

East-West Tie Line Designation

Board File No.: EB-2011-0140

PHASE 1

**SUBMISSIONS OF THE
NATIONAL CHIEF’S OFFICE FOR THE ASSEMBLY OF FIRST NATIONS**

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1	<u>INTRODUCTION</u>	1
2	<u>OVERVIEW</u>	2
3	<u>THE MANDATE FOR ABORIGINAL PARTICIPATION IN TRANSMISSION</u>	2
3.1	GOVERNMENT POLICY AND THE OEBA	2
3.1.1	GOVERNMENT POLICY ON ABORIGINAL PARTICIPATION IN THE ENERGY SECTOR.....	3
3.1.2	WHAT DOES THIS MEAN FOR THIS DESIGNATION PROCESS?	4
3.2	DISCRIMINATION AGAINST FIRST NATIONS	4
3.2.1	THE BOARD’S DUTY TO ERADICATE DISCRIMINATION	5
3.2.2	WHAT DOES THIS MEAN FOR THE DESIGNATION PROCESS?	6
4	<u>THE MINISTER’S LETTER</u>	6
4.1	THE MINISTER’S LETTER IS A DIRECTIVE	6
4.2	THE BOARD HAS TREATED THE MINISTER’S LETTER AS A DIRECTIVE	6
4.3	THE MINISTER’S LETTER IS A DIRECTION UNDER THE <i>ELECTRICITY ACT</i>	7
5	<u>CONSULTATION</u>	9
6	<u>CONCLUSION AND APPENDIX</u>	9

1 INTRODUCTION

The National Chief’s Office (NCO) for the Assembly of First Nations (AFN) is a registered intervenor in the Board’s proceeding to designate a transmitter to develop the East-West Tie Transmission Line (East-West Tie).

The AFN is the national First Nations representative organization for all the First Nations in Canada. The AFN represents the interests of First Nations nationally, including 133 Ontario First Nation communities. First Nations have an interest in this consultation from the perspectives of aboriginal and treaty rights holders, consumers, generators, distributors and transmitters.

These are the submissions of the NCO on the issues in Phase 1 of this proceeding.

2 OVERVIEW

The legal framework within which the Board operates mandates Aboriginal participation in Ontario's transmission industry in general and the East-West Tie in particular.

The *Ontario Energy Board Act, 1998* (OEBA)¹ requires the Board to act consistently with Government policy in this designation. Government policy is demonstrably committed to Aboriginal participation in the energy sector.

It follows that the Board should give substantial weight to Aboriginal participation in the East-West Tie Transmission Line project in this designation.

Aboriginal peoples in Ontario have endured systemic discrimination that has prevented their ability to participate fully in the mainstream economy of Ontario. Canada's *Charter of Rights and Freedoms* (Charter), international human rights law and the Board's mandate to serve the public interest all require eradication of this discrimination.

The Board has the opportunity and the responsibility in this designation process to move towards eradication of that discrimination by giving close scrutiny and substantial weight to Aboriginal participation in the East-West Tie transmission project.

A letter from the Minister of Energy to the Board (Minister's Letter)² instigated this designation process. The Minister's Letter expressed the Government's interest in having the Board undertake a designation process to select the most qualified and cost-effective transmission company to develop the East-West tie line.

The National Chief's Office regards as particularly important the section of the Minister's letter that requires the Board to "...take into account the significance of aboriginal participation to delivery of the transmission project, as well as a proponent's ability to carry out the procedural aspects of Crown consultation."

Those requirements should be read in the context of the legal mandate for Aboriginal participation in Ontario's transmission industry, discussed in these submissions. The Minister's letter also has independent force as a Minister's directive that must be implemented by the Board under the OEBA or, in the alternative, as a Minister's direction that must be implemented by the Board as proxy for the Ontario Power Authority (OPA) under the *Electricity Act*.

3 THE MANDATE FOR ABORIGINAL PARTICIPATION IN TRANSMISSION

Irrespective of the Minister's Letter, the legal framework within which the Board operates mandates Aboriginal participation in Ontario's transmission industry in general and the East-West Tie in particular.

3.1 GOVERNMENT POLICY AND THE OEBA

The Board's statutory objectives for electricity contained in its governing statute, the OEBA, include the requirement to

¹ OEBA s. 1

² Minister's letter to the Board Chair dated March 29, 2011

promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

In addition, when granting leave to construct an electricity transmission or distribution line, the Board must be satisfied that it is in the public interest in relation to:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service
2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources³

This designation process engages both of these provisions because the Government's Long-Term Energy Plan (LTEP) specifically provides that the need for a new East-West Tie includes "allowing more renewables".⁴

3.1.1 GOVERNMENT POLICY ON ABORIGINAL PARTICIPATION IN THE ENERGY SECTOR

Government energy policy in relation to Aboriginal peoples is committed to Aboriginal participation in the energy sector. Chapter 5 of the LTEP⁵ provides as follows

The Ontario government is committed to encouraging opportunities for Aboriginal participation in the energy sector ...

First Nation and Métis communities have diverse energy needs and interests. Ontario will work to ensure there is a wide range of options for Aboriginal participation in Ontario's energy future....

Ontario...recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories ...

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

- *Provide job training and skills upgrading to encourage employment on the transmission project development and construction.*
- *Further Aboriginal employment on the project.*
- *Enable Aboriginal participation in the procurement of supplies and contractor services.*

³ OEBA s. 96(2)

⁴ LTEP Chapter 4 – Reliable Transmission/Modern Distribution

⁵ Ontario's Long Term Energy Plan, Chapter 5 - Aboriginal Communities

Ontario will encourage transmission companies to enter into partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest.

Ontario...recognizes that successful participation by First Nation and Métis communities will be important to advance many key energy projects identified under a Long-Term Energy Plan. The path forward needs to be informed by regular dialogue with First Nation and Métis leadership through distinct processes. Working with First Nation and Métis leadership, Ontario will look for opportunities to promote on-going discussion of these issues.

The Minister's Letter is itself an example of the government's policy of commitment to Aboriginal participation in the energy sector. The Minister directs that the Board should "...take into account the significance of aboriginal participation to delivery of the transmission project, as well as a proponent's ability to carry out the procedural aspects of Crown consultation."

3.1.2 WHAT DOES THIS MEAN FOR THIS DESIGNATION PROCESS?

The Board must act consistently with these policies in carrying out its responsibilities under the OEBA or any other Act.⁶ These policies are also an essential element of any leave to construct application because the public interest requirement is specifically defined to include consistency with government policy. As a preliminary step to the leave to construct application, this designation process must also be consistent with government policy and in the public interest as defined.

It follows therefore that the Board should give substantial weight to Aboriginal participation in the East-West Tie Transmission Line project in this designation.

3.2 DISCRIMINATION AGAINST FIRST NATIONS

In the proceeding for review of the OPA's Integrated Power Supply Plan (IPSP) and procurement processes⁷ and in several subsequent proceedings, the NCO asserted that:

- a) First Nations and other Aboriginal peoples in Ontario have endured systemic discrimination contrary to section 15(1) of Canada's *Charter of Rights and Freedoms* (Charter) that has prevented their ability to participate fully in the mainstream economy of Ontario, including, but not limited to, energy generation, transmission and distribution, by reason of their race, national or ethnic origin, and their colour
- b) The absence of adequate affirmative action programs⁸ sustains this systemic discrimination

⁶ OEBA s. 1

⁷ EB-2007-0707 (IPSP Proceeding)

⁸ Permitted by the Charter s 15(2)

3.2.1 THE BOARD'S DUTY TO ERADICATE DISCRIMINATION

The Board's responsibilities, not least its role as an adjudicator, are directly impacted by the legal right to be free from discrimination. That duty takes a number of forms.

3.2.1.1 The Charter

The Charter provides

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁹

3.2.1.2 International Law

Article 2 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)¹⁰ provides

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

The courts have held that there is a duty under Canadian law to take into account international human rights law and standards such as UNDRIP in interpreting Canada's domestic legislation¹¹

3.2.1.3 The Public Interest

The Courts have held that the legislative scheme of the OEBA is subject to the public interest¹² and the Board has acknowledged that its duty is to serve the public interest

Our Mission

To promote a viable, sustainable and efficient energy sector that serves the public interest and assists consumers to obtain reliable energy services at reasonable cost.¹³

⁹ s.15

¹⁰ GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) [UNDRIP] - endorsed by Canada on November 12, 2010

¹¹ See *Canada (Human Rights Commission) c. Canada (Attorney General)*, 2012 FC 445 (2012) per Mactavish J. at paras 350 and 351

¹² *Union Gas Ltd. v. Township of Dawn* (1977), 15 O.R. (2d) 722 at para. 29 (Div. Ct.)

The principal duty of the Board in serving the public interest is to serve the interest of individuals.

The Board is a regulator of monopoly services. Its duty to the public implies an equal duty to each individual and in turn, at least as a starting point, that each individual has an equal stake in that monopoly.

It follows that one strand of the Board's duty to serve the public interest is to ensure that no significant group of individuals, wishing to participate in Ontario's energy business, should be unfairly denied the opportunity to do so.

3.2.2 WHAT DOES THIS MEAN FOR THE DESIGNATION PROCESS?

It follows that, in moving towards eradication of the systemic discrimination that Aboriginal peoples have endured, the Board should give close scrutiny and substantial weight to Aboriginal participation in the East-West Tie transmission project.

4 THE MINISTER'S LETTER

4.1 THE MINISTER'S LETTER IS A DIRECTIVE

The Minister may issue and the Board must implement a directive approved by the Lieutenant Governor in Council that requires a transmitter to expand its transmission systems for the connection of renewable energy generation facilities.¹⁴

The Minister's Letter expresses the Government's interest in having the Board undertake a designation process to select the most qualified and cost-effective transmission company to develop the East-West tie line. That letter implements a course of action previously approved by the Government in the LTEP

*The East-West tie will be submitted to the OEB to carry out a designation process to select the most qualified and cost-effective transmission company to develop the line.*¹⁵

As such, it is an approved directive under the OEBA that the Board must implement, including the requirement to "...take into account the significance of aboriginal participation to delivery of the transmission project, as well as a proponent's ability to carry out the procedural aspects of Crown consultation."

4.2 THE BOARD HAS TREATED THE MINISTER'S LETTER AS A DIRECTIVE

Board Staff's submissions suggest that the Minister's Letter is not a directive. The NCO disagrees for the reasons set out above. But, even if Board Staff is correct, the Board has treated the Minister's Letter as a directive and cannot now pick and choose which parts it must implement.

¹³ Board Website: <http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/What+We+Do>

¹⁴ OEBA s. 28.6

¹⁵ LTEP Chapter 4 – Reliable Transmission/Modern Distribution

The Board's *Framework for Transmission Project Development Plans* (Framework)¹⁶ identifies the OPA's economic connection test (ECT) as the trigger for the designation process. There has been no ECT for the East-West Tie.

Although, the Board has paid lip service to the OPA's role as energy planner¹⁷, in reality it has treated the Minister's letter (and presumably the LTEP) as the driver for this process. In essence, this means that the Board has treated the Minister's letter as a directive. As such, the requirements in that letter concerning Aboriginal participation and consultation form an integral part of this designation process.

4.3 THE MINISTER'S LETTER IS A DIRECTION UNDER THE *ELECTRICITY ACT*

NCO has noted previously that there is a tension between the Board's role as an adjudicator and its attempts in the absence of an IPSP to undertake planning and procurement that is properly the responsibility of the OPA.

The NCO reserves its position on that issue, but notes that

- The Board should ensure that conflicts of interest between these functions are avoided
- Where the Board undertakes functions that are not part of the adjudicative process, it may be bound by obligations appropriate to that function, including but not limited to the duty to carry out Aboriginal consultation and accommodation.
- Where the Board undertakes functions that are properly within the jurisdiction of the OPA it must comply with the same obligation as the OPA

The Framework states

The designation process of the Board is not a procurement process where the end result is a contract. Neither the Board, the OPA, nor the IESO has statutory authority to procure transmission

The NCO respectfully disagrees. The OPA has authority to procure transmission capacity

Capacity

(4) The OPA has the capacity, rights, powers and privileges of a natural person for the purpose of carrying out its objects....

Powers

(5) Without limiting the generality of subsection (4), the OPA has the power,

....

(b) To enter into contracts relating to the procurement of electricity supply and capacity in or outside Ontario;

¹⁶ EB-2010-0059

¹⁷ Board Chair's letter to the OPA dated April 25, 2011 requests a report from the OPA regarding the preliminary assessment of the need for an East-West tie line

(c) to enter into contracts relating to the procurement of electricity supply and capacity using alternative energy sources or renewable energy sources to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources;

....

(f) to take such steps as it considers advisable to ensure there is adequate transmission capacity as identified in the integrated power system plan¹⁸

Although the end result of the designation process is not a contract, the Board is clearly “procuring” the development of the transmission line as that expression is normally used.

Similarly, although the Framework states that the OPA remains responsible for independent transmission planning and that the Board’s mandate is restricted to review and approval, there are numerous examples to illustrate that the Board is undertaking a planning function, not least the principles in the Framework

2 Board Principles

The Board’s goal in developing a policy for transmission project development planning is to facilitate the timely development of the transmission system to accommodate renewable generation.

In this designation process for the East-West Tie, where the Board has proceeded without the ECT required by the Framework, it is particularly evident that the Board is the front runner, carrying out planning and procurement functions that properly belong to the OPA.

If the Minister’s letter is not a directive, then it is properly characterized as directions from the Minister under the *Electricity Act*, with which the Board must comply given that it is undertaking an OPA function

Directions re consultation

25.30 (4.4) The Minister may direct the OPA to implement procedures for consulting aboriginal peoples and other persons or groups as may be specified in the direction, on the planning, development or procurement of electricity supply, capacity, transmission systems and distribution systems and the direction may specify the manner or method by which such consultations shall occur and the timing within which such consultations shall occur.

Direction re programs for aboriginal participation

(4.5) The Minister may direct the OPA to establish measures to facilitate the participation of aboriginal peoples in the development of renewable energy generation facilities, transmission systems and distribution systems and such

¹⁸ *Electricity Act, 1998 s 25.1*

measures may include programs or funding for, or associated with, aboriginal participation in the development of such facilities or systems.

5 CONSULTATION

The Crown's duty to carry out Aboriginal consultation and accommodation is well established by a constantly evolving body of jurisprudence.¹⁹ The Board may in a proceeding before it have the responsibility to adjudicate the adequacy of such consultation and accommodation.

Governments, proponents and Aboriginal peoples continue to develop best practices for consultation and accommodation. Although some principles and practices have emerged, it is apparent that one-size does not fit all.

The duty to consult and accommodate remains with the Crown notwithstanding delegation. The Crown, and therefore the Board, will, no doubt wish to ensure the designated transmitter and its advisors are

- Thoroughly familiar with and experienced in the requirements and best practices of modern consultation and accommodation
- Capable fulfilling any accommodation requirements in the short and long term.

For the avoidance of doubt, participation by the NCO in this proceeding

- Does not constitute Aboriginal consultation
- Does not admit or acknowledge compliance by the Crown with its duty to consult on the East-West Tie.
- Is distinct from and without prejudice to the interest and position of any First Nation community, group or other organization or individuals.

6 CONCLUSION AND APPENDIX

The NCO has commented on some of the specific issues in the issues list for Phase 1 in the Appendix to these submissions. They should be read in conjunction with and subject to these comments. So far as the NCO has not commented specifically on any issue, it reserves the right to do so in reply and oral submission.

¹⁹ Per *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 - The duty to consult and accommodate Aboriginal peoples is grounded in the honour of the Crown as an essential corollary of the *Constitution Act, 1982* section 35

APPENDIX A
ISSUES LIST FOR
EB-2011-0140 EAST-WEST TIE LINE DESIGNATION
PHASE 1

Decision Criteria

- 1. What additions, deletions or changes, if any, should be made to the general decision criteria listed by the Board in its policy Framework for Transmission Project Development Plans (EB-2010-0059)?*
- 2. Should the Board add the criterion of First Nations and Métis participation? If yes, how will that criterion be assessed?*
- 3. Should the Board add the criterion of the ability to carry out the procedural aspects of First Nations and Métis consultation? If yes, how will that criterion be assessed?*
- 4. What is the effect of the Minister's letter to the Board dated March 29, 2011 on the above two questions?*

For the reasons set out in these submissions, the NCO submits that the Board is mandated to include Aboriginal participation and the ability to carry out the procedural aspects of Aboriginal consultation as decision criteria. Aboriginal consultation in the second criterion should be clarified to include accommodation.

The Minister's Letter should be read in the context of that legal mandate. The Minister's letter also has independent force as a Minister's directive that must be implemented by the Board under the OEBA or, in the alternative, as Minister's directions that must be implemented by the Board as proxy for the Ontario Power Authority (OPA) under the *Electricity Act*

Because these are mandated criteria, they stand separate from and in addition to the general criteria in the Framework. These criteria must be satisfied independently from the general decision criteria.

Aboriginal consultation and accommodation is the duty of the Crown. The Board's assessment of this criterion is therefor partly to ensure the most effective delegation by the Crown of this duty. The continuing roles of the Crown, the OPA and the IESO in the consultation should be clarified.

Use of the Decision Criteria

5. Should the Board assign relative importance to the decision criteria through rankings, groupings or weightings? If yes, what should those rankings, groupings or weightings be?

6. Should the Board articulate an assessment methodology to apply to the decision criteria? If yes, what should this methodology be?

As mentioned above, because Aboriginal participation and the ability to carry out the procedural aspects of Aboriginal consultation are mandated criteria, they stand separate from and in addition to the general criteria in the Framework. These criteria must be satisfied independently from the general decision criteria.

For the reasons set out in these submissions, the Board should place substantial weight on Aboriginal participation. In the NCO's submission, the Board should place particular weight on ownership among the various forms of participation.

The Board may conclude that the nature and level of Aboriginal participation demonstrated in a transmitter's application is evidence of its ability to satisfy the criterion of Aboriginal consultation and accommodation.

Filing Requirements

7. What additions, deletions or changes should be made to the Filing Requirements (G-2010-0059)?

8. May applicants submit, in addition or in the alternative to plans for the entire East-West Tie Line, plans for separate segments of the East-West Tie Line?

The Filing Requirements should include requirements relating to Aboriginal participation and consultation. Board Staff has proposed revised filing requirements in Appendix A to its submission. The following are not called for by the Minister's Letter or otherwise and should not form part of the assessment criteria

- In section 2.4 – “Benefits to transmission ratepayers of the First Nation and Métis participation”
- Section 2.6 – “If no First Nation or Métis participation in the project is planned, detailed reasons for this choice”

Obligations and Milestones

9. *What reporting obligations should be imposed on the designated transmitter (subject matter and timing)? When should these obligations be determined? When should they be imposed?*

10. *What performance obligations should be imposed on the designated transmitter? When should these obligations be determined? When should they be imposed?*

11. *What are the performance milestones that the designated transmitter should be required to meet: for both the development period and for the construction period? When should these milestones be determined? When should they be imposed?*

12. *What should the consequences be of failure to meet these obligations and milestones? When should these consequences be determined? When should they be imposed?*

Consequences of Designation

13. *On what basis and when does the Board determine the prudence of budgeted development costs?*

14. *Should the designated transmitter be permitted to recover its prudently incurred costs associated with preparing its application for designation? If yes, what accounting mechanism(s) are required to allow for such recovery?*

15. *To what extent will the designated transmitter be held to the content of its application for designation?*

16. *What costs will a designated transmitter be entitled to recover in the event that the project does not move forward to a successful application for leave to construct?*

Process

17. *The Board has stated its intention to proceed by way of a written hearing and has received objections to a written hearing. What should the process be for the phase of the hearing in which a designated transmitter is selected (phase 2)?*

18. *Should the Board clarify the roles of the Board's expert advisor, the IESO, the OPA, Hydro One Networks Inc. and Great Lakes Power Transmission LP in the designation process? If yes, what should those roles be?*

As mentioned above, the continuing roles of the Crown, the OPA and the IESO in Aboriginal consultation should be clarified.

19. What information should Hydro One Networks Inc. and Great Lakes Power Transmission LP be required to disclose?

20. Are any special conditions required regarding the participation in the designation process of any or all registered transmitters?

21. Are the protocols put in place by Hydro One Networks Inc. and Great Lakes Power Transmission LP, and described in response to the Board's letter of December 22, 2011, adequate, and if not, should the Board require modification of the protocols?

22. Given that EWT LP shares a common parent with Great Lakes Power Transmission LP and Hydro One Networks Inc., should the relationship between EWT LP and each of Great Lakes Power Transmission LP and Hydro One Networks Inc. be governed by the Board's regulatory requirements (in particular the Affiliate Relationships Code) that pertain to the relationship between licensed transmission utilities and their energy service provider affiliates?

23. What should be the required date for filing an application for designation?