings.
>
> (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p.108)

80. In addition, HONI submits that it would be unfair to allow NB to recover the costs of the extended First Nations and Métis consultation. The parties to the Designation Process would have based their estimates for the cost of consultation based on the time line that ended with the filing of an LTC application in late 2014 or early 2015.

81. In addition, NB has provided no evidence that these additional costs were prudently incurred.

82. NB seems to have assumed that all costs of consultation with Indigenous communities would be recoverable because consultation is required. Ms Tidmarsh stated:

> We deemed it prudent and important to keep up our consultation, especially since we were actually directed by the Crown to do so
> (Emphasis added)
> (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 107)

83. NB provided no evidence that the Crown directed NB to undertake additional consultation during the extended development phase.

84. That NB is required to consult does not mean that all of its costs for doing so can be deemed to be prudent and recoverable from ratepayers. NB is obligated to provide evidence that the costs were prudently incurred.

85. HONI submits that the additional costs in this category should be disallowed.

(d) Other Consultation

86. The OEB-approved costs in this category in the Designation Decision are approximately $500,000. NB states that incremental costs in the extended development period in this category are approximately $1.1 million.

87. The costs in this category are attributable to NB's view that stakeholders should be kept advised of the delay in the construction of the EWT. There is no evidence that the costs in this category were necessary, let alone prudently incurred. NB conducted four rounds of open houses despite only being required to complete three. NB documents that NB staff representation at several open houses outnumbered attendees, almost tripling the number of attendants at one open house. (EB-2017-0182 - Exhibit I.JD1.NextBridge.STAFF.2 – August 24, 2018)

88. HONI submits that the costs in this category should be disallowed.

(e) Project Management

89. The OEB-approved costs in this category in the Designation Decision are approximately $1.3 million. NB states that incremental costs in the extended development period in this category are approximately $3.7 million. (Exhibit B, Tab 16, Schedule 1, Attachments 9 and 11)

90. The sheer magnitude of the costs in this category demands particularly scrupulous attention.

91. These are costs for work which was to have been completed by the early part of 2015, the original date for the filing of the LTC application. These are costs, then, for work which should have been captured by the estimates approved in the Designation Decision. That NB spent nearly three times the amount, on project management, in the extended development period, than had been approved in the Designation Decision strongly suggests that NB grossly underestimated the costs in this category in the Designation Process. To allow NB to recover this remarkable excess would be unfair and would undermine the integrity of the Designation Process.

92. NB describes the project management costs for the extended development period as merely a continuation of work that had been done before the OPA's letter. In the words of Ms Tidmarsh: "there was nothing new or outside of the scope". (Transcript, EB-2017-0182/EB-2017-0194 Vol. 1, p. 114)

93. HONI acknowledges that, *prima facie*, some costs may have been necessary to maintain NB's infrastructure, over the extended development period, are recoverable. However, there is no evidence that the enormous increases in costs were necessary, let alone prudently incurred.

94. While HONI acknowledges that some costs in this category should be recoverable, there is no evidence upon which the Board can conclude how much should be recoverable. As is the case in the other categories of cost claim, the OEB should not guess as to the amount that can legitimately be claimed in this category.

(f) First Nations and Métis Land Acquisition and Participation

95. For the reasons set out in paragraphs 42-45 inclusive, above, HONI submits that the costs in this category should not be recoverable.

IV Conclusion

96. HONI acknowledges that, prima facie, some costs for the extension of the development period should be eligible for recovery. Unfortunately, based on the evidence that NB has chosen to lead, the OEB cannot determine what that amount should be. The OEB should not be left to guess which of the costs caused by the delay were prudently incurred, and should be allowed to be recovered by NB.

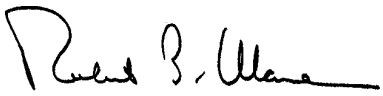
97. In theory, the OEB might also allow the recovery of costs for having to explore alternative routes following denial of access to Pukaskwa National Park. That said, the OEB has no evidence as to what those costs were and whether they were prudently incurred.

98. HONI submits that the OEB should attach conditions to the recovery of any Development Costs. The recovery of Development Costs should be on the condition that all reports, and in particular the results of all environmental assessment work should be made public and available to anyone. HONI submits that this should include Indigenous consultation agreements, Indigenous participation agreements, and the results of Indigenous environmental assessment work. Neither NB nor any of the Indigenous groups who are parties to this proceeding have provided evidence as to why any information about Indigenous participation,

including environmental assessment work, should be kept in confidence if the costs are to be recovered from ratepayers.

99. Given that the deciding of the right to develop was explicitly distinguished from the right to construct, it is clear that the Development Phase of the project was always intended to be for the benefit of the project, not for the exclusive benefit of the designated developer. Among other things, to find otherwise would mean that the OEB intended that the competition for the construction phase of the project would require all competitors to redo work that had already been done, a finding which would be illogical. Furthermore, to find otherwise would mean that the OEB intended that competition for the construction phase of the project would be inherently biased against anyone but NB. That cannot have been the OEB's intention or the effect of the Designation Decision.

All of which is respectfully submitted.



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September 19, 2018
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