EB-2011-0140

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 70 and 78 of the *Ontario Energy Act, 1998,* S.O. 1998, c. 15, Schedule B, as amended.

AND IN THE MATTER OF a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

SUBMISSIONS OF NISHNAWBE ASKI NATION ("NAN")

1. The Ontario Energy Board's ("OEB" or "Board") Procedural Order No. 2, dated April 16, 2012, invited the parties to file written submissions in response to the issues in Phase 1 of this proceeding, including the Board Staff Submission, dated April 24, 2012.

2. NAN takes this opportunity to make submissions on certain issues raised in the Board Staff Submission. At this stage in the proceeding, NAN's comments are limited to two issues raised in the Board Staff Submission, principally:

a. the inclusion of First Nation/Metis filing requirements, as outlined in Appendix "A" to the Board Staff Submission; and

b. the proposed written hearing and restricted interrogatory process for Phase 2 of the Designation Process.

First Nation / Metis Filing Requirements outlined in Appendix "A" to the Board Staff Submission

3. NAN's comments on this issue are restricted to First Nations. Parties in this proceeding representing Metis interests are better situated to provide comments affecting Metis groups.

4. NAN has reviewed the Minister's letter, dated March 29, 2011, and agrees with Board Staff that expanded informational requirements relating to First Nation participation should be included in Appendix "A" and become part of the filing requirements for candidates applying to be the designated transmitter.

5. However, NAN does not accept that any aspect of the Crown's Duty to Consult can be delegated to a third party in this or any other issue affecting Treaty Rights or land claims. NAN also submits that a substantive consultation process must be part of the activities of a designated transmitter but that is not to suggest that such consultation can discharge or release the Crown from its own Duty to Consult and Accommodate.

6. Further, if the Board is unclear on whether the Minister's letter constitutes a "Directive" under sections 27 or 28 of the *Ontario Energy Board Act, 1998,* NAN believes that speculation on that issue should be replaced by inquiry to the Minister's office for a definitive answer.

7. NAN also supports the proposition that the issues of First Nation participation and an applicant's ability and plan to carry out general consultation with First Nations should have the status of individual criteria in the evaluation of applications.

8. The planning and subsequent construction of the proposed East-West Tie will raise many issues relevant to First Nation communities along the east-west corridor.

9. Similarly, the actual construction of the East-West Tie will have an impact on further transmission development into NAN territory and, as such, would impact an even greater number of First Nation communities. NAN itself is comprised of 49 First Nations communities covering almost two-

thirds of the geographical area of Ontario. The earlier in the East-West Tie process that First Nations interests and participation are considered, the better.

10. NAN's support for general consultation by applicants should *not* be construed as agreement with the idea that delegating the procedural aspects of Crown consultation is appropriate in the circumstances of the East-West Tie or any other project affecting First Nations rights or claims.

11. NAN disagrees with the Board's suggestion that the "fact that the Minister's letter does emphasize the importance of this ability [i.e. a transmitter's ability to accept responsibility for the procedural aspects of Crown consultation] suggests that such a delegation is contemplated. NAN believes that it is premature to speculate on the intentions of the Crown as far as the delegation of any consultation is concerned.

12. What is important at the application stage is to have some idea of a candidate's ability to fulfill general consultation responsibilities— rather than the Crown's Duty to Consult --which may be requested of it. There can be little doubt that the very nature of the undertaking in planning and constructing the East-West Tie will require direct consultation between the Crown and First Nations.

13. Similarly, NAN does not agree with Board Staff's statement that "the creation of any additional criterion means that the relative importance of the original criteria is necessarily reduced."

14. The process by which a transmitter is designated by the OEB, and the subsequent process of granting leave to construct a transmission line, will raise different criteria from project to project. Admittedly, there will always be some criteria that will apply to all projects, such as social need, and economic and technical feasibility.

15. However, the criteria for any given project must reflect the complexity of the proposed project *and* the nature of the interests which can be affected by its planning and construction. In some projects, a few criteria may be appropriate; in others, a complex matrix of considerations will have to be addressed.

16. Significant First Nations interests will be affected by the proposed East-West Tie and, for that reason alone, those interests warrant the status of independent criteria in the designation process.

17. With respect to the comments of Board Staff that applicants who have commenced consultation with First Nations *before* they apply for designation "should not be regarded more favourably than those who have not commenced consultation but have a comprehensive and practical plan for consultation that would be initiated upon designation", NAN notes that the key issue should be whether there is a "comprehensive and practical plan for consultation" that is part of a candidate's application.

18. All of the comments above are made on the basis that the Crown cannot ultimately delegate its responsibility to consult with and accommodate First Nations where Treaty Rights or land claims may be affected by an undertaking.

19. Equally important, the ultimate responsibility of the Crown to properly discharge the Duty to Consult and Accommodate does not detract from the responsibility of proponents of undertakings to consult with First Nations in a substantive and consistent manner.

<u>The proposed written hearing and restricted interrogatory process for Phase 2 of the Designation Process</u>

20. NAN does not agree with the proposals of Board Staff for a continued written hearing, restricted interrogatory process, and elimination of the right of parties to cross-examine applicants.

21. In NAN's view, the proposed restricted hearing process raises the issue of potential conflicts of interest on the part of the OEB, as well as legal issues whether the Board may be exceeding its jurisdiction given its statutory and common law duty to ensure that stakeholder interests are afforded an effective voice in public hearings, as discussed below.

22. The novel nature of the designation process actually warrants full transparency and active participation by the parties to the proceeding—rather than the restricted participation being proposed by Board Staff.

23. In NAN's view, the development of a workable and effective designation process requires full input from the parties to the proceeding. The parties to this proceeding represent diverse interests bringing a multitude of concerns to the table for consideration by the OEB.

24. It would follow that only a fully open process in which applicants must respond *directly* to the unaltered interrogatories of the requesting parties, and in which rights of cross-examination are respected, can guarantee that the interests of all parties will be considered.

25. Further, the requirements under the *Statutory Powers Procedure Act*, and the principles of natural justice, to which the Board is subject, demand no less.

26. In NAN's respectful submission, the proposed restriction on the interrogatory rights of the parties is unacceptable, as would be the elimination of the right to cross-examine.

27. Equally important, to have the OEB act as an intermediary between the parties submitting interrogatories on the one hand and the applicants on the other hand, such that the Board can "cull or edit" any interrogatories, puts the Board in an awkward and untenable position.

28. What if a dispute should arise relating to the Board's "culling and editing" process, such that a party alleged that the Board had effectively eliminated the party's interrogatory? To whom would the party apply for relief? The Board? The Divisional Court? The Board could easily be placed in the inappropriate and possibly unlawful position of trying to adjudge its own conduct.

29. The same problems arise in having the Board alone pose oral questions to the applicants (after the Board has "culled or edited" the interrogatories posed to the applicants) in lieu of the right of the parties to cross-examine the applicants.

30. What Board Staff is proposing in respect of deviation from the Board's standard hearing process would result in the conflation of two very different roles in the hearing process: (1) the investigative and discussion process, and (2) the adjudicative process.

31. By putting the Board at the centre of the investigative and discussion process, and permitting the Board to determine the interrogatories to be posed to the applicants, with follow-up questions being posed only by the Board, the rights of the (non-applicant) parties to a full and open hearing will be compromised.

32. For these reasons alone, NAN submits that there should be a full oral hearing for Phase 2 of the designation process and that the parties should be free to pose interrogatories to specific applicants, and have the applicants respond directly to the requesting parties, with full cross-examination rights, to ensure that all relevant issues are canvassed.

33. The Board can play a role in the ordinary course, as it is well-equipped to do, to ensure that cross-examinations are not repetitive and that efficient use is made of oral hearing time.

34. Finally, in the event that an applicant's answer should be unresponsive to an interrogatory, the Board's adjudicative role can be called into play pursuant to an appropriate motion.

All of which is respectfully submitted to the Board

Anna Marcil

for: **DOUGLAS M. CUNNINGHAM**
Barrister & Solicitor
Counsel for Nishnawbe Aski Nation
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