

surrendered the Haldimand Tract to the Crown for transfer to the Six Nations. Accordingly, there is only a small potential for disturbance of hitherto undiscovered Ojibway burial and archaeological sites.

Given the possibility that burial sites or culturally significant archaeological sites might be uncovered during construction of the KWCG Project, it might become necessary to consult the Six Nations/Haudenosaunee, the Huron Wendat or the Mississaugas of the New Credit on such discoveries.

CLOC has suggested that it is impossible to say whether a duty to consult in relation to burial or archaeological sites has been triggered until a specific Project site is identified and an initial archaeological assessment done on the site -- or until human or archaeological remains are actually discovered. Accordingly there is no need to make contact with any Aboriginal community on the issue at the present time.

Unless it is known that a particular proposed site is very likely to have aboriginal remains, CLOC advises that giving notice would be premature and it is preferable to wait until information emerges through the processes that presently exist, for example under the *Cemeteries Act*. If new information does arise as the required archaeological work is undertaken, then the need for notice will have to be re-assessed, and existing processes (which require consultation with culturally affiliated communities, and mitigation) allowed to run their course.

Apart from the Six Nations, the Mississaugas and the Huron Wendat, there appear to be no other Aboriginal communities potentially having a right to be notified of the KWCG Project. In particular, the possibility of Métis s. 35 rights has been considered and, in the undersigned's opinion, no such claims can credibly be made in the vicinity of the proposed Project, and therefore there is no requirement to notify or consult Métis representatives.

Strength of Claims Assessment¹⁵

The second step of the analysis is to assess the legal strength of the assertions made by Aboriginal communities. This is necessary except where the rights in question have already been affirmed by a court or are clearly included in a Treaty, in which case they should be treated as established rather than asserted.

With respect to the Haudenosaunee claims in relation to the Haldimand Tract, the analysis established by the Supreme Court in *Delgamuukw*¹⁶ and *Bernard and Marshall*¹⁷ requires that, to establish Aboriginal title, an Aboriginal community must show that it occupied the land exclusively at the time that the Crown asserted sovereignty. Given the

¹⁵ Once again the undersigned acknowledges the assistance of counsel for MAA, MNR and CLOC in the preparation of this analysis. The legal positions referred to are not formal MAA, MNR or CLOC positions or Ontario corporate legal positions but rather those of the Ministry of Energy Legal Services Branch.

¹⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

¹⁷ *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43.

history of the Haldimand Tract and the surrounding area, it is highly unlikely that Six Nations will be able to establish a claim to Aboriginal title.

The 1797 surrender and sale of the Cambridge area lands that had been granted to the Six Nations under the Simcoe Deed appears to be valid. The historical record is clear that Joseph Brant and the other Six Nations Chiefs at the time wanted to sell their land to whomever they chose. Indeed, the Chiefs insisted on selling and the Crown reluctantly agreed to confirm such sales. It appears that since the 1797 surrender in question, the elected Six Nations Band Council has never formally objected to the validity of the surrender.

Even if the surrender were invalid, *Chippewas of Sarnia*¹⁸ may apply to this situation. In this case, the Chippewas of Sarnia brought an application for a declaration that they retained their Aboriginal title because the lands in question were not properly surrendered in the 1800s. The Ontario Court of Appeal agreed that the surrender was defective but declined to grant Aboriginal title to the Chippewas because the lands were now owned by innocent third party purchasers for value without notice. The Chippewas' proper remedy was damages against the Crown.

As in the *Sarnia* case, the Six Nations of the Grand River acquiesced in (indeed, insisted upon) the 1797 surrender, conducted themselves as if the surrender was valid, and did not complain or assert that there was anything wrong with this surrender for over 200 years. *Sarnia* is not a duty to consult case, but when it applies, it weakens the strength of the Aboriginal title or invalid surrender assertion, thus pushing any duty to consult closer to the shallow end of the spectrum.

With regard to the 1701 Nanfan Treaty, the courts have recognized the validity of this Treaty, so the hunting right guaranteed under this Treaty must be treated as established. Furthermore, although the express right in the 1701 Treaty is to hunt, it is likely that fishing, trapping and the gathering of edible plants are incidental to and included in the s. 35-protected right. As for the argument that the Six Nations surrendered its 1701 Nanfan Treaty rights to hunt and fish in the 1797 surrender, as indicated above we defer to the consensus legal position that Nanfan Treaty hunting rights continue to apply in the portions of the Haldimand Tract in issue pending additional research.

In light of the decision in *R. v. Williams and Taylor*, the Mississauga's of the New Credit should likewise be treated as having a harvesting right or a strong claim to such a right under Treaty No. 3. Such a right would apply to the lands on either side of the Haldimand tract including the lands east (downwind) of Cambridge.

Of course, given that most of the land in the areas under consideration is patented, privately held, and employed for "visibly incompatible" purposes¹⁹ (e.g. industrial, residential, commercial, agricultural), the ability of the Six Nations and the Mississaugas to exercise hunting or other harvesting rights in these areas is substantially curtailed.

¹⁸ *Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000 CanLII 5620 (ON C.A.).

¹⁹ See: *R. v. Badger* [1996] 1 S.C.R. 299.

Finally, as indicated above, the Six Nations and the Huron Wendat, and possibly the Mississaugas have interests in respect of any burial sites – and likely also in relation to any culturally significant non-human archaeological remains – that may be discovered in the course of archaeological studies or construction. Such legal rights should be taken as established. However notice is not necessary until there is an actual discovery or the strong likelihood thereof.

Potential Adverse Effects of the Project

The next step in the analysis is to consider the potential adverse impact of the project on the established and asserted s. 35 rights discussed above.

Environmental impact generally

In response to our request for information on the potential environmental impact of the proposed KWCG Project, your staff has provided us the following set of questions and answers:

Q. Simple-cycle gas turbines are not the most efficient gas technology for electricity generation. Why is this being chosen over the combined-cycle option?

A. Specific circumstances always determine the best technical solution for each situation. Due to the specific needs of KWCG and Ontario's system requirements in general, this generator will run only for short periods during times of peak demand. Simple-cycle generation is the most efficient and cost-effective technology for this need. Simple-cycle provides a high degree of operating flexibility to keep total system generation and demand in balance in real time. Other gas-fired configurations — combined-cycle and co-generation — have different operational characteristics which make them more suitable in locations with different demand situations.

Q. What is the environmental impact of what you are proposing?

A. Specific land-use and other environmental impacts will be determined and addressed during the environmental assessment process, once the preferred site is selected. Regulations are dictated and enforced by the Ontario Ministry of the Environment.

However, it should be noted that natural-gas fired generation is one of the cleanest fossil fuel power generating technologies. Compared with other fossil fuels, natural gas emits lower quantities of carbon dioxide and sulphur oxides. Modern gas turbine combustion systems are designed to minimize pollutants.

Q. What about noise?

A. Like other industrial facilities, natural gas-fired facilities will emit low levels of noise to some degree. For comparative purposes, the noise levels might be described as the equivalent of a gentle rainfall or a quiet residential area.

In addition, in response to our question regarding the possible use of river water to cool the proposed plant, your staff advised us that because of the location and single cycle technology the plant would be primarily air-cooled and any use of water would be very limited. Furthermore, any heated water would be vented as steam and not discharged into local streams or rivers such as the Speed or the Grand.

The above information does not provide a complete basis for determining the environmental effect of the proposed KWCG Project including any adverse impact on hunting, fishing, trapping or the gathering of edible plants. We note, however, that the proposed KWCG Project is intended to operate for a few days a year to generate power at periods of peak consumption. It is also noted that the likely site for the plant is a built-up industrial area beside Highway 401. This is an area that is assumed to have significant air pollution from existing industrial, commercial, residential and transportation activities. Given economic growth, such emissions are also assumed to be growing.

We have no information that the additional emissions caused by the KWCG Project would be significant in this context. Certainly the amount of new emissions from the Project would be less than what would result from any major new industrial development, given that gas will only be burned during periods of peak electricity demand. While air emissions and toxicity is a cumulative phenomenon, and not one within the expertise of the undersigned, common sense suggests that it is unlikely any harm to hunting and fishing success in the area would be detectable or traceable to the KWCG Project.

In the result, we rank the impact on any hunting, fishing, trapping and gathering of plants that occurs in the area surrounding the proposed Project as minimal. This is subject to additional environmental information that may be acquired as project planning and approvals proceed.

Traditional harvesting activity

The government of Ontario has no reliable information regarding actual traditional use of lands near Cambridge by either the Six Nations of the Grand or the Mississaugas of the New Credit. Such information would be relevant and, if it were available, helpful in making the present preliminary assessment.

In response to our request, the MNR provided a general sense, based on anecdotal information, that the scale of any Aboriginal fishing or harvest of deer and turkey would be small. MNR cautions that this information is speculative and not reliable. MNR has no information at all on trapping or plant harvesting in the area. As the area in question is largely in private hands, it may be that more significant Aboriginal harvesting takes

place with permission on such lands, but enforcement officers do not typically patrol private lands so the MNR is not aware of such activity if it occurs.

First Nations that are notified of the KWCG Project will have the opportunity to provide better information on any hunting, fishing, trapping or gathering of plants that they may carry on in the surrounding areas.

While acknowledging that there is extremely limited information on this matter, in light of the current intensive industrial, residential, commercial and agricultural land use in the area, and the extent of the patented, privately held lands and visibly incompatible uses, the view of the undersigned is that it would be surprising if significant traditional First Nation harvesting occurs.

Conclusion – “Depth” of consultation required

According to the Supreme Court, s. 35 consultation takes place on a spectrum from deep consultation (entailing full engagement and negotiation with the Aboriginal community, and possibly even a requirement of Aboriginal consent where there is a title interest affected), through medium to shallow consultation (which could entail mere notice and the provision of information).²⁰

As stated at the outset, the determination of the depth of consultation of an Aboriginal community is based on the strength of claims assessment and the impact assessment. If the legal rights and claims of an Aboriginal community are strong, and the potential impacts of the project on these rights and claims are significant, then deep consultation is required. If the claims are weak and the impacts mild, then a lower level of consultation is sufficient to meet the constitutional requirements.

We conclude, with respect to the Six Nations of the Grand River, that, in light of:

- the location of the KWCG project in the Haldimand Tract, but the low legal strength of any title or other relevant claims based on the Tract and Lord Simcoe’s Deed,
- the 1701 Albany Deed (Nanfan Treaty), which establishes an express hunting right which applies outside the Haldimand Tract south of a line that proceeds due west from Toronto, and may also apply in the Haldimand Tract if the right was not surrendered in 1797, and
- the Grand River Notification Agreement and proposed Interim Notification and Engagement Protocol Agreement, the spirit of which suggests providing notice,

²⁰ *Haida, supra.*

- the possibility of discovery of burial or archaeological sites, of Neutral origin particularly, at the Project site,
- the minimal predicted impact of the KWCG Project on the Six Nations' established and asserted harvesting rights,

a depth of consultation of the Six Nations of the Grand River at the low end of the scale is sufficient to satisfy the requirements of s. 35.

With respect to the Mississaugas of the New Credit, in light of:

- the likely right, if claimed, to a Treaty right to harvest applying to areas a few kilometers distant from the likely site of the KWCG Project,
- the Grand River Notification Agreement, the spirit of which would appear to suggest providing notice, but which does not on its face apply to the Project area,
- the small possibility of discovery of Ojibway burial or archaeological sites,
- the minimal predicted impact of the KWCG Project on the Mississauga's established/asserted harvesting rights,

a depth of consultation of the Mississaugas at the very low end of the scale is sufficient to satisfy the requirements of s. 35.

Finally, with respect to the Huron Wendat, in light of:

- the established entitlement of the Huron Wendat to be consulted in respect of archaeological and burial sites in areas formerly occupied by the Huron (Wendat) Confederacy and related nations,
- the possibility of discovering burial sites and archaeological sites of the Neutrals, some of whom joined the Huron Wendat, and
- the absence of any other rights or alleged rights or potential impacts on the Huron Wendat,

it would be premature to provide notice to the Huron Wendat before site selection and archaeological studies or an actual discovery, but should there be a discovery relevant to the Huron Wendat the existing procedures for such finds, which entail notice and consultation, should be followed.

Timing of notice and consultation

The duty to consult is triggered when the Crown contemplates proceeding with a project that may have an adverse effect on established or credibly asserted s. 35 rights. The decision need not be the final decision or the last opportunity for the Crown to approve a project or deny approval. Decisions that are merely steps in the strategic planning for the KWCG Project may also trigger the duty to consult.²¹

There seems to be little doubt that a decision by the Minister to issue a direction to the Ontario Power Authority to begin the procurement process for the KWCG Project constitutes such a step or decision.

This does not mean that all consultations must of necessity be complete prior to any direction being issued. However, it is recommended that notice to the Six Nations and the Mississaugas be given early, and prior to issuance of the direction. Also, language should be included in the direction that requires the Crown's s. 35 consultation duty to be fulfilled prior to any decision to proceed with the project.

I am available to discuss any questions that you might have about this preliminary assessment and the Crown's compliance with the s. 35 duty in relation to the KWCG Project.

Peter Landmann
Counsel

²¹ *Haida*, supra at ¶¶75, 76:

The Province argues that, although it did not consult the Haida prior to replacing the T.F.L. [Tree Farm Licence], it “has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans” (Crown's factum, at para. 64).

...

I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal rights and title.

[emphasis added]

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: January 26, 2011 11:21 AM
To: Landmann, Peter (MEI)
Cc: Perun, Halyna N. (MEI)
Subject: Re: 6N related Q and A

Thanks, Peter - yes, this relates to a direction. Will forward fyi when back in office. I have no information about the current thinking about the site or whether any consultation has occurred.

Carolyn

From: Landmann, Peter (MEI)
To: Calwell, Carolyn (MEI)
Cc: Perun, Halyna N. (MEI)
Sent: Wed Jan 26 11:12:25 2011
Subject: RE: 6N related Q and A

I assume this Q and A is triggered by the issuance of a direction to the OPA? I did a preliminary assessment on this proposal. It is attached and I have reproduced the executive summary below. You will see that I recommended that the direction require the duty to consult be fulfilled. At the time the site was an industrial park beside the 401. As we knew the site, I also recommended consultation prior to issuing the direction. Assuming the client complied with that advice (I do not have the direction) then the answer to the Q is straightforward:

5. This area is in the Haldimand Tract. Will the First Nations be impacted? If so have they been consulted and provided agreement?

A. As with all significant energy projects any potentially affected First Nations are notified and Ontario ensures that any duty to consult and accommodate is fulfilled. [if there has already been consultation, one could go on to add more info such as:] Consultation has already begun and is ongoing. [and/or] The _____ have indicated that they support the project.

I would also bring to your attention that the 1701 opinion of CLOC, if not rejected by clients, would require us to consult Belleville, Cornwall and Muskoka Iroquois as well as the Six Nations. I am going to send you another email on that fyi as that issue is coming to a head this week.

EXECUTIVE SUMMARY

The present assessment concludes as follows:

- the Six Nations of the Grand River (Elected Band Council and traditional Haudenosaunee Chiefs) have s. 35 rights and asserted rights in the Cambridge area and a right to be notified of the KWCG Project;

- a depth of consultation of the Six Nations of the Grand River at the low end of the scale is sufficient to satisfy the requirements of s. 35;
- the Mississaugas of the New Credit also have potential s. 35 rights near the Cambridge area and a right to be notified of the KWCG Project;
- a depth of consultation of the Mississaugas at the very low end of the scale is sufficient to satisfy the requirements of s. 35;
- the Six Nations of the Grand River, the Huron Wendat (based near Quebec City), and the Mississaugas of the New Credit may have a right to be consulted if any ancestral burial sites or culturally affiliated archaeological remains are discovered – or are very likely to be discovered – at the Project site;
- notice to and consultation of Aboriginal communities in relation to burial sites and archaeological remains should await Project site selection and any information that emerges under existing mechanisms;
- a decision by the Minister of Energy to issue a direction to the Ontario Power Authority (“OPA”) to begin the procurement process for the KWCG Project triggers the s. 35 duty to consult;
- this does not mean that all consultations must be complete prior to a direction being issued, but it is recommended that notice to the Six Nations of the Grand River and the Mississaugas of the New Credit be given early, and prior to issuance of the direction; and finally
- language should be included in the direction that requires the Crown’s s. 35 consultation duty to be fulfilled as a condition for proceeding with the Project.

Peter Landmann

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From: Calwell, Carolyn (MEI)
Sent: January 26, 2011 10:46 AM
To: Landmann, Peter (MEI)
Cc: Perun, Halyna N. (MEI)
Subject: 6N related Q and A

These are Qs and As related to the KWC plant that TransCanada and the OPA are negotiating. Would you please look at #5 re: Haldimand and give me your thoughts? I am concerned policy won't address and we'll be jammed to respond. Need asap please. Thanks very much.

C

From: Kovesfalvi, Sylvia (MEI)
To: King, Ryan (MEI); Calwell, Carolyn (MEI)
Cc: Kulendran, Jesse (MEI)
Sent: Wed Jan 26 10:06:56 2011
Subject: latest

- date revised to spring 2015
- yellow highlights additions from opa mats
- Viki's team reviewing relevant sections now
- We have until noon to finalize

4

5

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: January 26, 2011 11:37 AM
To: Landmann, Peter (MEI)
Cc: Perun, Halyna N. (MEI)
Subject: RE: 6N related Q and A
Attachments: KWC TransCanada Direction.20 12 2010.cln.docx

This is the latest direction – it will be revised following a noon meeting with the MO. Again, thank you for your help with the Q and As.

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Sent: January 26, 2011 11:12 AM
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Cc: Perun, Halyna N. (MEI)
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- a decision by the Minister of Energy to issue a direction to the Ontario Power Authority (“OPA”) to begin the procurement process for the KWCG Project triggers the s. 35 duty to consult;
- this does not mean that all consultations must be complete prior to a direction being issued, but it is recommended that notice to the Six Nations of the Grand River and the Mississaugas of the New Credit be given early, and prior to issuance of the direction; and finally
- language should be included in the direction that requires the Crown’s s. 35 consultation duty to be fulfilled as a condition for proceeding with the Project.

Peter Landmann

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Cc: Perun, Halyna N. (MEI)

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- yellow highlights additions from opa mats
- Viki's team reviewing relevant sections now
- We have until noon to finalize

December 1, 2010

Mr. Colin Anderson
Chief Executive Officer
Ontario Power Authority
Suite 1600
120 Adelaide Street West
Toronto, ON M5H 1T1

Dear Mr. Anderson,

Re: Kitchener-Waterloo-Cambridge Area New Supply

I write in connection with my authority as the Minister of Energy in order to exercise the statutory power of ministerial direction that I have in respect of the Ontario Power Authority (the "OPA") under section 25.32 of the *Electricity Act, 1998* (the "Act").

Background

The 2007 proposed Integrated Power System Plan forecast need for an additional gas plant in Kitchener-Waterloo-Cambridge (the "KWC Area"). In our Long Term Energy Plan, the Government identified the continued need for a peaking natural gas-fired plant in the KWC Area where demand is growing at more than twice the provincial rate.

The Ministry has determined that it is prudent and necessary to build a simple cycle natural gas-fired power plant that has a nameplate capacity of approximately 450MW for deployment in the KWC Area by [the spring of 2014] (the "KWC Project").

Pursuant to a direction dated August 18, 2008 (the "2008 Direction"), the OPA procured from TransCanada Energy Ltd. ("TransCanada") the design, construction and operation of a 900MW natural gas generating station in Oakville (the "Oakville Generating Station"). On October 7, 2010, I announced that the Oakville Generating Station would not proceed as changes in demand and supply have made the Oakville Generating station no longer necessary.

Direction

Therefore, pursuant to my authority under subsection 25.32(4) of the *Electricity Act, 1998*, I direct the OPA to proceed with negotiations with TransCanada related to the KWC Project with a view to:

- a) negotiating and executing an implementation agreement which would, among other things, provide that the OPA indemnify TransCanada pending the completion of a final contract with respect to certain costs that TransCanada must incur if an in service date of the [spring of 2014] is to be met;

- b) concluding and executing a definitive contract with TransCanada by **[June 30, 2011]**, which will address the reliability needs described above.

In negotiating this contract, it is anticipated that the OPA will have regard to (i) a reasonable balance of risk and reward for TransCanada, and (ii) the costs reasonably incurred by TransCanada with respect to the Oakville Generating Station. It is further expected that the contract provide for an in service date of no later than **[spring of 2014]**.

As with all electricity generation projects procured by the OPA, the KWC Project shall be required to undergo all local, municipal and environmental approvals to ensure it meets or exceeds regulated standards, including those for air quality, noise, odour and vibration.

For greater clarity, the OPA is not required by this direction to enter into a contract with TransCanada if it is unable to reach agreement with TransCanada on terms that satisfy the requirements of this direction.

I further direct that the 2008 Direction is hereby revoked.

This direction shall be effective and binding as of the date hereof.

]
Brad Duguid
Minister of Energy

Perun, Halyna N. (ENERGY)

From: Landmann, Peter (MEI)
Sent: January 26, 2011 12:30 PM
To: Calwell, Carolyn (MEI)
Cc: Perun, Halyna N. (MEI)
Subject: RE: 6N related Q and A

The draft directive does not comply with my legal advice to include a reference to the duty to consult.

- language should be included in the direction that requires the Crown's s. 35 consultation duty to be fulfilled as a condition for proceeding with the Project.

This has been standard in previous similar directives and its absence here is notable. To help protect this project from legal challenge I recommend adding the highlighted language:

As with all electricity generation projects procured by the OPA, the KWC Project shall be required to undergo all local, municipal and environmental approvals to ensure it meets or exceeds regulated standards, including those for air quality, noise, odour and vibration, and any duty to consult and accommodate Aboriginal communities on the KWC Project must be fulfilled.

Peter Landmann

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- the Mississaugas of the New Credit also have potential s. 35 rights near the Cambridge area and a right to be notified of the KWCG Project;
- a depth of consultation of the Mississaugas at the very low end of the scale is sufficient to satisfy the requirements of s. 35;

- the Six Nations of the Grand River, the Huron-Wendat (based near Quebec City), and the Mississaugas of the New Credit may have a right to be consulted if any ancestral burial sites or culturally affiliated archaeological remains are discovered – or are very likely to be discovered – at the Project site;
- notice to and consultation of Aboriginal communities in relation to burial sites and archaeological remains should await Project site selection and any information that emerges under existing mechanisms;
- a decision by the Minister of Energy to issue a direction to the Ontario Power Authority (“OPA”) to begin the procurement process for the KWCG Project triggers the s. 35 duty to consult;
- this does not mean that all consultations must be complete prior to a direction being issued, but it is recommended that notice to the Six Nations of the Grand River and the Mississaugas of the New Credit be given early, and prior to issuance of the direction; and finally
- language should be included in the direction that requires the Crown’s s. 35 consultation duty to be fulfilled as a condition for proceeding with the Project.

Peter Landmann

Ministry of the Attorney General
 Legal Services Branch
 Ministry of Energy and Infrastructure
 777 Bay Street, 4th Floor
 Toronto ON M5G 2E5

Telephone: 416 212-2418
 Blackberry: 416 735-7327
 Cell: 514 512-9492
 Facsimile: 416 325-1781
 E-mail: peter.landmann@ontario.ca

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From: Calwell, Carolyn (MEI)
Sent: January 26, 2011 10:46 AM
To: Landmann, Peter (MEI)
Cc: Perun, Halyna N. (MEI)
Subject: 6N related Q and A

These are Qs and As related to the KWC plant that TransCanada and the OPA are negotiating. Would you please look at #5 re: Haldimand and give me your thoughts? I am concerned policy won't address and we'll be jammed to respond. Need asap please. Thanks very much.

C

From: Kovesfalvi, Sylvia (MEI)
To: King, Ryan (MEI); Calwell, Carolyn (MEI)
Cc: Kulendran, Jesse (MEI)
Sent: Wed Jan 26 10:06:56 2011
Subject: latest

- date revised to spring 2015
- yellow highlights additions from opa mats
- Viki's team reviewing relevant sections now
- We have until noon to finalize

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: January 26, 2011 12:54 PM
To: Kulendran, Jesse (MEI)
Cc: Jennings, Rick (MEI); King, Ryan (MEI); MacCallum, Doug (MEI); Jenkins, Allan (MEI); Perun, Halyna N. (MEI); Landmann, Peter (MEI)
Subject: KWC Direction
Attachments: KWC TransCanada Direction.26 01 2011.docx

Confidential/Solicitor-Client Privileged

Further to direction just received, please find attached a further revised direction, tracked against the version that you received on Monday. I also added a statement regarding duty to consult, which follows Peter's prior recommendation. I will send a clean version of this draft to the OPA as a courtesy shortly, asking if the direction creates any impossibility for it. I will advise later this afternoon when I hear back from the OPA.

Carolyn

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January, 2011

Mr. Colin Andersen
Chief Executive Officer
Ontario Power Authority
Suite 1600
120 Adelaide Street West
Toronto, ON M5H 1T1

Dear Mr. Andersen,

Re: Kitchener-Waterloo-Cambridge Area New Supply

I write in connection with my authority as the Minister of Energy in order to exercise the statutory power of ministerial direction that I have in respect of the Ontario Power Authority (the "OPA") under section 25.32 of the *Electricity Act, 1998* (the "Act").

Background

The 2007 proposed Integrated Power System Plan forecasted need for a gas plant in Kitchener-Waterloo-Cambridge (the "KWC Area"). Building on the needs identified in the 2007 plan, in our Long Term Energy Plan, the Government identified the value of natural gas generation for peak needs where it can address local and system reliability issues. The Government confirmed the continued need for a clean, modern natural gas-fired plant in the KWC Area.

The Government has determined with input and advice from the OPA that it is prudent and necessary to build a simple cycle natural gas-fired power plant that has contract capacity of approximately 450MW for deployment in the KWC Area by the spring of 2014 (the "KWC Project") to meet local system needs. In the KWC Area, demand is growing at more than twice the provincial rate.

Pursuant to a direction dated August 18, 2008 (the "2008 Direction"), the OPA procured from TransCanada Energy Ltd. ("TransCanada") the design, construction and operation of a 900MW natural gas generating station in Oakville (the "Oakville Generating Station"). On October 7, 2010, I announced that the Oakville Generating Station would not proceed as changes in demand and supply have made the Oakville Generating station no longer necessary.

In light of the foregoing, together with the OPA, the Government has discussed with TransCanada a project in lieu of the Oakville Generating Station that would meet the KWC Area supply requirement by spring of 2014.

Direction

Therefore, pursuant to my authority under subsection 25.32(4) of the Act ~~*Electricity Act, 1998*~~, I direct the OPA to assume responsibility for discussions with TransCanada to procure a 450MW

gas plant with contract capacity of 450MW in the KWC Area to address the reliability needs described above, including the negotiation and execution of an interim implementation agreement to address the costs of and work on the KWC Project before a definitive agreement is executed. To best protect electricity rate payers, the OPA should look for opportunities to reprofile investments already made by TransCanada.

It is anticipated that the OPA will complete the contract for the KWC Project by June 30, 2011 having regard to a reasonable balance of risk ~~and reward~~ for TransCanada, the mutual termination of the contract for the Oakville Generation Project and the needs and interests of Ontario electricity customers. It is further expected that the contract provide for an in service date of no later than spring of 2015~~4~~ to meet the demand needs of the community.

As with all electricity generation projects procured by the OPA, the KWC Project shall be required to undergo all applicable municipal and environmental approvals to ensure it meets ~~or~~ exceeds regulated standards, including those for air quality, noise, odour and vibration. Any duty to consult and accommodate Aboriginal communities on the KWC Project must be fulfilled.

For greater clarity, the OPA is not required by this direction to enter into a contract with TransCanada if it is unable to reach agreement with TransCanada on terms that satisfy the requirements of this direction and fully consider rate payers' interests. In such event, the OPA may seek to recover its costs, if any, relating to the implementation agreement in accordance with its statutory authority.

I further direct that the 2008 Direction is hereby revoked.

This direction shall be effective and binding as of the date hereof.

Brad Duguid
Minister of Energy

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: January 26, 2011 3:00 PM
To: MacLennan, Craig (MEI)
Cc: Kulendran, Jesse (MEI); Perun, Halyna N. (MEI)
Subject: RE:
Attachments: KWC TransCanada Direction.26 01 2011.cln.docx

Clean copy attached. OPA advises of a high level discomfort, but I haven't heard specifics. I understand that the Board Chair is looking at it. Something more specific is to come, I believe.

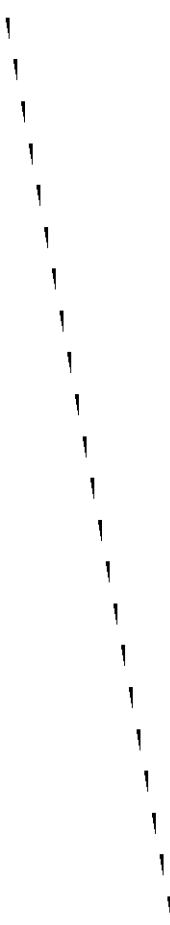
Carolyn

From: MacLennan, Craig (MEI)
Sent: January 26, 2011 2:23 PM
To: Calwell, Carolyn (MEI)
Subject:

Sorry to be annoying but do you have an eta on the letter?

C

Craig MacLennan
Chief of Staff
Office of the Minister of Energy
Tel: 416-327-3550



January , 2011

Mr. Colin Andersen
Chief Executive Officer
Ontario Power Authority
Suite 1600
120 Adelaide Street West
Toronto, ON M5H 1T1

Dear Mr. Andersen,

Re: Kitchener-Waterloo-Cambridge Area New Supply

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In light of the foregoing, together with the OPA, the Government has discussed with TransCanada a project that would meet the KWC Area supply requirement.

Direction

Therefore, pursuant to my authority under subsection 25.32(4) of the Act, I direct the OPA to assume responsibility for discussions with TransCanada to procure a gas plant with contract capacity of 450MW in the KWC Area to address the reliability needs described above, including

the negotiation and execution of an interim implementation agreement to address the costs of and work on the KWC Project before a definitive agreement is executed. To best protect electricity rate payers, the OPA should look for opportunities to re-profile investments already made by TransCanada.

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Brad Duguid
Minister of Energy

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: January 28, 2011 4:46 PM
To: Perun, Halyna N. (MEI)
Subject: FW: Direction

In the hurry, hurry wait category – direction for TC re: KWC.

From: Kulendran, Jesse (MEI)
Sent: January 28, 2011 4:26 PM
To: Calwell, Carolyn (MEI)
Subject: Re: Direction

Not yet signed. Understand there's a delay. Expect next week.
-J

Jesse Kulendran · Policy Coordinator · Deputy Minister's Office · Ministry of Energy · Tel.: 416-327-7025 · Blackberry:
416-206-1394

From: Calwell, Carolyn (MEI)
To: Kulendran, Jesse (MEI)
Sent: Fri Jan 28 16:24:47 2011
Subject: Direction

Hi Jesse – wondering about the status. Did the Minister sign this week? If so, may I have a copy for my file?

Carolyn

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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: February 1, 2011 11:18 AM
To: Perun, Halyna N. (MEI)
Subject: FW: FYI - OPA Media Call - Toronto Star - KW

Importance: High

From: Kovesfalvi, Sylvia (MEI)
Sent: February 1, 2011 11:17 AM
To: Calwell, Carolyn (MEI)
Subject: FW: FYI - OPA Media Call - Toronto Star - KW
Importance: High

FYI ...

From: Smith, Anne (MEI)
Sent: February 1, 2011 11:01 AM
To: Powers, Kevin (MEI); Kovesfalvi, Sylvia (MEI); Cooper, Linda (MEI); Wismer, Jennifer (MEI); Kulendran, Jesse (MEI)
Cc: Nutter, George (MEI); Lewyckyj, Maryanna (MEI); Cayley, Daniel (MEI)
Subject: FYI - OPA Media Call - Toronto Star - KW
Importance: High

FYI – I can give a heads up to our media people to look for a potential article.
Let me know any other next steps.
Anne

From: Ben Chin [<mailto:Ben.Chin@powerauthority.on.ca>]
Sent: February 1, 2011 10:57 AM
To: Block, Andrew (MEI); Smith, Anne (MEI)
Cc: Kristin Jenkins; Tim Butters; Mary Bernard
Subject: Please share with appropriate people
Importance: High

Just took a call from John Spears on 'rumours' of talks with Trans Canada, and possibility of plant in Waterloo.

-I said to him we have, and TC has publicly stated that we are in discussions about a project for TC following announcement on OGS.
-It's too early to speculate where or what that project is.
-agreed with him that LTEP does identify need in KWC, but again, too early to speculate on outcome of talks, just that we're making good progress

Spears observed TC seems to have indicated they would prefer a project as compensation for Oakville, rather than cash or to go to court

I responded: 'again I'd point you to what TC and we said. We have a good relationship with TC, they've developed a lot of vital energy infrastructure in Ontario, and the approach has been to look down the order paper at what other projects do we need that they could build. We're making good progress in that discussion, but it would be speculate to point to any one project at this time. We'll make sure you know when those discussions have concluded.'

Spears said he may or may not be writing about it.

Perun, Halyna N. (ENERGY)

From: Jenkins, Allan (MEI)
Sent: February 4, 2011 9:19 AM
To: Perun, Halyna N. (MEI)
Subject: FW: KWC Direction

From: Jenkins, Allan (MEI)
Sent: February 4, 2011 9:16 AM
To: Calwell, Carolyn (MEI)
Cc: McKeever, Garry (MEI)
Subject: RE: KWC Direction

Just came across this while updating the general gas generation House Note, in a section referring to a possible KWC procurement. This was added in 2009:

- The site search area lies within the Halimand Tract. Ministry legal counsel has advised that notice be provided to Six Nations of the Grand River prior to issuance of a direction. The current plan is to arrange a Ministry/OPA briefing of Six Nations before a procurement is announced.

Not sure if this is being considered for the current direction.

From: Calwell, Carolyn (MEI)
Sent: January 26, 2011 12:54 PM
To: Kulendran, Jesse (MEI)
Cc: Jennings, Rick (MEI); King, Ryan (MEI); MacCallum, Doug (MEI); Jenkins, Allan (MEI); Perun, Halyna N. (MEI); Landmann, Peter (MEI)
Subject: KWC Direction

Confidential/Solicitor-Client Privileged

Further to direction just received, please find attached a further revised direction, tracked against the version that you received on Monday. I also added a statement regarding duty to consult, which follows Peter's prior recommendation. I will send a clean version of this draft to the OPA as a courtesy shortly, asking if the direction creates any impossibility for it. I will advise later this afternoon when I hear back from the OPA.

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Perun, Halyna N. (ENERGY)

From: Landmann, Peter (MEI)
Sent: February 4, 2011 11:18 AM
To: Perun, Halyna N. (MEI)
Subject: Re: KWC Direction

I gave the advice and don't know if it was followed. Whether or not it was I have also recommended adding a provision in the directive on duty to consult. I have not seen a final signed directive. Do you know if it is now signed?

From: Perun, Halyna N. (MEI)
To: Landmann, Peter (MEI)
Sent: Fri Feb 04 11:04:24 2011
Subject: FW: KWC Direction

Hi Peter – not sure if anything needs to be done on this immediately – but am wondering if in your recommendation the below was considered? Thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Subject: FW: KWC Direction

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Cc: McKeever, Garry (MEI)
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Sent: January 26, 2011 12:54 PM

To: Kulendran, Jesse (MEI)

Cc: Jennings, Rick (MEI); King, Ryan (MEI); MacCallum, Doug (MEI); Jenkins, Allan (MEI); Perun, Halyna N. (MEI); Landmann, Peter (MEI)

Subject: KWC Direction

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Perun, Halyna N. (ENERGY)

From: Landmann, Peter (MEI)
Sent: February 4, 2011 5:36 PM
To: Perun, Halyna N. (MEI)
Subject: Re: KWC Direction

Yes this directive language is good enough. When its signed it would be nice to have original. (Too bad they did not follow up and consult before but we are often in the position of doing something a bit less than ideal.)

From: Perun, Halyna N. (MEI)
To: Landmann, Peter (MEI)
Sent: Fri Feb 04 17:13:01 2011
Subject: RE: KWC Direction

Hi Peter – the direction as we saw it last contains the following (what Carolyn sent up which was per your advice). Is this go enough?

“As with all electricity generation projects procured by the OPA, the KWC Project shall be required to undergo all applicable municipal and environmental approvals to ensure it meets or exceeds regulated standards, including those for air quality, noise, odour and vibration. Any duty to consult and accommodate Aboriginal communities on the KWC Project must be fulfilled.”

That House book note says legal advice is that Notice to the Six Nations of the Grand Bend be provided before any direction to procure is given. This wouldn't be feasible here as the direction is for the OPA to procure this plant from TransCanada and I don't think this info is to be out in the public domain until the direction goes out. So – is there a response I need to send to Allan on this in light of his email this morning?

Your advice here would be appreciated

Thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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E-mail: Halyna.Perun2@ontario.ca

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From: Landmann, Peter (MEI)
Sent: February 4, 2011 11:18 AM
To: Perun, Halyna N. (MEI)
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Sent: Fri Feb 04 11:04:24 2011
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Halyna

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From: Jenkins, Allan (MEI)
Sent: February 4, 2011 9:19 AM
To: Perun, Halyna N. (MEI)
Subject: FW: KWC Direction

From: Jenkins, Allan (MEI)
Sent: February 4, 2011 9:16 AM
To: Calwell, Carolyn (MEI)
Cc: McKeever, Garry (MEI)
Subject: RE: KWC Direction

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- The site search area lies within the Haldimand Tract. Ministry legal counsel has advised that notice be provided to Six Nations of the Grand River prior to issuance of a direction. The current plan is to arrange a Ministry/OPA briefing of Six Nations before a procurement is announced.

Not sure if this is being considered for the current direction.

From: Calwell, Carolyn (MEI)

Sent: January 26, 2011 12:54 PM

To: Kulendran, Jesse (MEI)

Cc: Jennings, Rick (MEI); King, Ryan (MEI); MacCallum, Doug (MEI); Jenkins, Allan (MEI); Perun, Halyna N. (MEI); Landmann, Peter (MEI)

Subject: KWC Direction

Confidential/Solicitor-Client Privileged

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Carolyn

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Perun, Halyna N. (ENERGY)

From: Landmann, Peter (MEI)
Sent: February 4, 2011 8:33 PM
To: Jenkins, Allan (MEI); Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI); McKeever, Garry (MEI)
Subject: Re: KWC Direction

I do not have the materials in front of me but if the direction is effectively a decision to proceed with a gas generation project in the Haldimand Tract or 1701 treaty subject to regulatory approval it would be ideal to notify 6N and hear what they have to say first. (It is not just a matter of notice.) But I would ask whether it is still feasible to notify and consult 6N prior to issuing the direction or whether your timing precludes that? If it is not feasible well then you issue a direction which says you will meet the duty and you consult after. Not quite as good legally but still very likely to meet the duty since the direction is expressly subject to it.

By the way it would be good (if you as clients believe it in your interests) for you to take an active role on the current 1701 discussions given the MAG advice to consult not just 6N but also Ty, Wahta, Oneida and Akw on projects in SW ont. This may be an example of a project that that advice will affect unless there is line ministry push back.

From: Jenkins, Allan (MEI)
To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI); Landmann, Peter (MEI); McKeever, Garry (MEI)
Sent: Fri Feb 04 20:02:33 2011
Subject: RE: KWC Direction

My question was about the intent, which as I read it, advises that notice be given to the Six Nations before we send the direction to the OPA.

From: Perun, Halyna N. (MEI)
Sent: Fri 2/4/2011 6:14 PM
To: Jenkins, Allan (MEI)
Cc: Calwell, Carolyn (MEI); Landmann, Peter (MEI); McKeever, Garry (MEI)
Subject: RE: KWC Direction

Hi Allan – I reviewed your query (in light of the House Book Note info you found from 2009) and what we sent up in the directive re duty to consult with Peter and he's fine with what went to the MO; ie;

“As with all electricity generation projects procured by the OPA, the KWC Project shall be required to undergo all applicable municipal and environmental approvals to ensure it meets or exceeds regulated standards, including those for air quality, noise, odour and vibration. Any duty to consult and accommodate Aboriginal communities on the KWC Project must be fulfilled.”

Hope this clarifies,

Halyna

Halyna N. Perun
A/Director
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Ministries of Energy & Infrastructure
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Cc: Jennings, Rick (MEI); King, Ryan (MEI); MacCallum, Doug (MEI); Jenkins, Allan (MEI); Perun, Halyna N. (MEI); Landmann, Peter (MEI)
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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: February 7, 2011 8:51 AM
To: Jenkins, Allan (MEI)
Cc: McKeever, Garry (MEI); Landmann, Peter (MEI); Perun, Halyna N. (MEI)
Subject: RE: KWC Direction

I know you had various back and forths about this on Friday. To be clear, the current direction is to attempt to negotiate a contract, rather than a direction to undertake a procurement, which the bullet below seems assumed. My point is just that circumstances around proceeding in this case have changed since 2009.

Carolyn

From: Jenkins, Allan (MEI)
Sent: February 4, 2011 1:36 PM
To: Calwell, Carolyn (MEI)
Cc: McKeever, Garry (MEI)
Subject: RE: KWC Direction

The point raised is that the Six Nations should be informed of the direction **before** we issue it to the OPA. Is that what we are doing?

From: Calwell, Carolyn (MEI)
Sent: February 4, 2011 12:16 PM
To: Jenkins, Allan (MEI)
Cc: McKeever, Garry (MEI)
Subject: Re: KWC Direction

It's addressed in the most recent draft - thanks for raising.

Carolyn

From: Jenkins, Allan (MEI)
To: Calwell, Carolyn (MEI)
Cc: McKeever, Garry (MEI)
Sent: Fri Feb 04 09:16:26 2011
Subject: RE: KWC Direction

Just came across this while updating the general gas generation House Note, in a section referring to a possible KWC procurement. This was added in 2009:

- The site search area lies within the Haldimand Tract. Ministry legal counsel has advised that notice be provided to Six Nations of the Grand River prior to issuance of a direction. The current plan is to arrange a Ministry/OPA briefing of Six Nations before a procurement is announced.

Not sure if this is being considered for the current direction.

From: Calwell, Carolyn (MEI)
Sent: January 26, 2011 12:54 PM
To: Kulendran, Jesse (MEI)
Cc: Jennings, Rick (MEI); King, Ryan (MEI); MacCallum, Doug (MEI); Jenkins, Allan (MEI); Perun, Halyna N. (MEI);

Landmann, Peter (MEI)
Subject: KWC Direction

Confidential/Solicitor-Client Privileged

Further to direction just received, please find attached a further revised direction, tracked against the version that you received on Monday. I also added a statement regarding duty to consult, which follows Peter's prior recommendation. I will send a clean version of this draft to the OPA as a courtesy shortly, asking if the direction creates any impossibility for it. I will advise later this afternoon when I hear back from the OPA.

Carolyn

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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: February 18, 2011 4:21 PM
To: MacLennan, Craig (MEI)
Cc: Kulendran, Jesse (MEI); Wismer, Jennifer (MEI); Jennings, Rick (MEI); King, Ryan (MEI); Perun, Halyna N. (MEI)
Subject: FW: KWC Directive - Suggested Revisions
Attachments: MISC_110218_KWC TransCanada Direction.docx

Confidential/Solicitor-Client Privileged

I received the attached revised direction regarding TransCanada and KWC from the OPA today. The OPA's proposed changes are tracked from the last version that I sent to you on January 26th.

I have no concerns about the proposed changes. The OPA is willing to live with this language and it is relatively soft, considering the OPA's prior position and earlier proposed wording.

Please do not hesitate to contact me if you have any questions or if you wish to discuss.

Carolyn



FebruaryJanuary , 2011

Mr. Colin Andersen
Chief Executive Officer
Ontario Power Authority
Suite 1600
120 Adelaide Street West
Toronto, ON M5H 1T1

Dear Mr. Andersen,

Re: Kitchener-Waterloo-Cambridge Area New Supply

I write in connection with my authority as the Minister of Energy in order to exercise the statutory power of ministerial direction that I have in respect of the Ontario Power Authority (the "OPA") under section 25.32 of the *Electricity Act, 1998* (the "Act").

Background

The 2007 proposed Integrated Power System Plan forecasted need for a gas plant in Kitchener-Waterloo-Cambridge (the "KWC Area"). Building on the needs identified in the 2007 plan, in our Long Term Energy Plan, the Government identified the value of natural gas generation for peak needs where it can address local and system reliability issues. The Government confirmed the continued need for a clean, modern natural gas-fired plant in the KWC Area.

The Government has determined with input and advice from the OPA that it is prudent and necessary to build a simple cycle natural gas-fired power plant that has contract capacity of approximately 450 up to 500 MW for deployment in the KWC Area by the spring of 2015 (the "KWC Project") to meet local system needs. In the KWC Area, demand is growing at more than twice the provincial rate.

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Pursuant to a direction dated August 18, 2008 (the "2008 Direction"), the OPA procured from TransCanada Energy Ltd. ("TransCanada") the design, construction and operation of a 900MW natural gas generating station in Oakville (the "Oakville Generating Station"). On October 7, 2010, I announced that the Oakville Generating Station would not proceed as changes in demand and supply have made the Oakville Generating station no longer necessary.

In light of the foregoing, together with the OPA, the Government has discussed with TransCanada the termination of the contract for the Oakville Generating Station and a project that would meet the KWC Area supply requirement.

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Direction

Therefore, pursuant to my authority under subsection 25.32(4) of the Act, I direct the OPA to assume responsibility for discussions with TransCanada to procure a gas plant with contract

capacity of 450MW in the KWC Area to address the reliability needs described above, including the negotiation and execution of an interim implementation agreement to address the costs of and work on the KWC Project before a definitive agreement is executed. To best protect electricity rate payers, the OPA should, if it deems appropriate, combine such negotiations with negotiations in respect of the mutual termination of the contract for the Oakville Generating Station, looking for opportunities to reprofile investments already made by TransCanada and minimize overall costs.

It is anticipated that the OPA will complete the contract for the KWC Project by June 30, 2011 having regard to a reasonable balance of risk for TransCanada, the mutual termination of the contract for the Oakville Generation Project and the needs and interests of Ontario electricity customers. It is further expected that the contract provide for an in service date of no later than spring of 2015 to meet the demand needs of the community.

As with all electricity generation projects procured by the OPA, the KWC Project shall be required to undergo all applicable municipal and environmental approvals to ensure it meets or exceeds regulated standards, including those for air quality, noise, odour and vibration. Any duty to consult and accommodate Aboriginal communities on the KWC Project must be fulfilled.

For greater clarity, the OPA is not required by this direction to enter into a contract with TransCanada if it is unable to reach agreement with TransCanada on terms that satisfy the requirements of this direction and fully consider rate payers' interests. In such event, the OPA may seek to recover its costs, if any, relating to the implementation agreement in accordance with its statutory authority.

I further direct that the 2008 Direction is hereby revoked.

This direction shall be effective and binding as of the date hereof.

Brad Duguid
Minister of Energy

Perun, Halyna N. (ENERGY)

From: Jennings, Rick (MEI)
Sent: February 18, 2011 5:33 PM
To: Calwell, Carolyn (MEI); MacLennan, Craig (MEI)
Cc: Kulendran, Jesse (MEI); Wismer, Jennifer (MEI); King, Ryan (MEI); Perun, Halyna N. (MEI)
Subject: RE: KWC Directive - Suggested Revisions

Carolyn, the wording is fine with me.

From: Calwell, Carolyn (MEI)
Sent: February 18, 2011 4:21 PM
To: MacLennan, Craig (MEI)
Cc: Kulendran, Jesse (MEI); Wismer, Jennifer (MEI); Jennings, Rick (MEI); King, Ryan (MEI); Perun, Halyna N. (MEI)
Subject: FW: KWC Directive - Suggested Revisions

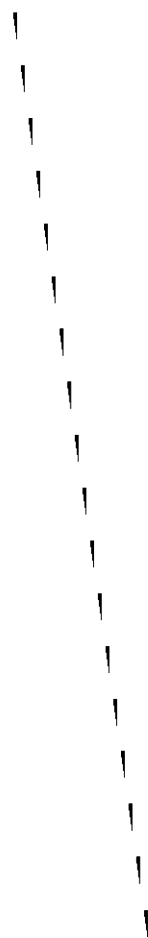
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Please do not hesitate to contact me if you have any questions or if you wish to discuss.

Carolyn



Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: February 22, 2011 10:14 AM
To: MacLennan, Craig (MEI)
Cc: Kulendran, Jesse (MEI); Wismer, Jennifer (MEI); Jennings, Rick (MEI); King, Ryan (MEI); Perun, Halyna N. (MEI)
Subject: RE: KWC Directive - Suggested Revisions
Attachments: MISC_110222_KWC TransCanada Direction.docx

Confidential/Solicitor-Client Privileged

The OPA advises of a typo in reference to the capacity of the KWC plant, under "Direction" at the top of page 2. Please see attached, with the change highlighted.

Carolyn

From: Calwell, Carolyn (MEI)
Sent: February 18, 2011 4:21 PM
To: MacLennan, Craig (MEI)
Cc: Kulendran, Jesse (MEI); Wismer, Jennifer (MEI); Jennings, Rick (MEI); King, Ryan (MEI); Perun, Halyna N. (MEI)
Subject: FW: KWC Directive - Suggested Revisions

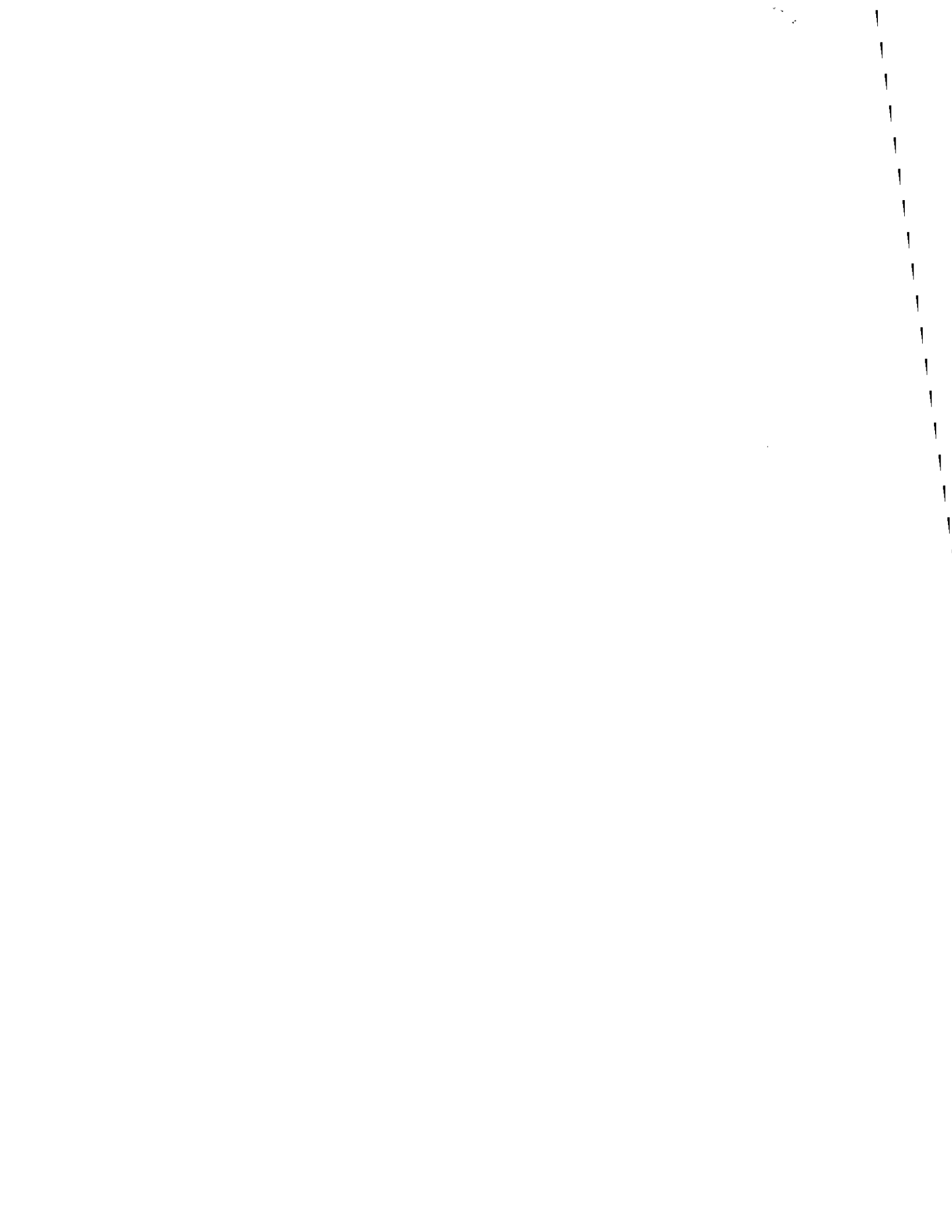
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Carolyn



FebruaryJanuary , 2011

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Chief Executive Officer
Ontario Power Authority
Suite 1600
120 Adelaide Street West
Toronto, ON M5H 1T1

Dear Mr. Andersen,

Re: Kitchener-Waterloo-Cambridge Area New Supply

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Direction

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I further direct that the 2008 Direction is hereby revoked.

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Brad Duguid
Minister of Energy

Perun, Halyna N. (ENERGY)

From: Michael Lyle [Michael.Lyle@powerauthority.on.ca]
Sent: April 15, 2011 4:20 PM
To: Perun, Halyna N. (MEI)
Subject: FW: TCE
Attachments: 20455701_2.doc

Sorry. This also should have been sent to you.

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario, M5H 1T1
Direct: 416-969-6035
Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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From: Michael Lyle
Sent: April 15, 2011 4:20 PM
To: 'Sean.Mullin@ontario.ca'; 'craig.maclennan@ontario.ca'; 'david.lindsay@ontario.ca'; 'James Hinds'
Cc: Colin Andersen; JoAnne Butler; Kristin Jenkins; Brett Baker; Michael Killeavy; Susan Kennedy; Deborah Langelaan
Subject: TCE

SOLICITOR/CLIENT PRIVILEGE

Attached per our earlier conversation is the draft letter with respect to mediation and arbitration.

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario, M5H 1T1
Direct: 416-969-6035
Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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[ONTARIO POWER AUTHORITY LETTERHEAD]

April 15, 2011

SENT BY FACSIMILE AND EMAIL

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Mr. Alex Pourbaix
President, Energy and Oil Pipelines
TransCanada Energy Limited
450 – 1 Street, SW
Calgary, Alberta
T2P 5H1

Dear Alex:

Southwest GTA Clean Energy Supply Contract (the “Contract”) between TransCanada Energy Ltd. (“TCE”) and Ontario Power Authority (the “OPA”) dated October 9, 2009

In your email of April 13, 2011, you questioned the merit of the parties entering into a mediation process. I can assure you that the OPA’s proposal to mediate was made in good faith and in an effort to work together with TCE to negotiate the definitive form of an agreement in respect of the development of a power generation project in the Cambridge area.

A mediated process would allow the parties to advance negotiations on certain key issues including those respecting CAPEX estimates and TCE’s alleged damages. It would also permit a process whereby TCE could provide information that it considers commercially sensitive to a mediator (and any expert engaged by the mediator) who could then maintain confidentiality of such information from the OPA while facilitating further discussions between the parties. TCE’s rejection of the OPA’s proposal to continue negotiations in a mediated process forecloses the parties from receiving the benefits of third party facilitation.

The OPA is hopeful that, on reflection, you will recognize the benefits of participating in negotiations with the assistance of a mediator. We believe that TCE should take all steps necessary to comply with its obligations relating to good faith negotiations and reconsider its position respecting mediation. We continue to be prepared to proceed promptly with a mediation to further the negotiations and we reiterate our request to you in that regard.

As you know, the Contract provides that any matter in issue between the parties as to their rights under the Contract may be decided by arbitration in accordance with Section 16.2 of the Contract. If you are not prepared to continue negotiations in a mediated process, the OPA requests that the parties meet to discuss an arbitration of the dispute between the parties and terms of reference of an arbitration. In that case, we would ask you to have your legal counsel contact ours.

May we please hear from you at your earliest opportunity.

Sincerely,

ONTARIO POWER AUTHORITY

Per:

Name: Colin Andersen

Title: Chief Executive Officer

Draft & Privileged

Perun, Halyna N. (ENERGY)

From: Kelly, John (JUS)
Sent: April 15, 2011 6:05 PM
To: Perun, Halyna N. (MEI)
Subject: RE: TCE

We need to know who said what and when and to whom.

We would want a witness statement from each of the people who were involved in discussions with TCE from the Government setting out:

1. who they are and what their role is in this matter
2. what meeting or meetings they were at with TCE or it's reps.
3. what they heard in chronological order
4. what was said by all
5. what, if anything they said
6. what notes if any they made at or about the time.(they would include copies of notes to us)

It is important to know what level they are at in terms of authority.

They would either send the memo to me or Eunice marked Privileged and Confidential or to you to send to us.

They would record that they have been asked to prepare the notes for use in anticipation of threatened litigation.

It is important that they understand that what they say is privileged and wont be disclosed by us without their consent.They need to be as accurate and honest as possible .Failure to be accurate and honest will not be in their interest in the long run.

From: Perun, Halyna N. (MEI)
Sent: April 15, 2011 5:56 PM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Subject: FW: TCE

Confidential and in Contemplation of Litigation

Hi – here is the proposed letter. Forgot to discuss with you the common interest privileged agreement – will need your advice on that.

It would be helpful to me for you to send me an email setting out what you would need from government people who were involved in discussions with TCE/OPA. Can you send me a shorty? Thank you (I will then copy you on my email to folks.

Thank you!!

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: April 15, 2011 4:20 PM
To: Perun, Halyna N. (MEI)
Subject: FW: TCE

Sorry. This also should have been sent to you.

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario, M5H 1T1
Direct: 416-969-6035
Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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Sent: April 15, 2011 4:20 PM
To: 'Sean.Mullin@ontario.ca'; 'craig.maclennan@ontario.ca'; 'david.lindsay@ontario.ca'; 'James Hinds'
Cc: Colin Andersen; JoAnne Butler; Kristin Jenkins; Brett Baker; Michael Killeavy; Susan Kennedy; Deborah Langelaan
Subject: TCE

SOLICITOR/CLIENT PRIVILEGE

Attached per our earlier conversation is the draft letter with respect to mediation and arbitration.

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Perun, Halyna N. (MEI)

From: Kelly, John (JUS)

Sent: April 18, 2011 10:08 AM

To: Perun, Halyna N. (MEI)

Assume that, after notification by the OPA that the contract was not preceding, someone from the Ministers office says to TCE "We will make you whole".

Given that there has been a breach of the contract by OPA and given that the contract contains provisions excluding consequential damages, what consideration was given by TCE for the rep. by the Govt. that it would be made whole? There may be no consideration for the promise and it may be unenforceable in any event.

John Kelly
Counsel
Crown Law Office - Civil
Ministry of the Attorney General
720 Bay Street - 8th Floor
Toronto, ON
M7A 2S9

Tel: 416-212-1161

Fax: 416-326-4181

email: John.Kelly@ontario.ca

04/18/2011

Perun, Halyna N. (ENERGY)

From: Kelly, John (JUS)
Sent: April 17, 2011 9:58 AM
To: Perun, Halyna N. (MEI)
Subject: RE: TCE

Halyna, there is no know reason at present to think that there is a conflict between 'political staff' and the Crown. We need to know what was said and by whom in order to determine if political staff said anything which puts them in conflict with the Crown. If it was an employee of the Crown or a Deputy, that person is deemed to be held out by the Crown as it's representative.. When and if there is a conflict of interest, we can discuss separate representation.

From: Perun, Halyna N. (MEI)
Sent: April 15, 2011 6:52 PM
To: Kelly, John (JUS)
Subject: RE: TCE

Can you find out at your end please whether typically they have their own representation or whether typically CLOC represents? Something I am sure they'll be asking – so please give this some thought – thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
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E-mail: Halyna.Perun2@ontario.ca

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From: Kelly, John (JUS)
Sent: April 15, 2011 6:50 PM
To: Perun, Halyna N. (MEI)
Subject: Re: TCE

No

From: Perun, Halyna N. (MEI)
To: Kelly, John (JUS)
Sent: Fri Apr 15 18:43:59 2011
Subject: RE: TCE

OK thanks – If you could check it once in a while that would be helpful – hopefully it will be quiet. I sent your request, by the way to the Deputy and the Chief of Staff in the Minister's Office.

Do you know at what point, if any, political staff would be asking for their own outside/independent counsel?

Halyna

Halyna N. Perun
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Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
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From: Kelly, John (JUS)
Sent: April 15, 2011 6:40 PM
To: Perun, Halyna N. (MEI)
Subject: RE: TCE

I have a blackberry but rarely turn it on or look at it. I plan to be in the office on Sunday at about 10:30 for a few hours and could be contacted then. Otherwise I will check it from time to time.

From: Perun, Halyna N. (MEI)
Sent: April 15, 2011 6:36 PM
To: Kelly, John (JUS)
Subject: RE: TCE

Thanks for reminding me. PS – are you available on the weekend via BB if something comes up on this matter that may need your urgent attention?

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
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From: Kelly, John (JUS)
Sent: April 15, 2011 6:34 PM

To: Perun, Halyna N. (MEI)
Subject: RE: TCE

I don't have particulars of the conference call yet.

From: Perun, Halyna N. (MEI)
Sent: April 15, 2011 5:56 PM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Subject: FW: TCE

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Direct: 416-969-6035
Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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From: Michael Lyle

Sent: April 15, 2011 4:20 PM

To: 'Sean.Mullin@ontario.ca'; 'craig.maclennan@ontario.ca'; 'david.lindsay@ontario.ca'; 'James Hinds'

Cc: Colin Andersen; JoAnne Butler; Kristin Jenkins; Brett Baker; Michael Killeavy; Susan Kennedy; Deborah Langelaan

Subject: TCE

SOLICITOR/CLIENT PRIVILEGE

Attached per our earlier conversation is the draft letter with respect to mediation and arbitration.

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario, M5H 1T1
Direct: 416-969-6035
Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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Perun, Halyna N. (ENERGY)

From: Machado, Eunice (JUS)
Sent: April 18, 2011 6:27 PM
To: Perun, Halyna N. (MEI)
Subject: Re: TCE

Thanks Halyna
Eunice Machado
Counsel, Crown Law Office - Civil
T: 416-326-4576
Eunice.Machado@ontario.ca

From: Perun, Halyna N. (MEI)
To: Machado, Eunice (JUS)
Cc: Carson, Cheryl (MEI)
Sent: Mon Apr 18 18:25:29 2011
Subject: RE: TCE

Thanks Eunice – no problem – we (the lawyers) were dis-invited to the 10 a.m. and I haven't heard a thing since then. John also sent us an email re what we should be asking the clients to prepare and I'll send this to you next

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Machado, Eunice (JUS)
Sent: April 18, 2011 1:05 PM
To: Perun, Halyna N. (MEI); Kelly, John (JUS)
Subject: Re: TCE

Hi Halyna,

From witnesses, we need:

- a written statement of each person's individual recollection of what meeting(s) were had with TCE, date(s), who was present, what was said, by whom etc
- to the extent possible, they should write down exactly what they recall was said and avoid paraphrasing
- they should not compare their notes with the other people who were at the meeting - this is an individual exercise
- if they took notes at the meeting, they should attach a copy of their notes as well

Sorry I couldn't make the 10am mtg either. I'm in the office for the rest of the day if I can be of assistance.

Thanks
Eunice Machado
Counsel, Crown Law Office - Civil
T: 416-326-4576
Eunice.Machado@ontario.ca

From: Perun, Halyna N. (MEI)
To: Kelly, John (JUS); Machado, Eunice (JUS)
Sent: Fri Apr 15 17:56:02 2011
Subject: FW: TCE

Confidential and in Contemplation of Litigation

Hi – here is the proposed letter. Forgot to discuss with you the common interest privileged agreement – will need your advice on that.

It would be helpful to me for you to send me an email setting out what you would need from government people who were involved in discussions with TCE/OPA. Can you send me a shorty? Thank you (I will then copy you on my email to folks.

Thank you!!

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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From: Michael Lyle [mailto:Michael.Lyle@powerauthority.on.ca]
Sent: April 15, 2011 4:20 PM
To: Perun, Halyna N. (MEI)
Subject: FW: TCE

Sorry. This also should have been sent to you.

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario, M5H 1T1
Direct: 416-969-6035

Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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From: Michael Lyle
Sent: April 15, 2011 4:20 PM
To: 'Sean.Mullin@ontario.ca'; 'craig.maclennan@ontario.ca'; 'david.lindsay@ontario.ca'; 'James Hinds'
Cc: Colin Andersen; JoAnne Butler; Kristin Jenkins; Brett Baker; Michael Killeavy; Susan Kennedy; Deborah Langelaan
Subject: TCE

SOLICITOR/CLIENT PRIVILEGE

Attached per our earlier conversation is the draft letter with respect to mediation and arbitration.

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority
120 Adelaide Street West, Suite 1600
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Perun, Halyna N. (ENERGY)

From: Nimi Visram [Nimi.Visram@powerauthority.on.ca] on behalf of Michael Lyle [Michael.Lyle@powerauthority.on.ca]
Sent: April 20, 2011 3:46 PM
To: Perun, Halyna N. (MEI)
Cc: Michael Lyle
Subject: TCE
Attachments: Thornton Grout Finnigan LLP Letter April 19, 2011.pdf

Please find attached correspondence from Thornton Grout Finnigan LLP dated April 19, 2011.

Nimi Visram | Ontario Power Authority | Executive Assistant & Board Coordinator, to General Counsel & Vice President, Legal, Aboriginal and Regulatory Affairs

120 Adelaide St W., Suite 1600 | Toronto, Ontario, M5H 1T1

☎ Phone: 416.969.6027 | 📠 Fax: 416.967.3683 | ✉ Email: nimi.visram@powerauthority.on.ca

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Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

Canadian Pacific Tower
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto, ON Canada M5K 1K7
T 416.304.1616 F 416.304.1313

Michael E. Barrack
T: 416-304-1109
E: mbarrack@tgf.ca

April 19, 2011

VIA EMAIL

WITHOUT PREJUDICE

Ontario Power Authority
120 Adelaide Street West
Suite 1600
Toronto, Ontario
M5H 1T1

Ministry of Energy
4th Floor, Hearst Block
900 Bay Street
Toronto, Ontario
M7A 2E1

Attn: Colin Andersen
Chief Executive Officer

Attn: The Honourable Brad Duguid
Minister of Energy

Dear Sirs:

Re: Southwest GTA Clean Energy Supply Contract (the "Contract") between
TransCanada Energy Ltd. ("TCE") and Ontario Power Authority (the "OPA")
dated October 9, 2009

We have been retained by TCE to represent its interests in connection with the termination of the Contract by letter dated October 7, 2010. That termination occurred following a public announcement by Minister Duguid. We are uncertain whether the Minister issued a directive to the OPA regarding the termination.

In the termination letter, the OPA stated to TCE, "the OPA acknowledges that you are entitled to your reasonable damages from the OPA, including the anticipated value of the Contract." The letter also identified the OPA's "wish to work with you to identify other projects and the extent to which such projects may compensate you for termination of the Contract while appropriately protecting the interests of ratepayers."

We have been briefed on the unsuccessful attempts to resolve this matter on the basis suggested in the termination letter, despite several months of negotiations. Our instructions are to commence the formal legal process of identifying the appropriate mechanism to determine the reasonable damages, including the anticipated value of the Contract and an appropriate mechanism for transferring that value from the OPA and the Province of Ontario to TCE. In order to facilitate this process, we would request that you have your legal counsel contact us in order to discuss the manner of proceeding.

tgf.ca



Thornton Grout Finnigan LLP

2.

We would be available to meet with counsel to begin this process this week. We would request that your counsel contact us no later than Tuesday, April 26, 2011. Our client has instructed us to move forward with reasonable expedition. We understand that a counterproposal will be delivered to TCE by the close of business on Wednesday, April 20, 2011 as part of the informal settlement discussions. While this formal process of dispute resolution moves forward, our client remains willing to discuss alternatives, but is not willing to suspend the formal process.

We look forward to hearing from your counsel.

Yours very truly,

Thornton Grout Finnigan LLP

A handwritten signature in dark ink, appearing to read 'Michael E. Barrack', written over a horizontal line.

Michael E. Barrack
MEB/slg

Cc *Craig MacLennan, Chief of Staff to the Minister of Energy*
Janison Steve, Principal Secretary to the Premier
Sean Mullin, Director of Policy, Office of the Premier

Perun, Halyna N. (ENERGY)

From: Kelly, John (JUS)
Sent: April 26, 2011 8:29 AM
To: Perun, Halyna N. (MEI)
Subject: RE: TCE

I don't have any. What is happening with this file?

From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 4:22 PM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Cc: Carson, Cheryl (MEI)
Subject: RE: TCE

Hi – OPA is asking about the common interest privilege agreement. Please let us know your proposed changes – thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 9:09 AM
To: Kelly, John (JUS)
Subject: Re: TCE

We'll need to get instructions as to whether the ministry wants to reply independently of the opa - my guess is not but we'll need to ask -

Halyna Perun
A/Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Kelly, John (JUS)
To: Perun, Halyna N. (MEI)

Sent: Thu Apr 21 08:56:49 2011
Subject: RE: TCE

I think it says they are expecting a proposal from OPA

From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 8:47 AM
To: Kelly, John (JUS)
Subject: Re: TCE

It's addressed to the minister as well

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Kelly, John (JUS)
To: Perun, Halyna N. (MEI)
Sent: Thu Apr 21 08:38:45 2011
Subject: RE: TCE

This requests a reply from OPA ,not the Ministry.

From: Perun, Halyna N. (MEI)
Sent: April 20, 2011 8:55 PM
To: Kelly, John (JUS); Machado, Eunice (JUS); Carson, Cheryl (MEI)
Subject: Fw: TCE

Received this via OPA not ministry. Request for response by Tuesday. We'll need instructions from clients re reply - references to "formal process" rather oblique. There is a proposal that OPA board was considering this evening to be put to TCE I guess tomorrow. I don't know much more than this but will connect with you tomorrow at some point once know more thanks



Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607


Sent using BlackBerry

From: Nimi Visram <Nimi.Visram@powerauthority.on.ca>
To: Perun, Halyna N. (MEI)
Cc: Michael Lyle <Michael.Lyle@powerauthority.on.ca>
Sent: Wed Apr 20 15:45:38 2011
Subject: TCE

Please find attached correspondence from Thornton Grout Finnigan LLP dated April 19, 2011.

Nimi Visram | Ontario Power Authority | Executive Assistant & Board Coordinator, to General Counsel & Vice President, Legal, Aboriginal and Regulatory Affairs
120 Adelaide St W., Suite 1600 | Toronto, Ontario, M5H 1T1

 Phone: 416.969.6027 |  Fax: 416.967.3683 |  Email: nimi.visram@powerauthority.on.ca

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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: April 27, 2011 6:04 PM
To: Perun, Halyna N. (MEI)
Subject: RE: potential litigation

Mike Lyle appreciated the heads up – he hadn't heard.

From: Perun, Halyna N. (MEI)
Sent: April 27, 2011 5:55 PM
To: Lung, Ken (JUS); Slater, Craig (JUS)
Cc: Calwell, Carolyn (MEI)
Subject: RE: potential litigation

Thanks Ken – We'll let our client and the OPA know

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
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Ph: (416) 325-6681 / Fax: (416) 325-1781
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From: Lung, Ken (JUS)
Sent: April 27, 2011 5:33 PM
To: Perun, Halyna N. (MEI); Slater, Craig (JUS)
Cc: Calwell, Carolyn (MEI)
Subject: RE: potential litigation

Halyna, we have heard that PACA notice is on its way. Will copy when received.

From: Perun, Halyna N. (MEI)
Sent: April 8, 2011 7:34 PM
To: Lung, Ken (JUS); Slater, Craig (JUS)
Cc: Calwell, Carolyn (MEI)
Subject: potential litigation

Confidential

Hi Ken and Craig:

Although this certainly won't be needing your immediate attention this weekend, we wanted to give you a heads up on litigation that we are anticipating. A PACA notice may be issued as early as Tuesday.

You may recall that the government announced last October that the proposed Oakville Generating Station would no longer be required due to system changes. At the time of the announcement, the Ontario Power Authority already had a contract with TransCanada. Since October, the OPA and TransCanada have been negotiating the exit of the Oakville contract, settlement of sunk costs and lost profit and the development of a new plant in the Kitchener Waterloo Cambridge area (that the KWC plant would go to TransCanada is not public knowledge – industry expects it to be procured through the OPA's typical practices).

The OPA advises that negotiations appear to be close to an impasse and the tone is becoming increasingly aggressive. We understand that Energy Minister's staff will be meeting with TransCanada on Tuesday. The PACA notice may follow shortly thereafter.

We can expect that both the OPA and the government will be named in any action.

We also understand that TransCanada's plan is to "name names". Political staff were involved in initial discussions with TransCanada about the decision not to proceed with the plant.

We will need litigation support. The OPA has retained Oslers, which has also been involved in the negotiations. The OPA would like to set up a lawyers meeting with all litigation counsel and the Ministry later next week. We have heard from the OPA that TransCanada may be using in-house counsel at this point and is in the process of seeking external counsel.

Carolyn or I will let you know what more we hear.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: April 27, 2011 7:56 PM
To: Perun, Halyna N. (MEI)
Subject: Fw: TCE

Again, apologies. I spoke to Mike Lyle by phone.

From: Calwell, Carolyn (MEI)
To: Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI)
Sent: Wed Apr 27 18:03:40 2011
Subject: TCE

Confidential/Solicitor-Client Privileged

MAG advises that they have heard that the notice from Transcanada under the *Proceedings Against the Crown Act* is "on its way". This notice is required at least 60 days before Transcanada can file a statement of claim against the province. Serving the notice starts the clock running. After 60 days, Transcanada could then file its statement of claim at any time – it need not file right away. We will keep you posted as we hear more.

Carolyn

Carolyn Calwell
A/Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: April 28, 2011 7:25 AM
To: MacLennan, Craig (MEI)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI)
Subject: Re:

Confidential/Solicitor-Client Privileged

The notice is not publicly posted. There is nothing to stop TCE from making it public through a media release or similar manner.

Carolyn

----- Original Message -----

From: MacLennan, Craig (MEI)
To: Calwell, Carolyn (MEI)
Sent: Thu Apr 28 07:11:17 2011
Subject:

Is TC's notice public? Does it get posted?

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: April 28, 2011 9:09 AM
To: MacLennan, Craig (MEI); Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario
Attachments: Letter to C. Andersen_B. Duguid from M. Barrack dated April 19, 2011.PDF; PAC s. 7 Notice April 27.PDF; Letter to Pourbaix from OPA dated October 7, 2010.PDF; Oct. 7, 2010 Press Release.PDF

Confidential/Solicitor-Client Privileged

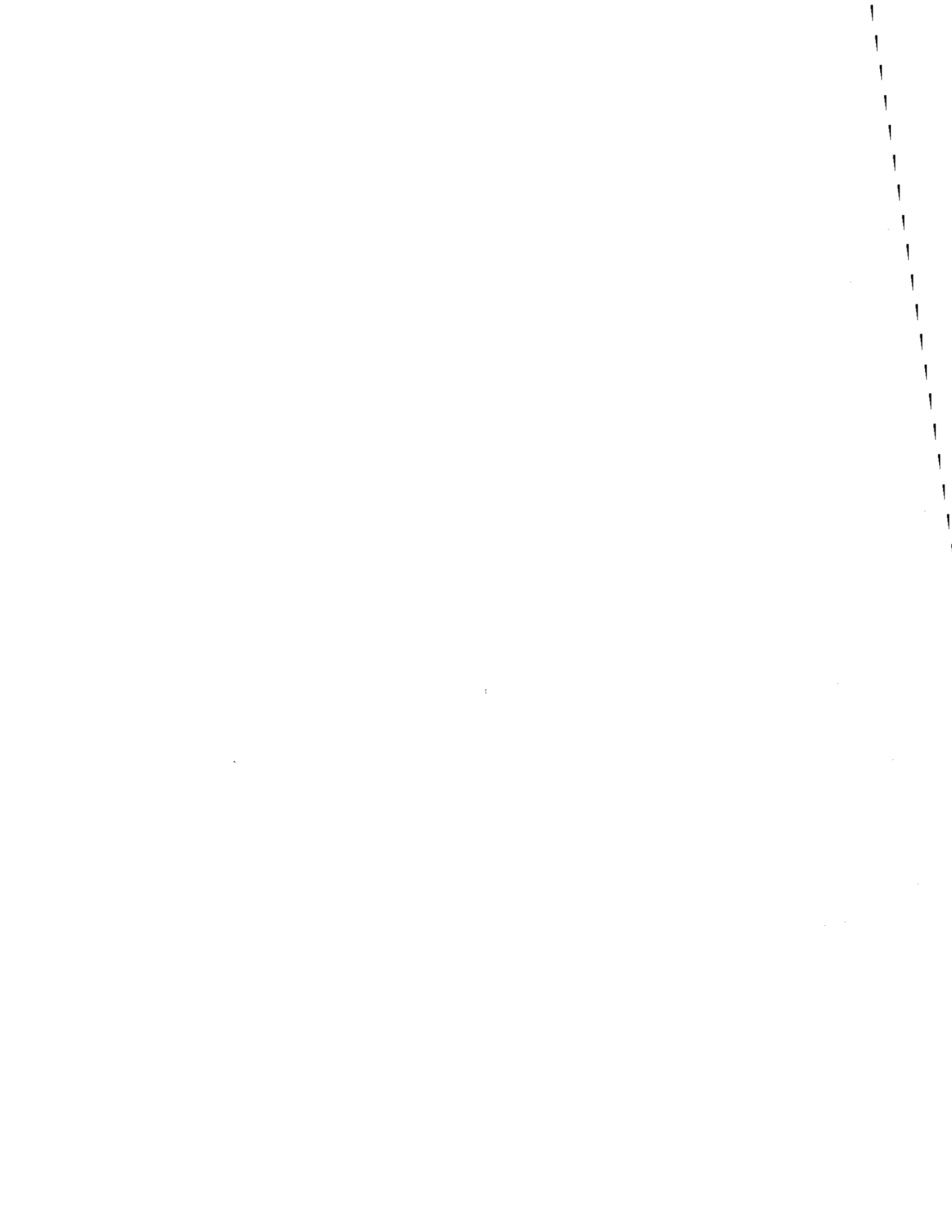
Please find attached notice from TCE under the *Proceedings Against the Crown Act* that has been received by MAG. Also attached are the documents to which TCE refers in its notice.

It appears that the notice was served yesterday. TCE will therefore be in a position to issue a Statement of Claim against the province on or after June 27th.

Carolyn

Carolyn Calwell
A/Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
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416.212.5409

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Perun, Halyna N. (MEI)

From: Calwell, Carolyn (MEI)
Sent: April 28, 2011 9:30 AM
To: MacLennan, Craig (MEI); Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Subject: RE: TransCanada Energy Limited v. Her Majesty in right of Ontario

Confidential/Solicitor-Client Privileged

The obligation to give notice only applies to the Crown – not to the OPA. I don't expect that TCE would have served a PACA notice on the OPA, except on an information or courtesy basis. I don't know whether TCE has done so.

TCE could issue its Statement of Claim against the OPA at any time (without waiting 60 days), but as a practical matter, is unlikely to do so, as it would then be put to the expense of bringing a motion before the court to either amend its Statement of Claim to include Ontario or to join two separate actions against the OPA and Ontario.

Despite serving the PACA notice, TCE could decide not to proceed with the claim.

After 60 days, TCE can proceed against Ontario at any time up to the expiry of the limitation period. The limitation period generally expires on the "second anniversary of the day that the claim was discovered". In this case, the claim would have been "discovered" on October 7, 2010 when the Minister announced that the Oakville Plant was not proceeding and Colin Andersen sent his letter to TCE.

Therefore, TCE can bring a claim against Ontario any time between June 27, 2011 and October 7, 2012. TCE can bring a claim against the OPA between now and October 7, 2012.

Carolyn

From: MacLennan, Craig (MEI)
Sent: April 28, 2011 9:21 AM
To: Lindsay, David (ENERGY); Calwell, Carolyn (MEI)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Subject: Re: TransCanada Energy Limited v. Her Majesty in right of Ontario

Did they file against opa? I'm confused.

From: Lindsay, David (ENERGY)
To: MacLennan, Craig (MEI); Calwell, Carolyn (MEI)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Sent: Thu Apr 28 09:17:10 2011
Subject: Re: TransCanada Energy Limited v. Her Majesty in right of Ontario

I defer to legal counsel, but I believe that the 60 day notice period is with respect to the Crown.

TCE actually has a contract with the OPA and the 60 day notice requirement doesn't apply to the OPA.

David

From: MacLennan, Craig (MEI)
To: Calwell, Carolyn (MEI); Lindsay, David (ENERGY)

04/29/2011

Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Sent: Thu Apr 28 09:13:14 2011
Subject: Re: TransCanada Energy Limited v. Her Majesty in right of Ontario

Not before June 27?

From: Calwell, Carolyn (MEI)
To: MacLennan, Craig (MEI); Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Sent: Thu Apr 28 09:08:48 2011
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario

Confidential/Solicitor-Client Privileged

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It appears that the notice was served yesterday. TCE will therefore be in a position to issue a Statement of Claim against the province on or after June 27th.

Carolyn

Carolyn Calwell
A/Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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04/29/2011

Perun, Halyna N. (ENERGY)

From: MacLennan, Craig (MEI)
Sent: April 28, 2011 9:39 AM
To: Calwell, Carolyn (MEI); Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Subject: Re: TransCanada Energy Limited v. Her Majesty in right of Ontario

Ok thanks all.

From: Calwell, Carolyn (MEI)
To: MacLennan, Craig (MEI); Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Sent: Thu Apr 28 09:30:11 2011
Subject: RE: TransCanada Energy Limited v. Her Majesty in right of Ontario

Confidential/Solicitor-Client Privileged

The obligation to give notice only applies to the Crown – not to the OPA. I don't expect that TCE would have served a PACA notice on the OPA, except on an information or courtesy basis. I don't know whether TCE has done so.

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Despite serving the PACA notice, TCE could decide not to proceed with the claim.

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Therefore, TCE can bring a claim against Ontario any time between June 27, 2011 and October 7, 2012. TCE can bring a claim against the OPA between now and October 7, 2012.

Carolyn

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Sent: April 28, 2011 9:21 AM
To: Lindsay, David (ENERGY); Calwell, Carolyn (MEI)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
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To: MacLennan, Craig (MEI); Calwell, Carolyn (MEI)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Sent: Thu Apr 28 09:17:10 2011
Subject: Re: TransCanada Energy Limited v. Her Majesty in right of Ontario

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David

From: MacLennan, Craig (MEI)
To: Calwell, Carolyn (MEI); Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Sent: Thu Apr 28 09:13:14 2011
Subject: Re: TransCanada Energy Limited v. Her Majesty in right of Ontario

Not before June 27?

From: Calwell, Carolyn (MEI)
To: MacLennan, Craig (MEI); Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Carson, Cheryl (MEI)
Sent: Thu Apr 28 09:08:48 2011
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario

Confidential/Solicitor-Client Privileged

Please find attached notice from TCE under the *Proceedings Against the Crown Act* that has been received by MAG. Also attached are the documents to which TCE refers in its notice.

It appears that the notice was served yesterday. TCE will therefore be in a position to issue a Statement of Claim against the province on or after June 27th.

Carolyn

Carolyn Calwell
A/Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: April 28, 2011 5:32 PM
To: Lung, Ken (JUS) \\\n
Cc: Perun, Halyna N. (MEI)
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario
Attachments: Letter to C. Andersen_B. Duguid from M. Barrack dated April 19, 2011.PDF; PAC s. 7 Notice April 27.PDF; Letter to Pourbaix from OPA dated October 7, 2010.PDF; Oct. 7, 2010 Press Release.PDF

Ken, can you please confirm that the PACA notice was served yesterday and advise as to the manner of service? I assume that there was no cover letter?

Carolyn

From: Perun, Halyna N. (MEI)
Sent: April 28, 2011 8:38 AM
To: Calwell, Carolyn (MEI)
Cc: Carson, Cheryl (MEI)
Subject: Fw: TransCanada Energy Limited v. Her Majesty in right of Ontario

Hi Carolyn - please provide to dm and min office - thanks

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Lung, Ken (JUS)
To: Perun, Halyna N. (MEI)
Sent: Thu Apr 28 08:25:05 2011
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario



Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

Canadian Pacific Tower
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto, ON Canada M5K 1K7
T 416.304.1414 F 416.304.1313

Michael E. Barrack
T: 416-304-1109
E: mbarrack@tgf.ca

April 19, 2011

VIA EMAIL

WITHOUT PREJUDICE

Ontario Power Authority
120 Adelaide Street West
Suite 1600
Toronto, Ontario
M5H 1T1

Ministry of Energy
4th Floor, Hearst Block
900 Bay Street
Toronto, Ontario
M7A 2E1

Attn: Colin Andersen
Chief Executive Officer

Attn: The Honourable Brad Duguid
Minister of Energy

Dear Sirs:

Re: Southwest GTA Clean Energy Supply Contract (the "Contract") between TransCanada Energy Ltd. ("TCE") and Ontario Power Authority (the "OPA") dated October 9, 2009

We have been retained by TCE to represent its interests in connection with the termination of the Contract by letter dated October 7, 2010. That termination occurred following a public announcement by Minister Duguid. We are uncertain whether the Minister issued a directive to the OPA regarding the termination.

In the termination letter, the OPA stated to TCE, "the OPA acknowledges that you are entitled to your reasonable damages from the OPA, including the anticipated value of the Contract." The letter also identified the OPA's "wish to work with you to identify other projects and the extent to which such projects may compensate you for termination of the Contract while appropriately protecting the interests of ratepayers."

We have been briefed on the unsuccessful attempts to resolve this matter on the basis suggested in the termination letter, despite several months of negotiations. Our instructions are to commence the formal legal process of identifying the appropriate mechanism to determine the reasonable damages, including the anticipated value of the Contract and an appropriate mechanism for transferring that value from the OPA and the Province of Ontario to TCE. In order to facilitate this process, we would request that you have your legal counsel contact us in order to discuss the manner of proceeding.



Thornton Grout Finnigan LLP

2.

We would be available to meet with counsel to begin this process this week. We would request that your counsel contact us no later than Tuesday, April 26, 2011. Our client has instructed us to move forward with reasonable expedition. We understand that a counterproposal will be delivered to TCE by the close of business on Wednesday, April 20, 2011 as part of the informal settlement discussions. While this formal process of dispute resolution moves forward, our client remains willing to discuss alternatives, but is not willing to suspend the formal process.

We look forward to hearing from your counsel.

Yours very truly,

Thornton Grout Finnigan LLP

A handwritten signature in black ink, appearing to read 'M. Barrack', written over a horizontal line.

Michael E. Barrack
MEB/slg

Cc *Craig MacLennan, Chief of Staff to the Minister of Energy*
 Jamison Steve, Principal Secretary to the Premier
 Sean Mullin, Director of Policy, Office of the Premier

Notice Pursuant to Section 7 of the *Proceedings Against the Crown Act*

TransCanada Energy Limited hereby provides notice to Her Majesty the Queen in right of Ontario of its claim for damages arising out of the termination on October 7, 2010 of the Southwest GTA Clean Energy Supply Contract between TransCanada Energy Ltd. ("TransCanada") and the Ontario Power Authority ("OPA") dated October 9, 2009 (the "Contract"). On October 7, 2010 the Minister of Energy, the Honourable Brad Duguid publicly announced that the Province would not proceed with the construction of the power plant that was the subject matter of the Contract. Subsequently, by letter also dated October 7, 2010, the OPA informed TransCanada that it would not complete the Contract. TransCanada accepted the OPA's repudiation of the Contract. As a result of the termination of the Contract, TransCanada has suffered damages including the anticipated financial value of the Contract.

Please find attached the following documents dated October 7, 2010: (a) the press release from the Ministry of Energy; and (b) the letter from the OPA to TransCanada repudiating the Contract.



120 Adelaide Street West
Suite 1600
Toronto, Ontario M5H 1T1

T 416 967-7474
F 416 967-1947
www.powerauthority.on.ca

October 7, 2010

TransCanada Energy Ltd.
450-1st Street
Calgary, AB T2P 5H1

Attn: Alex Pourbaix,
President,
Energy and Oil Pipelines

Dear Mr Pourbaix :

Re: Southwest GTA Clean Energy Supply Contract (the "Contract") between TransCanada Energy Ltd. and Ontario Power Authority (the "OPA") dated October 9, 2009

As you are no doubt aware, the Minister of Energy today announced that your Oakville gas plant will not proceed. This announcement is supported by the OPA's planning analysis of the current circumstances in southwest GTA.

The OPA will not proceed with the Contract. As a result of this, the OPA acknowledges that you are entitled to your reasonable damages from the OPA, including the anticipated financial value of the Contract. We would like to begin negotiations with you to reach mutual agreement to terminate the Contract.

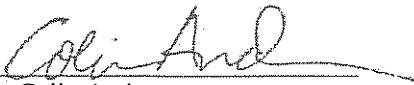
Given Ontario's ongoing need for power generation projects and your desire to generate power in Ontario, we wish to work with you to identify other projects and the extent to which such projects may compensate you for termination of the Contract while appropriately protecting the interests of ratepayers.

You are hereby directed to cease all further work and activities in connection with the Facility (as defined in the Contract), other than anything that may be reasonably necessary in the circumstances to bring such work or activities to a conclusion.

We undertake that we will not disclose this letter without giving you prior notice and we request that you do the same.

Sincerely,

ONTARIO POWER AUTHORITY

Per: 
Name: Colin Andersen
Title: Chief Executive Officer



- Facebook

•

Oakville Power Plant Not Moving Forward

October 7, 2010 1:15 AM

McGuinty Government to Invest in Transmission to Meet Local Power Demands

Ontario is taking action to keep the lights on in Southwest Greater Toronto Area homes and businesses without the construction of a proposed natural gas plant in Oakville.

When the need for this plant was first identified four years ago, there were higher demand projections for electricity in the area. Since then changes in demand and supply - including more than 8,000 megawatts of new, cleaner power and successful conservation efforts - have made it clear that this proposed natural gas plant is no longer required. A transmission solution can ensure that the growing region will have enough electricity to meet future needs of homes, hospitals, schools and businesses.

The government is currently updating Ontario's Long-Term Energy Plan to ensure a strong, reliable, clean and cost-effective electricity system that eliminates reliance on dirty coal.

QUICK FACTS

- The need for additional generation in Southwest GTA was first identified in 2006. Since then, additional supply has come online and the demand picture has changed in the region.
- Ontario permanently closed four more units of dirty, smog-producing,

coal-fired generation on October 1, 2010, four years ahead of schedule.

- In 2009, more than 80 per cent of our generation came from emissions-free sources.

LEARN MORE

- Read about the update to Ontario's Long-Term Energy Plan and how to offer your views.
- Learn more about renewable energy in Ontario.
- Find out about how Ontario is phasing out coal-fired generation.

CONTACTS

- Andrew Block
Minister's Office
416-327-6747
- Anne Smith
Communications Branch
416-327-7226

Ministry of Energy
ontario.ca/energy

"As we're putting together an update to our Long-Term Energy Plan, it has become clear we no longer need this plant in Oakville. With transmission investments we can keep the lights on and still shut down all dirty coal-fired generation."

– Hon. Brad Duguid
Minister of Energy

"My duty as MPP has always been to put the priorities of Oakville first, and together, our voice was heard. I am tremendously pleased that this power plant will not be built anywhere in Oakville. I would like to thank my constituents for

their support, and Premier McGuinty and Minister Duguid for their willingness to listen."

– Kevin Flynn
MPP, Oakville

Site Help

Notices

- © Queen's Printer for Ontario, 2009 - 2011
- IMPORTANT NOTICES

LAST MODIFIED: FEBRUARY 14, 2011

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: April 29, 2011 6:42 PM
To: Perun, Halyna N. (MEI)
Subject: Re: TransCanada Energy Limited v. Her Majesty in right of Ontario

Will do. Also, I spoke to Susan Kennedy about the Cooperation Agreement. She agreed to my suggestions (fairly minor) in principle and we'll see a re-write next week. We'll need to get a briefing to get it signed, I expect. Will keep you posted once I see the next draft.

Carolyn

From: Perun, Halyna N. (MEI)
To: Calwell, Carolyn (MEI)
Sent: Fri Apr 29 18:31:35 2011
Subject: RE: TransCanada Energy Limited v. Her Majesty in right of Ontario

Hi Carolyn – Ken asked that we follow up with CLOC – He told me this morning (as we were waiting for Malliha for the diversity committee meeting and I forgot to let you know).

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Calwell, Carolyn (MEI)
Sent: April 28, 2011 5:32 PM
To: Lung, Ken (JUS)
Cc: Perun, Halyna N. (MEI)
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario

Ken, can you please confirm that the PACA notice was served yesterday and advise as to the manner of service? I assume that there was no cover letter?

Carolyn

From: Perun, Halyna N. (MEI)
Sent: April 28, 2011 8:38 AM
To: Calwell, Carolyn (MEI)

Cc: Carson, Cheryl (MEI)

Subject: Fw: TransCanada Energy Limited v. Her Majesty in right of Ontario

Hi Carolyn - please provide to dm and min office - thanks

Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

From: Lung, Ken (JUS)

To: Perun, Halyna N. (MEI)

Sent: Thu Apr 28 08:25:05 2011

Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: May 3, 2011 11:21 AM
To: Machado, Eunice (JUS)
Cc: Perun, Halyna N. (MEI)
Subject: RE: TCE

Eunice, we haven't heard anything further from our clients. We will make some inquiries and advise. In the meantime, please feel free to contact me directly about any matter related to this file.

Carolyn

Carolyn Calwell
A/Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

From: Machado, Eunice (JUS)
To: Perun, Halyna N. (MEI)
Sent: Mon May 02 11:37:20 2011
Subject: RE: TCE

Hi Halyna,

I'm just following up to see if you have any instructions yet on our meeting to discuss next steps? Let me know.

Thanks,

Eunice Machado
Tel: 416-326-4576
Fax: 416-326-4181

From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 4:22 PM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Cc: Carson, Cheryl (MEI)
Subject: RE: TCE

Hi – OPA is asking about the common interest privilege agreement. Please let us know your proposed changes – thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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E-mail: Halyna.Perun2@ontario.ca

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From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 9:09 AM
To: Kelly, John (JUS)
Subject: Re: TCE

We'll need to get instructions as to whether the ministry wants to reply independently of the opa - my guess is not but we'll need to ask -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Kelly, John (JUS)
To: Perun, Halyna N. (MEI)
Sent: Thu Apr 21 08:56:49 2011
Subject: RE: TCE

I think it says they are expecting a proposal from OPA

From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 8:47 AM
To: Kelly, John (JUS)
Subject: Re: TCE

It's addressed to the minister as well

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Kelly, John (JUS)
To: Perun, Halyna N. (MEI)
Sent: Thu Apr 21 08:38:45 2011
Subject: RE: TCE

This requests a reply from OPA ,not the Ministry.

From: Perun, Halyna N. (MEI)
Sent: April 20, 2011 8:55 PM

To: Kelly, John (JUS); Machado, Eunice (JUS); Carson, Cheryl (MEI)
Subject: Fw: TCE

Received this via OPA not ministry. Request for response by Tuesday. We'll need instructions from clients re reply - references to "formal process" rather oblique. There is a proposal that OPA board was considering this evening to be put to TCE I guess tomorrow. I don't know much more than this but will connect with you tomorrow at some point once know more thanks

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Nimi Visram <Nimi.Visram@powerauthority.on.ca>
To: Perun, Halyna N. (MEI)
Cc: Michael Lyle <Michael.Lyle@powerauthority.on.ca>
Sent: Wed Apr 20 15:45:38 2011
Subject: TCE

Please find attached correspondence from Thornton Grout Finnigan LLP dated April 19, 2011.

Nimi Visram | Ontario Power Authority | Executive Assistant & Board Coordinator, to General Counsel & Vice President, Legal, Aboriginal and Regulatory Affairs
120 Adelaide St W., Suite 1600 | Toronto, Ontario, M5H 1T1
☎ Phone: 416.969.6027 | 📠 Fax: 416.967.3683 | ✉ Email: nimi.visram@powerauthority.on.ca

♻ Please consider your environmental responsibility before printing this email.

Perun, Halyna N. (ENERGY)

From: Wismer, Jennifer (MEI)
Sent: May 6, 2011 4:07 PM
To: Lindsay, David (ENERGY); Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI)
Subject: RE: MOF Answer re Public Disclosure of Schedule of Lawsuits, Claims, Possible Claims and Pending Litigation

Yes, will do. Thanks

From: Lindsay, David (ENERGY)
Sent: May 6, 2011 4:02 PM
To: Perun, Halyna N. (MEI)
Cc: Wismer, Jennifer (MEI); Calwell, Carolyn (MEI)
Subject: Re: MOF Answer re Public Disclosure of Schedule of Lawsuits, Claims, Possible Claims and Pending Litigation

Thanks for the heads up Halyna. We will need to coordinate with Communications for holding language in the event that this disclosure prompts any questions. We should also make sure that the OPA is aware of this requirement to disclose.

Jennifer, can you help coordinate between communications, legal and our Minister's office before this document is tabled.

David

From: Perun, Halyna N. (MEI)
To: Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI); Calwell, Carolyn (MEI)
Sent: Fri May 06 15:54:15 2011
Subject: MOF Answer re Public Disclosure of Schedule of Lawsuits, Claims, Possible Claims and Pending Litigation

Confidential and Solicitor/Client Privileged

David – Please find attached the revised scheduled of lawsuits for 2010/11 that will be submitted for public account purposes. The information about TCE appears as a note ("Additional Information") at the end of the chart. Our obligation is to disclose not only actual claims greater than \$50 M (where a claim has in fact been commenced against the Crown) but also potential or threatened claims. The note now says the following:

TransCanada Energy Limited seeks compensation arising out of the October 7, 2010 announcement that the Southwest GTA natural gas generation facility would not proceed. The OPA and TransCanada Energy Ltd. entered into a Clean Energy Supply Contract dated October 9, 2009.

The list of litigation (of all ministries) appears in the Notes to the Consolidated Financial Statements and in Volume 1 of the Public Accounts, which are filed with the Standing Committee on Public Accounts. The exact time when this material would be filed with the Standing Committee is not yet determined. It's at the discretion of the Minister of Finance. However, it's usually expected to take place in August (same as last year). We understand that it must be published within 180 days from year end.

Please let me know if you'd like me to advise MO of this.

Thank you

Halyna

Halyna N. Perun
A/Director

Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 3, 2011 9:30 AM
To: Calwell, Carolyn (MEI)
Subject: Fw: TCE

Hi Carolyn over to you to respond thank you

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Machado, Eunice (JUS)
To: Perun, Halyna N. (MEI)
Sent: Mon May 02 11:37:20 2011
Subject: RE: TCE

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Tel: 416-326-4576
Fax: 416-326-4181

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Sent: April 21, 2011 4:22 PM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Cc: Carson, Cheryl (MEI)
Subject: RE: TCE

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Halyna

Halyna N. Perun
A/Director
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Ministries of Energy & Infrastructure
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Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

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To: Perun, Halyna N. (MEI)
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Subject: RE: TCE

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Sent: April 21, 2011 8:47 AM
To: Kelly, John (JUS)
Subject: Re: TCE

It's addressed to the minister as well

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From: Kelly, John (JUS)
To: Perun, Halyna N. (MEI)
Sent: Thu Apr 21 08:38:45 2011
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Sent: April 20, 2011 8:55 PM
To: Kelly, John (JUS); Machado, Eunice (JUS); Carson, Cheryl (MEI)
Subject: Fw: TCE

Received this via OPA not ministry. Request for response by Tuesday. We'll need instructions from clients re reply - references to "formal process" rather oblique. There is a proposal that OPA board was considering this evening to be put to TCE I guess tomorrow. I don't know much more than this but will connect with you tomorrow at some point once know

more thanks

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Nimi Visram <Nimi.Visram@powerauthority.on.ca>
To: Perun, Halyna N. (MEI)
Cc: Michael Lyle <Michael.Lyle@powerauthority.on.ca>
Sent: Wed Apr 20 15:45:38 2011
Subject: TCE

Please find attached correspondence from Thornton Grout Finnigan LLP dated April 19, 2011.

Nimi Visram | Ontario Power Authority | Executive Assistant & Board Coordinator, to General Counsel & Vice President, Legal, Aboriginal and Regulatory Affairs
120 Adelaide St W., Suite 1600 | Toronto, Ontario, M5H 1T1
☎ Phone: 416.969.6027 | 📠 Fax: 416.967.3683 | ✉ Email: nimi.visram@powerauthority.on.ca

♻️ Please consider your environmental responsibility before printing this email.

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 4, 2011 10:22 AM
To: Khatri, Anupa (MEI)
Subject: agenda items for deputy lindsay's meeting

[REDACTED]

[REDACTED]

TCE

[REDACTED]

[REDACTED]

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 4, 2011 2:11 PM
To: Calwell, Carolyn (MEI)
Subject: Tce

Hi didn't have a chance to come by to review the public accounts issue - where is that doc that we received yesterday published? Not clear to me - am waiting to see the deputy and wanted to flag this for him thanks

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 6, 2011 4:43 PM
To: Kelly, John (JUS)
Cc: Calwell, Carolyn (MEI)
Subject: WTO matter and TCE

Confidential

Hi – Thanks for your voice message today asking about the status of these two matters.

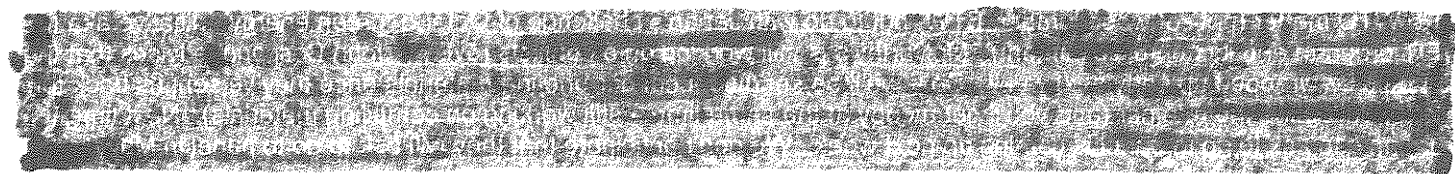
[REDACTED]

Re TCE: Carolyn was in touch with you about this. As you know, we were looking for when exactly did your office receive the PACA notice (it was not evident to us in the materials we received from Ken). OPA and TCE are in discussions. Energy is not involved in these at the moment. So, nothing else to report. Your services will likely not be required until such time as a statement of claim, including HMQ, is in fact issued. Of course, we'll be in touch if something comes up in the meantime that requires your input on this file.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 6, 2011 4:59 PM
To: Calwell, Carolyn (MEI)
Subject: FW: WTO matter and TCE

Huh?

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
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From: Kelly, John (JUS)
Sent: May 6, 2011 4:52 PM
To: Perun, Halyna N. (MEI)
Subject: RE: WTO matter and TCE

Thanks. As to the second para. we advised your ADAG as to the date we received the PACA notice.

From: Perun, Halyna N. (MEI)
Sent: May 6, 2011 4:43 PM
To: Kelly, John (JUS)
Cc: Calwell, Carolyn (MEI)
Subject: WTO matter and TCE

Confidential

Hi – Thanks for your voice message today asking about the status of these two matters.

Re WTO matter (not softwood lumber, BTW, but to do with Japan's challenge of Ontario "green energy" initiative aka the FIT program and its domestic content): McCarthy's is still working on a conflicts review. John Boscariol advises that that should be wrapped up early next week. So – we'll be sending them our briefing materials once they've sent us back the letter accepting the retainer (and you'll get a copy at the same time – still working on compiling materials). Next time Japan can ask to go to panel is coming up next week. We don't anticipate that they will ask to go to panel in May.

Re TCE: Carolyn was in touch with you about this. As you know, we were looking for when exactly did your office receive the PACA notice (it was not evident to us in the materials we received from Ken). OPA and TCE are in discussions. Energy is not involved in these at the moment. So, nothing else to report. Your services will likely not be required until such time as a statement of claim, including HMQ, is in fact issued. Of course, we'll be in touch if something comes up in the meantime that requires your input on this file.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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E-mail: Halyna.Perun2@ontario.ca

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 27, 2011 7:15 PM
To: Lindsay, David (ENERGY)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: TCE

Confidential and Solicitor-Client Privileged

I was called into to meet with ADAG Malliha Wilson at end of day today. She wanted to let me know that counsel for TCE requested a meeting with her and our counsel John Kelly to discuss the matter. The meeting is scheduled for Wed June 1. Malliha was asked to proceed with the meeting by MAG MO. I am assuming that Energy MO and PO are aware – but we should probably advise them. Apparently, TCE counsel are working on a draft of the statement of claim and will be sharing it with Malliha and John next week. Please let me know if you'd like us to send a note to Craig on this as a head's up.

Thank you!

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 27, 2011 7:16 PM
To: Calwell, Carolyn (MEI)
Subject: FW: TCE

Hi – there was not more to this meeting but to let me know that this meeting is happening – but I'll fill you in when I see you next week.

Halyna

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Sent: May 27, 2011 7:15 PM
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Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: TCE

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Thank you!

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 27, 2011 7:46 PM
To: Calwell, Carolyn (MEI)
Subject: Re: TCE

No I don't think she would - but this is really political and she is very attuned to that

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Calwell, Carolyn (MEI)
To: Perun, Halyna N. (MEI)
Sent: Fri May 27 19:19:37 2011
Subject: Re: TCE

Interesting. Would Maliha usually be invited to these sorts of meetings with opposing counsel?

Carolyn

From: Perun, Halyna N. (MEI)
To: Calwell, Carolyn (MEI)
Sent: Fri May 27 19:15:45 2011
Subject: FW: TCE

Hi – there was not more to this meeting but to let me know that this meeting is happening – but I'll fill you in when I see you next week.

Halyna

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From: Perun, Halyna N. (MEI)
Sent: May 27, 2011 7:15 PM

To: Lindsay, David (ENERGY)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: TCE

Confidential and Solicitor-Client Privileged

I was called into to meet with ADAG Malliha Wilson at end of day today. She wanted to let me know that counsel for TCE requested a meeting with her and our counsel John Kelly to discuss the matter. The meeting is scheduled for Wed June 1. Malliha was asked to proceed with the meeting by MAG MO. I am assuming that Energy MO and PO are aware – but we should probably advise them. Apparently, TCE counsel are working on a draft of the statement of claim and will be sharing it with Malliha and John next week. Please let me know if you'd like us to send a note to Craig on this as a head's up.

Thank you!

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 27, 2011 8:35 PM
To: Lindsay, David (ENERGY)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: Re: TCE

Confidential and Solicitor-Client privileged

I am happy to send Craig a head's up and will copy you on that - likely tomorrow - have a good evening!

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Lindsay, David (ENERGY)
To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Sent: Fri May 27 20:08:54 2011
Subject: Re: TCE

Hi Halyna,

Thanks for the e-mail. A heads up from either you or me to Craig would be appropriate. It might be appropriate to get it from you first.

After our meeting today I did mention to Craig this afternoon that we had spoken about OPA legal's request for clarification on direction. I suggested to Craig that he touch base with the Chair of OPA to make sure we are all on same page.

This request by TCE for a meeting with AG folks might suggest it is time to have a meeting to coordinate the "four corners" inside government. Jennifer you and I should recommend to Craig that we have a meeting with all the appropriate political and bureaucratic offices to make sure we are on the same page.

David

From: Perun, Halyna N. (MEI)
To: Lindsay, David (ENERGY)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Sent: Fri May 27 19:15:07 2011
Subject: TCE

Confidential and Solicitor-Client Privileged

I was called into to meet with ADAG Malliha Wilson at end of day today. She wanted to let me know that counsel for TCE requested a meeting with her and our counsel John Kelly to discuss the matter. The meeting is scheduled for Wed June 1. Malliha was asked to proceed with the meeting by MAG MO. I am assuming that Energy MO and PO are aware – but we should probably advise them. Apparently, TCE counsel are working on a draft of the statement of claim and will be sharing it with Malliha and John next week. Please let me know if you'd like us to send a note to Craig on this as a head's up.

Thank you!

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 29, 2011 11:12 AM
To: McLellan, Craig (MGS)
Cc: Lindsay, David (ENERGY); Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: TCE

Confidential and Solicitor-Client Privileged

Hi Crag: TCE counsel have asked to meet with our counsel (CLOC - John Kelly) as well as ADAG Malliha Wilson. The MAG MO has asked that this meeting proceed and in any event it's normal for government counsel to meet with opposing counsel on a matter. The meeting is scheduled for Wed June 1. Our counsel has been advised that TCE counsel is working on a draft statement of claim and plans to share a draft of it with CLOC at that meeting. Given MAG MO's involvement you likely know of this already but wanted to make you aware.

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

Recipient

McLellan, Craig (MGS)
Lindsay, David (ENERGY)
Calwell, Carolyn (MEI)
Wisner, Jennifer (MEI)

Recall

Failed: 30/05/2011 9:44 AM
Failed: 30/05/2011 10:54 AM

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 30, 2011 9:39 AM
To: Wismer, Jennifer (MEI)
Subject: RE: TCE

Argh

Halyna

Halyna N. Perun
A/Director
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-----Original Message-----

From: Wismer, Jennifer (MEI)
Sent: May 30, 2011 9:38 AM
To: Perun, Halyna N. (MEI)
Subject: FW: TCE
Importance: High

Can you resend this to our Craig and recall this email, it went to the wrong Craig at MGS.
Thanks

-----Original Message-----

From: Perun, Halyna N. (MEI)
Sent: May 29, 2011 11:12 AM
To: McLellan, Craig (MGS)
Cc: Lindsay, David (ENERGY); Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: TCE

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Halyna Perun
A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 30, 2011 9:42 AM
To: McLellan, Craig (MGS)
Subject: RE: TCE

Confidential and Solicitor-Client Privileged

Hi - This went to the wrong Craig. With apologies! Please delete you're your email system and please let me know that you have done so. Many thanks

Please

Halyna

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From: Perun, Halyna N. (MEI)
Sent: May 29, 2011 11:12 AM
To: McLellan, Craig (MGS)
Cc: Lindsay, David (ENERGY); Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: TCE

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Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 30, 2011 9:45 AM
To: MacLennan, Craig (MEI)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI); Lindsay, David (ENERGY)
Subject: RE: TCE

Confidential and Solicitor-Client Privileged

Please see below. Unfortunately, I sent the first email to you to the wrong Craig and the Deputy responded to it. I have asked the Craig at MGS to delete from his email system and to notify me.

My apologies

Halyna

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-----Original Message-----

From: Lindsay, David (ENERGY)
Sent: May 29, 2011 12:16 PM
To: Perun, Halyna N. (MEI); McLellan, Craig (MGS)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: Re: TCE

Thanks for this Halyna.

Craig, wonder if we should create a "four corners" opportunity so that we are all singing from the same song sheet.

I would suggest we ask Cabinet office to coordinate a meeting so all parties within government understand the positioning. We might want to include representatives from OPA.

David

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: McLellan, Craig (MGS)

Cc: Lindsay, David (ENERGY); Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Sent: Sun May 29 11:11:58 2011
Subject: TCE

Confidential and Solicitor-Client Privileged

Hi Crag: TCE counsel have asked to meet with our counsel (CLOC - John Kelly) as well as ADAG Malliha Wilson. The MAG MO has asked that this meeting proceed and in any event it's normal for government counsel to meet with opposing counsel on a matter. The meeting is scheduled for Wed June 1. Our counsel has been advised that TCE counsel is working on a draft statement of claim and plans to share a draft of it with CLOC at that meeting. Given MAG MO's involvement you likely know of this already but wanted to make you aware.

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A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 30, 2011 10:11 AM
To: Calwell, Carolyn (MEI)
Subject: RE: TCE

Hi Carolyn - can you please respond to Craig re details? Thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
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-----Original Message-----

From: MacLennan, Craig (MEI)
Sent: May 30, 2011 9:48 AM
To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI)
Subject: Re: TCE

How are the terms of arbitration discussions going?

----- Original Message -----

From: Lindsay, David (ENERGY)
To: Perun, Halyna N. (MEI); MacLennan, Craig (MEI)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Sent: Mon May 30 09:46:59 2011
Subject: Re: TCE

Mistakes happen. Thanks for clarification. I was wondering why nobody replied yesterday?

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: MacLennan, Craig (MEI)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI); Lindsay, David (ENERGY)
Sent: Mon May 30 09:44:33 2011
Subject: RE: TCE

Confidential and Solicitor-Client Privileged

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My apologies

Halyna

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From: Lindsay, David (ENERGY)
Sent: May 29, 2011 12:16 PM
To: Perun, Halyna N. (MEI); McLellan, Craig (MGS)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: Re: TCE

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David

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: McLellan, Craig (MGS)
Cc: Lindsay, David (ENERGY); Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Sent: Sun May 29 11:11:58 2011
Subject: TCE

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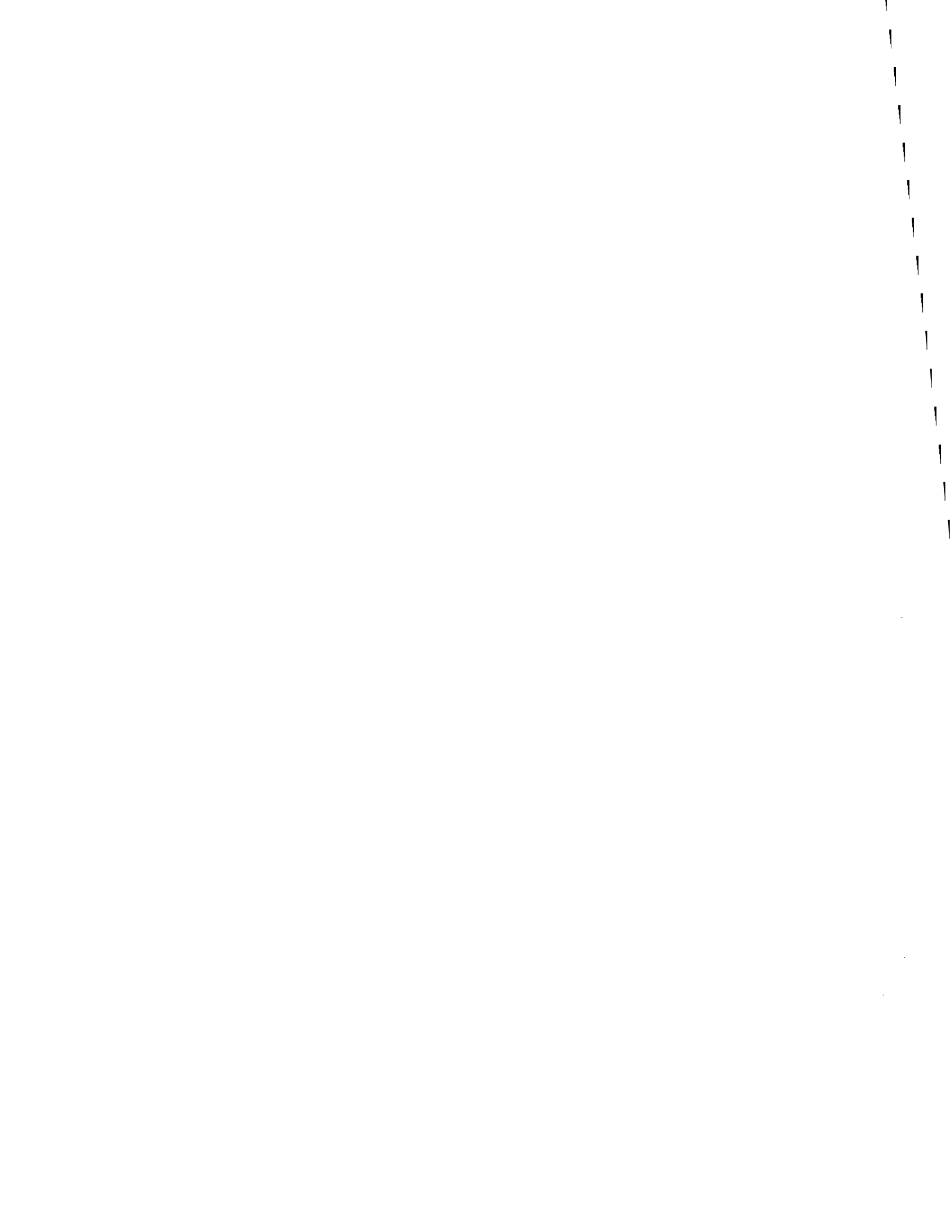
Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry



Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 30, 2011 5:27 PM
To: Wismer, Jennifer (MEI)
Cc: Calwell, Carolyn (MEI)
Subject: Tce

Hi - Carolyn will be attending the meeting with TCE and CLOC on Wed June 1 @ 2 -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 31, 2011 1:52 PM
To: Kelly, John (JUS)
Cc: Calwell, Carolyn (MEI); Machado, Eunice (JUS)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Hi John - The Thursday morning meeting that Carolyn mentions is pretty critical - attendees include the Secretary of the Cabinet, the Deputy Minister of Energy, the Chief of Staff for the Minister of Energy, the Deputy Minister of Finance, the Premier's Chief of Staff - so, if you are asked to attend it would be good to be available to go - it's usually first thing in the morning.

Halyna

Halyna N. Perun
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777 Bay Street, 4th Floor, Suite 425
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-----Original Message-----

From: Kelly, John (JUS)
Sent: May 31, 2011 11:54 AM
To: Calwell, Carolyn (MEI); Machado, Eunice (JUS)
Cc: Perun, Halyna N. (MEI)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Thanks Carolyn. I am not available Thurs. as I am in meetings all day.

-----Original Message-----

From: Calwell, Carolyn (MEI)
Sent: May 31, 2011 11:23 AM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Cc: Perun, Halyna N. (MEI)
Subject: TCE - Cooperation and Common Interest Privilege Agreement

Fully executed copy attached for your file. I understand that the OPA will be in a position to share documentation tomorrow.

Further to my message to John, there have been some discussions about how to proceed that I would like to fill you in on. My ENERGY clients are looking for recommendation about the scope of arbitration and would like to meet either Thursday or Friday with you, the OPA and

OPA outside counsel in this regard. They have asked for a deck that includes a recommendation. I would suggest that we work from the version that we sent up last week.

Finally, John, you may be invited to a regular meeting of ENERGY officials, the PO and the SOC that is scheduled for Thursday. I will confirm when I hear.

I look forward to speaking with you.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure Legal Services Branch Ministry of the
Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 31, 2011 3:10 PM
To: Calwell, Carolyn (MEI)
Subject: TCE

Do you want Anupa to ask Diana Almond to send you the meeting request re meeting with ADAG and TCE tomorrow – in case there is a change – it would be good for you to be copied on the meeting request

Halyna

Halyna N. Perun
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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: May 31, 2011 3:14 PM
To: Calwell, Carolyn (MEI)
Subject: FW:

These were talking points for PO's discussion with TCE re continuing mediation -

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
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From: Perun, Halyna N. (MEI)
Sent: April 13, 2011 4:15 PM
To: Mullin, Sean (OPO)
Cc: MacLennan, Craig (MEI); Wismer, Jennifer (MEI)
Subject:

Confidential and Solicitor/Client Privilege

Some speaking points for your consideration:

Mediation

- given that there is a gap in our numbers – and OPA doesn't have access to the assumptions and models that you've been working from [and vice versa] for that reason alone it's good to get before a mediator to at least get both parties on the same page re assumptions/numbers
- there is no downside to mediation
- we can tighten timelines if that is the sticking point

Litigation

- pursuing litigation obviously ends the negotiations phase

Future RFP

- You have to know that litigating would make it very difficult for you to win the KW project

- OPA would proceed with an open procurement process

Halyna

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From: MacLennan, Craig (MEI)
Sent: April 13, 2011 3:27 PM
To: Perun, Halyna N. (MEI)
Subject: RE:

Confidential and Solicitor/Client Privileged

Can you script us on the mediation language as well pls.

- mediation helps get ppl together
- we can shorten timelines
- we can do some work on our side if you can do some work on your side

and on litigation

- filed ends negotiations on other options

From: Perun, Halyna N. (MEI)
Sent: April 13, 2011 3:22 PM
To: MacLennan, Craig (MEI)
Subject:

I am on a call now -

Confidential and Solicitor/Client Privileged

You could say:

- You have to know that litigating would make it very difficult for you to win the KW project.
- Obviously, the OPA would have to consider where it's at with TC and would want to be competitive in the KW process.
- Obviously, some of the premium you'd be getting for sole source would not be available
- OPA would proceed with an open procurement process.

But - nothing in our government RFP template rules sets out outright that if you're in litigation, you're precluded from bidding. In fact, you can't be disqualified from bidding just because you've sued the government. I assume the OPA RFP rules work in the same way.

I will still check with MGS counsel but have checked good sources that I know here – and that is how the RFP process works. Also OPA counsel doesn't advise to say more.

Halyna

Halyna N. Perun

05/31/2011

Perun, Halyna N. (MEI)

From: Perun, Halyna N. (MEI)
Sent: May 31, 2011 3:17 PM
To: Calwell, Carolyn (MEI)
Subject: FW:

Halyna

Halyna N. Perun
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From: Perun, Halyna N. (MEI)
Sent: April 13, 2011 3:50 PM
To: MacLennan, Craig (MEI)
Cc: Wismer, Jennifer (MEI)
Subject: RE:

Confidential and Solicitor/Client Privileged

Your language on mediation looks good – could suggest adding:

- given that there is a gap in our numbers – [Craig: I think this the case?] and OPA doesn't have access to the assumptions and models that you've been working from [and vice versa I am guessing?] for that reason alone it's good to get before a mediator to at least get both parties on the same page re assumptions/numbers
- there is no downside to mediation [I am assuming that's the case – as they could always sue if mediation fails]
- pursuing litigation obviously ends the negotiations phase
- all options vis a vis the KWC are open to OPA/government to pursue once you start the litigation

Halyna

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05/31/2011

Director
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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: May 16, 2011 3:22 PM
To: Perun, Halyna N. (MEI)
Subject: RE: TransCanada Energy

I'm happy to prepare a deck for your review. I would propose to lay it out as follows, subject to any different views that you might have and with plans to finesse the language:

- 1) The Supply Contract (context)
- 2) The October 7, 2010 Announcement (including Colin's letter)
- 3) OPA's Negotiations (where the parties are on their numbers – in general terms)
- 4) Status to Date (including prospect of arbitration)

Carolyn

From: Perun, Halyna N. (MEI)
Sent: May 16, 2011 3:11 PM
To: Calwell, Carolyn (MEI)
Subject: RE: TransCanada Energy

Hi Carolyn – We should probably come with a slide deck – albeit short – for this meeting. Could you please take the lead in creating one? Happy to discuss an approach

Halyna

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From: Perun, Halyna N. (MEI)
Sent: May 16, 2011 2:24 PM
To: Khatri, Anupa (MEI)
Subject: FW: TransCanada Energy

Hi Anupa – we've been asked to set up a meeting on "Southwest GTA Clean Energy Supply Contract between TransCanada and the Ontario Power Authority" for Malliha Wilson – please include me and Carolyn, Fateh Salem, Ken Lung, John Kelly, and Eunice Machado.

Thank you

Halyna

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From: Perun, Halyna N. (MEI)
Sent: May 16, 2011 2:20 PM
To: Calwell, Carolyn (MEI)
Subject: RE: TransCanada Energy

Hi Carolyn – Fateh confirmed that the PACA notice came to Malliha Wilson as an email with attachments on April 27 directly from Michael Barrack, TGF (who's the author of the letter to OPA and Energy of April 19). Apparently, she knows Michael quite well....

Halyna

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From: Perun, Halyna N. (MEI)
Sent: May 16, 2011 2:18 PM
To: Salim, Fateh (JUS)
Cc: Kelly, John (JUS); Machado, Eunice (JUS); Calwell, Carolyn (MEI)
Subject: RE: TransCanada Energy

Hi Fateh – As discussed, I'll have my office set up a briefing with Malliha on this file. Your office will send out the standard confirming letter to TGF indicating that MAG is in receipt of the PACA notice and that John is the CLOC counsel assigned to the matter. Thanks

Halyna

Halyna N. Perun

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From: Salim, Fateh (JUS)
Sent: May 16, 2011 1:59 PM
To: Perun, Halyna N. (MEI)
Cc: Kelly, John (JUS); Machado, Eunice (JUS)
Subject: TransCanada Energy

Hi Halyna:

We have been directed to advise the other side that we received the Notice in the matter and to confirm that we are Counsel. Can you please advise if you have any concerns before we proceeded to do so? Please let us know today.

Also, the ADAG would like a further briefing on this matter. John is away until next week but it would be helpful if your office could coordinate the scheduling of the briefing for next week.

Thanks

Fateh Salim
Counsel & Deputy Director
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Perun, Halyna N. (MEI)

From: Kelly, John (JUS)

Sent: May 25, 2011 9:12 AM

To: Perun, Halyna N. (MEI)

Cc: Machado, Eunice (JUS)

Halyna, I just returned a call from Michael Barack and John Finnegan, counsel to Trans Canada. In essence, they confirm that the Govt. cancelled the contract and communicated that fact to Trans Canada before the Minister of Energy was advised. Apparently the Chief of Staff (or equivalent title) in the PO told one Trans Canada's senior people at the time they indicated the plant would not proceed that Trans Canada would be "made whole" as to damages.

They indicated that the Oct. 7th letter was negotiated extensively and means that the Govt. and OPA would not rely on the limitation of damages or the argument that they would not have been able to complete the project due to objections.

Barack indicated that negotiations as to damages are " an unmitigated disaster". They say that the result of the offer from OPA re: Cambridge is that it represents a 4% return (and not 9% as apparently suggested by the OPA) and that they could not make any money on a 4% return.

They have indicated that the problem is that Colin Andersen at OPA is being very confrontational and that he and whoever is advising him doesn't know anything about the proper calculation of damages. Apparently counsel are not involved in these discussions at the table.

They say their clients are experts at the calculation of damages as they do it all the time and they want OPA to get outside expert assistance to break the deadlock.

They have indicated that they have been team players and have not created a fuss about the termination on the understanding that they would have a meaningful discussion on damages and resolution but, if things don't happen soon, they will seek instructions to proceed in Commercial Court as they prefer that to Arbitration.

I advised them that I was new to the file and would seek instructions and advise of the Govt. position. They indicated they would sue the Govt. for interference with contractual relations if forced to do so.

I have no idea what the PO will say to these allegations but I think we should find out as soon as possible.

I earlier suggested that it might be worthwhile to have the parties try to agree to retain an independent expert to provide a non-binding opinion as to damages for the purpose of attempting to resolve the issue.

I look forward to discussing this with you.

John

John Kelly
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Fax: 416-326-4181

email: John.Kelly@ontario.ca

06/03/2011

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: May 26, 2011 9:29 AM
To: Khatri, Anupa (MEI); Perun, Halyna N. (MEI)
Subject: TCE Update - Items for meeting with DM

Confidential

The TransCanada matter should be on the agenda. This is the dispute over the Southwest GTA Supply Contract and the question of whether we should agree to arbitration. The immediate issue (having just heard from John Kelly) is getting access to the correspondence exchanged between the MO, the PO and TransCanada. TransCanada claims to have a host of correspondence upon which they will assert that they were promised that the limitation of liability provision in the contract would not be relied upon and that there would be no claim that they could not complete the contract. John advises that he can't recommend a position on arbitration without full information about what was promised (which seems fair).

Carolyn

From: Khatri, Anupa (MEI)
Sent: May 26, 2011 9:16 AM
To: Calwell, Carolyn (MEI); Carson, Cheryl (MEI); Johnson, Paul (MEI); Kacaba, Jennifer (MEI); Landmann, Peter (MEI); Linington, Brenda (MEI); Ranalli, David (MEI); Rehob, James (MEI); Shear, Dan (MEI); Todd, Brian (MEI); Zoladek, Marta (MEI)
Subject: Re: Agenda items for Halyna's next regular meeting with DM Lindsay- 27th May 2011

Hi everyone,

Please forward any agenda items that you'd like Halyna to raise at her next regular meeting with DM Lindsay on Friday, 27th May 2011, by 4 p.m. today. Please send me details of the topic you propose be set out in the agenda and a short description of the issue you would like Halyna to discuss. Halyna may follow up with you for more information.

Thanks,
Anupa Khatri
Director's Secretary
Ministries of Energy & Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Pfx: 416-325-1841

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Perun, Halyna N. (MEI)

From: Kelly, John (JUS)
Sent: May 26, 2011 9:32 AM
To: Calwell, Carolyn (MEI); Perun, Halyna N. (MEI)
Cc: Machado, Eunice (JUS)
Subject: RE:

I will send my comments shortly. As indicated, in my discussion with Mike Barrack this am, he indicated that they have assembled all the correspondence between Trans Canada, the Ministers office, OPA and the PO on the issues relating to the alleged agreement by the Govt. not to raise the limitation of damages ability to obtain Permits in any Arbitration. As I said, I have no correspondence and need to have whatever there is on these issues. Michael Lyle says he would recommend delivering copies of their correspondence is we sign the Joint Defence confidentiality agreement. Please advise if the agreement will be signed so we can move on. I look forward to receiving a correspondence we have. Many thank.

From: Calwell, Carolyn (MEI)
Sent: May 26, 2011 8:24 AM
To: Kelly, John (JUS); Perun, Halyna N. (MEI)
Cc: Machado, Eunice (JUS)
Subject: RE:

Thanks very much, John. I have revised the deck with your comments in mind.

Halyna, I would suggest that this deck could be sent to the DMO with a request for a briefing on the issue.

Carolyn

From: Kelly, John (JUS)
Sent: May 25, 2011 2:26 PM
To: Calwell, Carolyn (MEI); Perun, Halyna N. (MEI)
Cc: Machado, Eunice (JUS)
Subject: RE:

I read the note and, based on what I was told this morning by counsel, it may not properly represent the position of Trans Canada.

Counsel told me that , unless there was agreement that damages were not limited by the provisions of the contract (in other words, they would be made whole) and that no defence would be raised that they could not have completed the contract, they would litigate in Commercial Court.

As for Option 1, I would add that there will be litigation of the alleged promise to keep them whole and not to use the defence that they couldn't complete the contract.

As for Option 2. the only way Trans Canada would consider arbitrating would be if there was no limitation to damages and no defence that it couldn't complete the contract.

They have said they would litigate and not Arbitrate and I assume they would only Arbitrate damages based on the assumption above. From their point of view, I assume the only issue would be the quantum of damages assuming no limitations as per the contract.

As for Option 3, I don't think Trans Canada would agree to Arbitrate all issues. I think that would happen in Commercial Court.

05/26/2011

From: Calwell, Carolyn (MEI)
Sent: May 25, 2011 11:50 AM
To: Perun, Halyna N. (MEI); Kelly, John (JUS)
Cc: Machado, Eunice (JUS)
Subject: RE:

Please find attached a first cut of a deck, as we discussed yesterday. I welcome your comments and revisions.

Carolyn

Carolyn Calwell
 Deputy Director
 Ministry of Energy & Ministry of Infrastructure
 Legal Services Branch
 Ministry of the Attorney General
 777 Bay Street, Suite 425
 Toronto ON M5G 2E5
 416.212.5409

From: Perun, Halyna N. (MEI)
Sent: May 25, 2011 9:34 AM
To: Kelly, John (JUS)
Cc: Machado, Eunice (JUS); Calwell, Carolyn (MEI)
Subject: RE:

Thank s John for the update. We're proceeding to develop the options as we discussed yesterday and your conversation below will certainly inform them. Carolyn is back later this morning and likely will be sending something to you for your review later in the day. I agree that the PO's views on this will be critical.

Halyna

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From: Kelly, John (JUS)
Sent: May 25, 2011 9:12 AM
To: Perun, Halyna N. (MEI)
Cc: Machado, Eunice (JUS)
Subject:

Halyna, I just returned a call from Michael Barack and John Finnegan, counsel to Trans Canada. In essence, they confirm that the Govt. cancelled the contract and communicated that fact to Trans Canada before the Minister of

05/26/2011

Energy was advised. Apparently the Chief of Staff (or equivalent title) in the PO told one Trans Canada's senior people at the time they indicated the plant would not proceed that Trans Canada would be "made whole" as to damages.

They indicated that the Oct. 7th letter was negotiated extensively and means that the Govt. and OPA would not rely on the limitation of damages or the argument that they would not have been able to complete the project due to objections.

Barack indicated that negotiations as to damages are " an unmitigated disaster". They say that the result of the offer from OPA re: Cambridge is that it represents a 4% return (and not 9% as apparently suggested by the OPA) and that they could not make any money on a 4% return.

They have indicated that the problem is that Colin Andersen at OPA is being very confrontational and that he and whoever is advising him doesn't know anything about the proper calculation of damages. Apparently counsel are not involved in these discussions at the table.

They say their clients are experts at the calculation of damages as they do it all the time and they want OPA to get outside expert assistance to break the deadlock.

They have indicated that they have been team players and have not created a fuss about the termination on the understanding that they would have a meaningful discussion on damages and resolution but, if things don't happen soon, they will seek instructions to proceed in Commercial Court as they prefer that to Arbitration.

I advised them that I was new to the file and would seek instructions and advise of the Govt. position. They indicated they would sue the Govt. for interference with contractual relations if forced to do so.

I have no idea what the PO will say to these allegations but I think we should find out as soon as possible.

I earlier suggested that it might be worthwhile to have the parties try to agree to retain an independent expert to provide a non-binding opinion as to damages for the purpose of attempting to resolve the issue.

I look forward to discussing this with you.

John

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email: John.Kelly@ontario.ca

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: May 26, 2011 9:55 AM
To: 'Michael Lyle'
Cc: Perun, Halyna N. (MEI)
Subject: RE: OPA - TCE [Privileged and Confidential]
Attachments: #20420450v6_LEGAL_1_ - v6 Common Interest Privilege Agreement OPA (3).DOC

Mike,

I understand from John Kelly that you are prepared to share some correspondence related to this matter if the Common Interest Privilege Agreement is signed. We may have a window of opportunity with the DM tomorrow and are prepared to take the agreement forward if we can remove the declaratory relief paragraph (#17 in the last version that Susan sent). As such, we would recommend the Agreement in the form attached (having deleted that paragraph). Please let me know if this is acceptable so that we can move on execution.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
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Ministry of the Attorney General
777 Bay Street, Suite 425
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416.212.5409

From: Calwell, Carolyn (MEI)
Sent: May 24, 2011 11:01 AM
To: 'Michael Lyle'
Subject: FW: OPA - TCE [Privileged and Confidential]

Mike,

In Susan's absence and in light of our meeting later today, I wanted to send you my comment on the Common Interest Privilege Agreement. I believe that this is the only outstanding issue on this document.

Carolyn

From: Calwell, Carolyn (MEI)
Sent: May 20, 2011 4:29 PM
To: 'Susan Kennedy'
Subject: RE: OPA - TCE [Privileged and Confidential]

Susan,

I wanted to follow up on the message that I left yesterday. In light of the relationship between the Ministry and the OPA, I have trouble justifying or explaining an allowance for declaratory relief between the parties. That PACA allows for that remedy doesn't warrant including it here. I would prefer the paragraph to come out. Nevertheless, as indicated, I would be happy to discuss further if you wish.

Carolyn

Carolyn Calwell

Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
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777 Bay Street, Suite 425
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416.212.5409

From: Susan Kennedy [mailto:Susan.Kennedy@powerauthority.on.ca]
Sent: May 13, 2011 2:56 PM
To: Calwell, Carolyn (MEI)
Subject: FW: OPA - TCE [Privileged and Confidential]

Susan H. Kennedy
Director, Corporate/Commercial Law Group

From: Ivanoff, Paul [mailto:PIvanoff@osler.com]
Sent: May 11, 2011 6:13 PM
To: Susan Kennedy
Subject: RE: OPA - TCE [Privileged and Confidential]

Susan,

I have revised the Cooperation and Common Interest Privilege Agreement to address the Crown's comment regarding injunctive relief. I note that Section 14 of the *Proceedings Against the Crown Act* contemplates that declaratory relief may be sought in lieu of an injunction. The text of that section is as follows:

No injunction or specific performance against Crown

14. (1) Where in a proceeding against the Crown any relief is sought that might, in a proceeding between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

Limitation on injunctions and orders against Crown servants

(2) The court shall not in any proceeding grant an injunction or make an order against a servant of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in a proceeding against the Crown, but in lieu thereof may make an order declaratory of the rights of the parties. R.S.O. 1990, c. P.27, s. 14.

With that in mind, I suggest that we propose to the Crown that we revise the "Injunctive Relief" section (i.e. Section 17) to provide for "Declaratory Relief" instead of "Injunctive Relief". They are not immune from a declaratory order. The attached version of the Agreement reflects the change.

Please contact me if you would like to discuss.

Regards,
Paul

**COOPERATION AND
COMMON INTEREST PRIVILEGE AGREEMENT**

THIS AGREEMENT is effective as of the 1st day of April, 2011 (the “**Effective Date**”).

BETWEEN:

**ONTARIO POWER AUTHORITY
("OPA")**

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTER OF ENERGY
("●NTARIO")**

RECITALS:

- A. The OPA and TransCanada Energy Ltd. ("TCE") entered into the Southwest GTA Clean Energy Supply Contract dated as of October 9, 2009 (the "SWGTA Contract").
- B. The OPA and Ontario have concluded that, in connection with the threatened claims and potential litigation by TCE relating to the SWGTA Contract, legal and factual issues could arise with respect to which they have common interests and joint or compatible defences.
- C. The OPA and Ontario have undertaken, and will undertake, factual, legal and other research, and are of the opinion that it is in their best interest to exchange information, pool their individual work product and cooperate in a joint defence effort.
- D. Cooperation in such a joint defence effort will necessarily involve the exchange of confidential information as well as information which is otherwise privileged such as, amongst others, solicitor/client communication and/or communications made and materials obtained or prepared in contemplation of litigation.
- E. In light of their common interest, and the fact that litigation by TCE against the OPA and Ontario is anticipated, OPA and Ontario wish to proceed cooperatively in the preparation of joint or compatible defences, and by this Agreement seek to document their mutual intention and agreement that neither OPA nor Ontario shall suffer any waiver or loss of privilege as a result of disclosure to each other of their Privileged Information (as defined

below) or as a result of their cooperation in the preparation of positions, responses and defences to the Claims (as defined below).

AGREEMENT

In consideration of the promises and the mutual covenants and agreements herein, the Parties agree as follows:

DEFINITIONS

1. In the foregoing Recitals and in this Agreement, the following terms have the meanings set forth in this Section:
 - (a) “**Claims**” means any and all claims made or filed by TCE relating to, arising out of, or in connection with the SWGTA Contract, and any and all arbitration, mediation, or litigation that arises out of any and all such claims.
 - (b) “**Effective Date**” means the effective date as defined above.
 - (c) “**Parties**” means the OPA and Ontario and, for the purpose of giving effect to this Agreement, includes their legal counsel, agents, consultants and experts.
 - (d) “**Privileged Information**” means information and communications, whether written or electronically recorded, in respect of the preparation of positions, responses and defences to the Claims which are or would be otherwise in law privileged and protected from disclosure or production to Third Parties made between OPA (or its employees, legal counsel, agents, consultants, experts or any other person or entity acting on OPA’s behalf) and Ontario (or its employees, legal counsel, agents, consultants, experts or any other person or entity acting on Ontario’s behalf), including but not limited to:
 - (i) information and communications contained in documents, memoranda, correspondence, drafts, notes, reports, factual summaries, transcripts;
 - (ii) communications between counsel, or counsel and clients including their employees, consultants, board members or advisors;
 - (iii) any joint or several interview of prospective witnesses, and summaries or reports thereof;
 - (iv) any analyses, document binders, files, compilations or databases;
 - (v) the sharing or exchange via any media, including but not limited to electronic media;
 - (vi) theories, impressions, analyses, legal research, or legal opinions;
 - (vii) communications to and from experts, and documentation relating to or setting out expert commentary and opinion; and

- (viii) any other material, communications and information which would otherwise be protected from disclosure to Third Parties.
- (e) "TCE" has the meaning defined in paragraph A of the Recitals.
- (f) "Third Party" or "Third Parties" means any person or entity that is not a Party. Third Party includes TCE, their employees, agents, counsel, subcontractors, consultants, experts, or any other person or entity acting on TCE's behalf.

COMMON INTEREST OF THE PARTIES

2. The Parties have a common, joint, and mutual interest in the defence of the Claims, wish to cooperate with each other in respect of the defence of the Claims, and due to the anticipated litigation with TCE, wish to share between them Privileged Information without risk of prejudice to or of waiver in whole or in part of their respective privileges and rights to hold such Privileged Information protected from disclosure.
3. The Parties are under no obligation to share Privileged Information. However, from time to time, either Party (the "Disclosing Party") in its sole discretion may choose to share Privileged Information with the other Party (the "Receiving Party").
4. To the extent that exchanges of Privileged Information have been made prior to entering into this Agreement, it is the Parties' intention that all such exchanges be subject to the terms of this Agreement as if they had occurred after the Effective Date.
5. The execution of this Agreement, the cooperation between the Parties in respect of the defences to the Claims and the exchange of Privileged Information under this Agreement, where the materials would otherwise be protected by law against disclosure by solicitor-client (attorney client) privilege, litigation privilege, work product doctrine, without prejudice privilege, or any other applicable rule of privilege or confidentiality:
 - (i) are not intended to, do not and shall not constitute a waiver in whole or in part in favour of any Third Party by either Party of any applicable privilege or other rule of protection from disclosure; and
 - (ii) will not be asserted at any time by either Party as a waiver of any such privilege or other rule of protection from disclosure.
6. Disclosure of Privileged Information by the Receiving Party to Third Parties without the prior written consent of counsel for the Disclosing Party is expressly prohibited, unless the disclosure is ordered by a court of competent jurisdiction or is otherwise required by law. If disclosure of any Privileged Information is sought from a Receiving Party in any arbitration, litigation or other legal proceedings, the Receiving Party [from whom disclosure is sought] shall take all steps necessary to preserve and invoke, to the fullest extent possible, all applicable privileges, immunities and protections against disclosure, and shall immediately provide written notice of such legal proceedings to the Disclosing Party. The Receiving Party shall not voluntarily surrender or disclose the Privileged

Information without first providing the Disclosing Party a reasonable opportunity to protect its interests before the applicable court or arbitral tribunal.

7. All of the Privileged Information shall be preserved as confidential and privileged both prior to resolution of all outstanding Claims and thereafter, and shall not be used for any purpose other than the stated sole purpose of cooperation in the defence of the Claims.
8. Neither Party shall disclose to a Third Party the existence of this Agreement, nor its terms, unless both Parties consent in writing or unless compelled by order of a court or arbitral tribunal.
9. The Parties acknowledge and agree that their common interest in the defence of the Claims and their intention that no waiver of privilege shall result from their exchange of Privileged Information between them shall in no way be affected or deemed to be negated in whole or in part by the existence now or in the future of any adversity between the Parties relating to or arising out of the SWGTA Contract, whether in connection with the Claims or otherwise, and that any such adversity shall not affect this Agreement.

COOPERATION

10. The Parties shall cooperate in respect of the defence of the Claims, including providing access to information, materials and employees as may be reasonably necessary from time to time, as the case may be, provided that each of the Parties reserves the right to determine what information will be shared and under what circumstances, and no obligation or duty to share any such information is created by this Agreement.

WITHDRAWAL

11. It is the intent of the Parties that this Agreement shall remain in effect until final resolution of the Claims, either by litigation in a final, non-appealable judgment or arbitral award or by a final negotiated settlement, whichever is later.
12. Notwithstanding the foregoing, any Party may withdraw from this Agreement by giving twenty (20) days advance written notice to the other Party, which 20 days is calculated beginning on the day after the notice is received by a Party. For greater certainty, withdrawal from this Agreement by a Party is not effective until the expiration of the 20 days' notice period required by this provision.
13. Any withdrawal from this Agreement shall be prospective in effect only and the withdrawing Party and any Privileged Information made available by or to the other Party prior to that Party's withdrawal shall continue to be governed by the terms of this Agreement whether or not the Parties are, in any respect in relation to the SWGTA Contract, adverse in interest.
14. On or before the effective date of a withdrawal from this Agreement, the withdrawing Party shall return to the Disclosing Party all Privileged Information received from the Disclosing Party. In the case of copies, with the consent of the Disclosing Party, the Receiving Party may destroy such copies in a secure manner, and confirm in writing to the Disclosing Party that it has done so.

WAIVER OF CONFLICT OF INTEREST

15. The Parties agree that this Agreement and the sharing of Privileged Information between them shall not be used as a basis for a motion to disqualify a Party's counsel (including for certainty the Party's counsel's law firm and any partner or associate thereof) after a Party has withdrawn from this Agreement for any reason, including without limitation, due to any conflict of interest which arises or becomes known to the withdrawing Party after the Effective Date, adversity between the Parties or any other reason whatsoever based on this Agreement or the cooperation and disclosure of Privileged Information hereunder.
16. The Parties confirm that there is no and shall not be deemed to be any solicitor-client relationship between counsel for the OPA and Ontario, nor any solicitor-client relationship between counsel for Ontario and the OPA, as a result of any communications, sharing of Privileged Information, cooperation or any other action taken in furtherance of the Parties' common interests or under and in reliance upon this Agreement.

NOTICE

17. All notices and other communications between the Parties, unless otherwise specifically provided, shall be in writing and deemed to have been duly given when delivered in person or telecopied or delivered by overnight courier, with postage prepaid, addressed as follows:

To: Ontario Power Authority

120 Adelaide Street West, Suite 1600
Toronto, ON M5H 1T1

Attention: Michael Lyle, General Counsel

Tel. No.: (416) 969-6035

Fax No.: (416) 967-1947

E-Mail: michael.lyle@powerauthority.on.ca

To: Her Majesty the Queen in Right of Ontario as Represented by the Minister
of Energy

777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5

Attention: Halyna Perun, A/ Legal Director, Legal Services Branch
Ministries of Energy & Infrastructure

Tel. No.: (416) 325-6681

Fax No.: (416) 325-1781
E-mail: halyna.perun2@ontario.ca

GENERAL PROVISIONS

18. This Agreement shall be construed in accordance with the laws of the Province of Ontario and the Parties to this Agreement irrevocably attorn to the jurisdiction of Ontario with respect to any and all matters arising under this Agreement.
19. If any of the provisions of this Agreement or portions thereof should be determined to be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
20. Any failure of any Party to enforce any of the provisions of this Agreement or to require compliance with any of its terms at any time while this Agreement is in force shall in no way affect the validity of this Agreement, or any part hereof, and shall not be deemed a waiver of the right of such Party thereafter to enforce any and each such provisions.
21. Nothing contained in or done further to this Agreement shall be deemed either expressly or by implication to create a duty of loyalty between any counsel and anyone other than the client of that counsel.
22. This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof. There are no other oral understandings, terms, or conditions and neither Party has relied upon any representation, express or implied, not contained in this Agreement.
23. No change, amendment, or modification of this Agreement shall be valid or binding upon the Parties hereto unless such change, amendment, or modification is in writing and duly executed by both Parties hereto.
24. The headings contained in this Agreement are for convenience and reference only and in no way define, describe, extend, or limit the scope or intent of this Agreement or the intent of any provision contained herein.
25. This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the Parties.
26. This Agreement may be signed in counterparts and by facsimile and all counterparts together shall constitute the Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

ONTARIO POWER AUTHORITY

By: _____

Name: _____

Title: _____

**HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO AS REPRESENTED BY THE
MINISTER OF ENERGY**

By: _____

Name: _____

Title: _____

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: May 26, 2011 10:15 AM
To: Perun, Halyna N. (MEI)
Subject: FW:
Attachments: TransCanada Options 26 05 2011 f (2).ppt; #20420450v6_LEGAL_1_ - v6 Common Interest Privilege Agreement OPA (3).DOC; BN Common Interest Privilege Agreement.26 05 2011.doc

Revised to address John Kelly's further comments. Please disregard previous deck.

By way of explanation, Options 1 and 3 lead to the same outcome. The reason that I included Option 3 is because of its alignment with the OPA's position. In simple terms, Option 1 says, OPA do what you will – we don't care about (you or) litigation while Option 3 says, OPA, we support your position.

Perhaps you could walk the DM through the deck at your regular tomorrow. It may also be a good opportunity to get the DM to sign the Common Interest Privilege Agreement. Attached is a briefing note that explains the agreement (Abbey took the lead and did a good job!). We need confirmation from the OPA that they are willing to remove a provision that would allow for declaratory relief. Mike Lyle indicated in our meeting that he understood my position but I just got off the phone with him and he wants to think about this further. We both agree that it is unlikely that such a provision would ever be used but he thinks it should stay in because "agreements need remedies" and I think it's inappropriate for an agreement between the Ministry and an agency. I will keep you posted as I hear more.

Carolyn

From: Calwell, Carolyn (MEI)
Sent: May 26, 2011 8:24 AM
To: Kelly, John (JUS); Perun, Halyna N. (MEI)
Cc: Machado, Eunice (JUS)
Subject: RE:

Thanks very much, John. I have revised the deck with your comments in mind.

Halyna, I would suggest that this deck could be sent to the DMO with a request for a briefing on the issue.

Carolyn

From: Kelly, John (JUS)
Sent: May 25, 2011 2:26 PM
To: Calwell, Carolyn (MEI); Perun, Halyna N. (MEI)
Cc: Machado, Eunice (JUS)
Subject: RE:

I read the note and, based on what I was told this morning by counsel, it may not properly represent the position of Trans Canada.

Counsel told me that, unless there was agreement that damages were not limited by the provisions of the contract (in other words, they would be made whole) and that no defence would be raised that they could not have completed the contract, they would litigate in Commercial Court.

As for Option 1, I would add that there will be litigation of the alleged promise to keep them whole and not to use the defence that they couldn't complete the contract.

As for Option 2, the only way Trans Canada would consider arbitrating would be if there was no limitation to damages and no defence that it couldn't complete the contract.

They have said they would litigate and not Arbitrate and I assume they would only Arbitrate damages based on the assumption above. From their point of view, I assume the only issue would be the quantum of damages assuming no limitations as per the contract.

As for Option 3, I don't think Trans Canada would agree to Arbitrate all issues. I think that would happen in Commercial Court.

From: Calwell, Carolyn (MEI)
Sent: May 25, 2011 11:50 AM
To: Perun, Halyna N. (MEI); Kelly, John (JUS)
Cc: Machado, Eunice (JUS)
Subject: RE:

Please find attached a first cut of a deck, as we discussed yesterday. I welcome your comments and revisions.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

From: Perun, Halyna N. (MEI)
Sent: May 25, 2011 9:34 AM
To: Kelly, John (JUS)
Cc: Machado, Eunice (JUS); Calwell, Carolyn (MEI)
Subject: RE:

Thank s John for the update. We're proceeding to develop the options as we discussed yesterday and your conversation below will certainly inform them. Carolyn is back later this morning and likely will be sending something to you for your review later in the day. I agree that the PO's views on this will be critical.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

Notice

This communication may be solicitor/client privileged and contain confidential information intended only for the person(s) to whom it is addressed. Any dissemination or use of this information by others than the intended recipient(s) is prohibited. If you have received this message in error please notify the writer and permanently delete the message and all attachments. Thank you.

From: Kelly, John (JUS)
Sent: May 25, 2011 9:12 AM
To: Perun, Halyna N. (MEI)
Cc: Machado, Eunice (JUS)
Subject:

Halyna, I just returned a call from Michael Barack and John Finnegan, counsel to Trans Canada. In essence, they confirm that the Govt. cancelled the contract and communicated that fact to Trans Canada before the Minister of Energy was advised. Apparently the Chief of Staff (or equivalent title) in the PO told one Trans Canada's senior people at the time they indicated the plant would not proceed that Trans Canada would be "made whole" as to damages.

They indicated that the Oct. 7th letter was negotiated extensively and means that the Govt. and OPA would not rely on the limitation of damages or the argument that they would not have been able to complete the project due to objections.

Barack indicated that negotiations as to damages are " an unmitigated disaster". They say that the result of the offer from OPA re: Cambridge is that it represents a 4% return (and not 9% as apparently suggested by the OPA) and that they could not make any money on a 4% return.

They have indicated that the problem is that Colin Andersen at OPA is being very confrontational and that he and whoever is advising him doesn't know anything about the proper calculation of damages. Apparently counsel are not involved in these discussions at the table.

They say their clients are experts at the calculation of damages as they do it all the time and they want OPA to get outside expert assistance to break the deadlock.

They have indicated that they have been team players and have not created a fuss about the termination on the understanding that they would have a meaningful discussion on damages and resolution but, if things don't happen soon, they will seek instructions to proceed in Commercial Court as they prefer that to Arbitration.

I advised them that I was new to the file and would seek instructions and advise of the Govt. position. They indicated they would sue the Govt. for interference with contractual relations if forced to do so.

I have no idea what the PO will say to these allegations but I think we should find out as soon as possible.

I earlier suggested that it might be worthwhile to have the parties try to agree to retain an independent expert to provide a non-binding opinion as to damages for the purpose of attempting to resolve the issue.

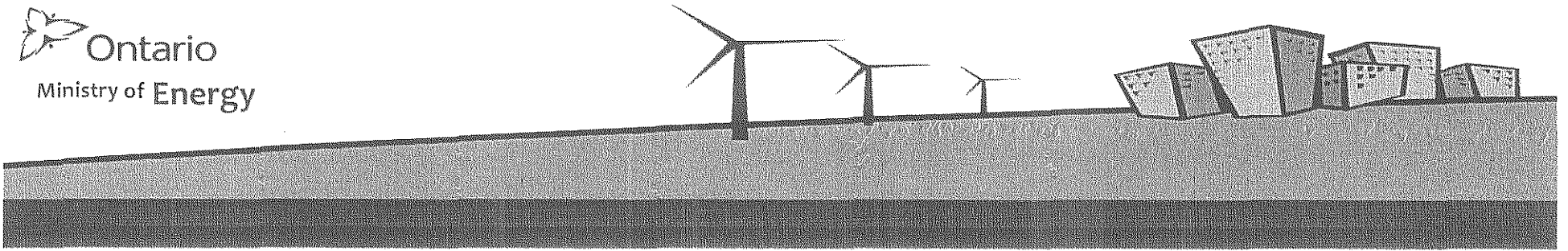
I look forward to discussing this with you.

John

John Kelly
Counsel
Crown Law Office - Civil
Ministry of the Attorney General
720 Bay Street - 8th Floor
Toronto, ON
M7A 2S9

Tel: 416-212-1161
Fax: 416-326-4181

email: John.Kelly@ontario.ca

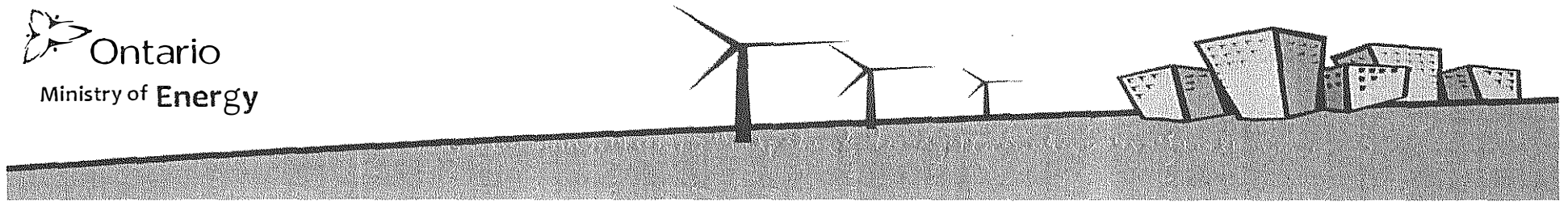


TransCanada Energy & the Southwest GTA Clean Energy Supply Contract Options for Arbitration

Confidential/Solicitor-Client Privileged

Prepared in contemplation of litigation

Legal Services Branch
Ministry of Energy/Ministry of
Infrastructure



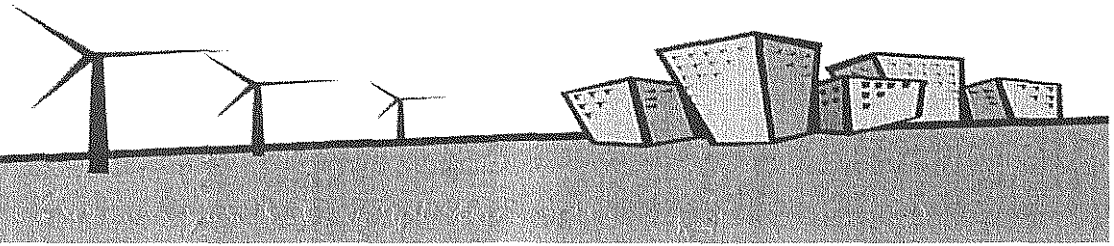
Current Status

- ◆ TransCanada served a PACA notice on or about April 27, 2011 and will be in a position to serve and file a Statement of Claim against the Crown on or after June 27th. TransCanada could serve and file a Statement of Claim against the OPA at any time.
- ◆ Allegations against the Province relate to intentional interference with contractual relations, namely the Southwest GTA Clean Energy Supply Contract (the Supply Contract) between the OPA and TransCanada.
- ◆ The OPA has been discussing exit arrangements and possible alternatives to the Southwest GTA generation facility with TransCanada since October 2010.
- ◆ The OPA and TransCanada continue negotiations but the financial gap between the parties is large and increasingly appears to be insurmountable.
- ◆ The OPA and TransCanada have discussed the possibility of proceeding to arbitration to resolve the dispute.
- ◆ TransCanada has suggested that it is only willing to use arbitration if the parties agree that damages are not limited by the Supply Contract and there will be no assertion that TransCanada could not complete the Supply Contract .



Option 1: No arbitration

- ◆ Option 1: Decline to take a position on arbitration
- ◆ Assumptions
 - ◆ The Crown will prepare to defend a law suit from TransCanada
 - ◆ Litigation will deal with the meanings of statements that TransCanada would be “made whole” and the reference to the “anticipated financial value of the Contract” (OPA letter dated October 7, 2010)
 - ◆ Defences will include the argument that TransCanada could not complete the Supply Contract in any event because of its inability to get regulatory approvals
 - ◆ The OPA and TransCanada are highly unlikely to resolve the issues through their own negotiations
- ◆ Expected outcome: Highly likely to result in litigation between TransCanada, the OPA and the Crown
- ◆ Advantages
 - ◆ Sends clear signal to TransCanada that the Crown is not concerned about litigation
 - ◆ Could change the current tenor of negotiations between the OPA and TransCanada
 - ◆ Court proceeding will be protracted
- ◆ Disadvantages
 - ◆ Timing of next steps is controlled by TransCanada
 - ◆ Evidence will be required around the conversations between representatives of the Crown and TransCanada in and around October 2010
 - ◆ Court proceeding will be public



Option 2: Arbitration on damages

- ◆ **Option 2:** Arbitration on damages alone with concessions that there are no limitations to damages and no defences based on TransCanada's inability to obtain permitting
- ◆ **Assumptions**
 - ◆ Arbitration will focus on expert evaluations of TransCanada's lost opportunity
- ◆ **Expected outcome:** Likely to lead to arbitration and, in due course, resolution of the dispute
- ◆ **Advantages**
 - ◆ TransCanada has said this is the only basis on which it will agree to arbitration
 - ◆ Province may not need to participate in arbitration of limited scope
 - ◆ Process will be short, relative to a court process, and could be confidential
- ◆ **Disadvantages**
 - ◆ Creates highest financial exposure for the Province and the OPA
 - ◆ OPA will likely want written instructions to proceed in this way



Option 3: Arbitration on all issues

- ◆ **Option 3:** Arbitration on all issues (OPA's current position)
- ◆ **Assumptions**
 - ◆ Crown would take the position that arbitration must consider:
 - ◆ TransCanada's ability to deliver on its obligations under the Supply Contract
 - ◆ The terms of the Supply Contract, including the limitation of liability
 - ◆ Meanings of statements that TransCanada would be "made whole" and the reference to the "anticipated financial value of the Contract" (OPA letter dated October 7, 2010)
 - ◆ Evidence will be required around the conversations between representatives of the Crown and TransCanada in and around October 2010
- ◆ **Expected outcome:** Highly likely to result in litigation between TransCanada, the OPA and the Crown
- ◆ **Advantages**
 - ◆ If TransCanada agrees to arbitrate on all issues, process will be shorter than a court process, but longer than arbitration on damages alone
 - ◆ Arbitration could be confidential
 - ◆ Likely to result in less financial exposure to the OPA and the Province than arbitration on damages alone
- ◆ **Disadvantages**
 - ◆ TransCanada has said that it will not proceed with arbitration on this basis

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**COOPERATION AND
COMMON INTEREST PRIVILEGE AGREEMENT**

THIS AGREEMENT is effective as of the 1st day of April, 2011 (the “**Effective Date**”).

BETWEEN:

**ONTARIO POWER AUTHORITY
 (“OPA”)**

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTER OF ENERGY
 (“ONTARIO”)**

RECITALS:

- A. The OPA and TransCanada Energy Ltd. (“TCE”) entered into the Southwest GTA Clean Energy Supply Contract dated as of October 9, 2009 (the “SWGTA Contract”).
- B. The OPA and Ontario have concluded that, in connection with the threatened claims and potential litigation by TCE relating to the SWGTA Contract, legal and factual issues could arise with respect to which they have common interests and joint or compatible defences.
- C. The OPA and Ontario have undertaken, and will undertake, factual, legal and other research, and are of the opinion that it is in their best interest to exchange information, pool their individual work product and cooperate in a joint defence effort.
- D. Cooperation in such a joint defence effort will necessarily involve the exchange of confidential information as well as information which is otherwise privileged such as, amongst others, solicitor/client communication and/or communications made and materials obtained or prepared in contemplation of litigation.
- E. In light of their common interest, and the fact that litigation by TCE against the OPA and Ontario is anticipated, OPA and Ontario wish to proceed cooperatively in the preparation of joint or compatible defences, and by this Agreement seek to document their mutual intention and agreement that neither OPA nor Ontario shall suffer any waiver or loss of privilege as a result of disclosure to each other of their Privileged Information (as defined

below) or as a result of their cooperation in the preparation of positions, responses and defences to the Claims (as defined below).

AGREEMENT

In consideration of the promises and the mutual covenants and agreements herein, the Parties agree as follows:

DEFINITIONS

1. In the foregoing Recitals and in this Agreement, the following terms have the meanings set forth in this Section:
 - (a) “**Claims**” means any and all claims made or filed by TCE relating to, arising out of, or in connection with the SWGTA Contract, and any and all arbitration, mediation, or litigation that arises out of any and all such claims.
 - (b) “**Effective Date**” means the effective date as defined above.
 - (c) “**Parties**” means the OPA and Ontario and, for the purpose of giving effect to this Agreement, includes their legal counsel, agents, consultants and experts.
 - (d) “**Privileged Information**” means information and communications, whether written or electronically recorded, in respect of the preparation of positions, responses and defences to the Claims which are or would be otherwise in law privileged and protected from disclosure or production to Third Parties made between OPA (or its employees, legal counsel, agents, consultants, experts or any other person or entity acting on OPA’s behalf) and Ontario (or its employees, legal counsel, agents, consultants, experts or any other person or entity acting on Ontario’s behalf), including but not limited to:
 - (i) information and communications contained in documents, memoranda, correspondence, drafts, notes, reports, factual summaries, transcripts;
 - (ii) communications between counsel, or counsel and clients including their employees, consultants, board members or advisors;
 - (iii) any joint or several interview of prospective witnesses, and summaries or reports thereof;
 - (iv) any analyses, document binders, files, compilations or databases;
 - (v) the sharing or exchange via any media, including but not limited to electronic media;
 - (vi) theories, impressions, analyses, legal research, or legal opinions;
 - (vii) communications to and from experts, and documentation relating to or setting out expert commentary and opinion; and

- (viii) any other material, communications and information which would otherwise be protected from disclosure to Third Parties.
- (e) “TCE” has the meaning defined in paragraph A of the Recitals.
- (f) “Third Party” or “Third Parties” means any person or entity that is not a Party. Third Party includes TCE, their employees, agents, counsel, subcontractors, consultants, experts, or any other person or entity acting on TCE’s behalf.

COMMON INTEREST OF THE PARTIES

2. The Parties have a common, joint, and mutual interest in the defence of the Claims, wish to cooperate with each other in respect of the defence of the Claims, and due to the anticipated litigation with TCE, wish to share between them Privileged Information without risk of prejudice to or of waiver in whole or in part of their respective privileges and rights to hold such Privileged Information protected from disclosure.
3. The Parties are under no obligation to share Privileged Information. However, from time to time, either Party (the “Disclosing Party”) in its sole discretion may choose to share Privileged Information with the other Party (the “Receiving Party”).
4. To the extent that exchanges of Privileged Information have been made prior to entering into this Agreement, it is the Parties’ intention that all such exchanges be subject to the terms of this Agreement as if they had occurred after the Effective Date.
5. The execution of this Agreement, the cooperation between the Parties in respect of the defences to the Claims and the exchange of Privileged Information under this Agreement, where the materials would otherwise be protected by law against disclosure by solicitor-client (attorney client) privilege, litigation privilege, work product doctrine, without prejudice privilege, or any other applicable rule of privilege or confidentiality:
 - (i) are not intended to, do not and shall not constitute a waiver in whole or in part in favour of any Third Party by either Party of any applicable privilege or other rule of protection from disclosure; and
 - (ii) will not be asserted at any time by either Party as a waiver of any such privilege or other rule of protection from disclosure.
6. Disclosure of Privileged Information by the Receiving Party to Third Parties without the prior written consent of counsel for the Disclosing Party is expressly prohibited, unless the disclosure is ordered by a court of competent jurisdiction or is otherwise required by law. If disclosure of any Privileged Information is sought from a Receiving Party in any arbitration, litigation or other legal proceedings, the Receiving Party [from whom disclosure is sought] shall take all steps necessary to preserve and invoke, to the fullest extent possible, all applicable privileges, immunities and protections against disclosure, and shall immediately provide written notice of such legal proceedings to the Disclosing Party. The Receiving Party shall not voluntarily surrender or disclose the Privileged

Information without first providing the Disclosing Party a reasonable opportunity to protect its interests before the applicable court or arbitral tribunal.

7. All of the Privileged Information shall be preserved as confidential and privileged both prior to resolution of all outstanding Claims and thereafter, and shall not be used for any purpose other than the stated sole purpose of cooperation in the defence of the Claims.
8. Neither Party shall disclose to a Third Party the existence of this Agreement, nor its terms, unless both Parties consent in writing or unless compelled by order of a court or arbitral tribunal.
9. The Parties acknowledge and agree that their common interest in the defence of the Claims and their intention that no waiver of privilege shall result from their exchange of Privileged Information between them shall in no way be affected or deemed to be negated in whole or in part by the existence now or in the future of any adversity between the Parties relating to or arising out of the SWGTA Contract, whether in connection with the Claims or otherwise, and that any such adversity shall not affect this Agreement.

COOPERATION

10. The Parties shall cooperate in respect of the defence of the Claims, including providing access to information, materials and employees as may be reasonably necessary from time to time, as the case may be, provided that each of the Parties reserves the right to determine what information will be shared and under what circumstances, and no obligation or duty to share any such information is created by this Agreement.

WITHDRAWAL

11. It is the intent of the Parties that this Agreement shall remain in effect until final resolution of the Claims, either by litigation in a final, non-appealable judgment or arbitral award or by a final negotiated settlement, whichever is later.
12. Notwithstanding the foregoing, any Party may withdraw from this Agreement by giving twenty (20) days advance written notice to the other Party, which 20 days is calculated beginning on the day after the notice is received by a Party. For greater certainty, withdrawal from this Agreement by a Party is not effective until the expiration of the 20 days' notice period required by this provision.
13. Any withdrawal from this Agreement shall be prospective in effect only and the withdrawing Party and any Privileged Information made available by or to the other Party prior to that Party's withdrawal shall continue to be governed by the terms of this Agreement whether or not the Parties are, in any respect in relation to the SWGTA Contract, adverse in interest.
14. On or before the effective date of a withdrawal from this Agreement, the withdrawing Party shall return to the Disclosing Party all Privileged Information received from the Disclosing Party. In the case of copies, with the consent of the Disclosing Party, the Receiving Party may destroy such copies in a secure manner, and confirm in writing to the Disclosing Party that it has done so.

WAIVER OF CONFLICT OF INTEREST

15. The Parties agree that this Agreement and the sharing of Privileged Information between them shall not be used as a basis for a motion to disqualify a Party's counsel (including for certainty the Party's counsel's law firm and any partner or associate thereof) after a Party has withdrawn from this Agreement for any reason, including without limitation, due to any conflict of interest which arises or becomes known to the withdrawing Party after the Effective Date, adversity between the Parties or any other reason whatsoever based on this Agreement or the cooperation and disclosure of Privileged Information hereunder.
16. The Parties confirm that there is no and shall not be deemed to be any solicitor-client relationship between counsel for the OPA and Ontario, nor any solicitor-client relationship between counsel for Ontario and the OPA, as a result of any communications, sharing of Privileged Information, cooperation or any other action taken in furtherance of the Parties' common interests or under and in reliance upon this Agreement.

NOTICE

17. All notices and other communications between the Parties, unless otherwise specifically provided, shall be in writing and deemed to have been duly given when delivered in person or telecopied or delivered by overnight courier, with postage prepaid, addressed as follows:

To: Ontario Power Authority

120 Adelaide Street West, Suite 1600
Toronto, ON M5H 1T1

Attention: Michael Lyle, General Counsel

Tel. No.: (416) 969-6035

Fax No.: (416) 967-1947

E-Mail: michael.lyle@powerauthority.on.ca

To: Her Majesty the Queen in Right of Ontario as Represented by the Minister of Energy

777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5

Attention: Halyna Perun, A/ Legal Director, Legal Services Branch
Ministries of Energy & Infrastructure

Tel. No.: (416) 325-6681

Fax No.: (416) 325-1781
E-mail: halyna.perun2@ontario.ca

GENERAL PROVISIONS

18. This Agreement shall be construed in accordance with the laws of the Province of Ontario and the Parties to this Agreement irrevocably attorn to the jurisdiction of Ontario with respect to any and all matters arising under this Agreement.
19. If any of the provisions of this Agreement or portions thereof should be determined to be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
20. Any failure of any Party to enforce any of the provisions of this Agreement or to require compliance with any of its terms at any time while this Agreement is in force shall in no way affect the validity of this Agreement, or any part hereof, and shall not be deemed a waiver of the right of such Party thereafter to enforce any and each such provisions.
21. Nothing contained in or done further to this Agreement shall be deemed either expressly or by implication to create a duty of loyalty between any counsel and anyone other than the client of that counsel.
22. This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof. There are no other oral understandings, terms, or conditions and neither Party has relied upon any representation, express or implied, not contained in this Agreement.
23. No change, amendment, or modification of this Agreement shall be valid or binding upon the Parties hereto unless such change, amendment, or modification is in writing and duly executed by both Parties hereto.
24. The headings contained in this Agreement are for convenience and reference only and in no way define, describe, extend, or limit the scope or intent of this Agreement or the intent of any provision contained herein.
25. This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the Parties.

26. This Agreement may be signed in counterparts and by facsimile and all counterparts together shall constitute the Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

ONTARIO POWER AUTHORITY

By: _____

Name: _____

Title: _____

**HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO AS REPRESENTED BY THE
MINISTER OF ENERGY**

By: _____

Name: _____

Title: _____

Ministry of the Attorney General

Briefing Note

Legal Services Division

Legal Services Branch – ENE/MOI

A. Issue

Execution of the Common Interest Privilege Agreement between the Government of Ontario ("Ontario") and the Ontario Power Authority ("OPA") that would enable the parties to exchange privileged information in a joint defense effort against possible litigation by TransCanada Energy Ltd ("TCE").

B. Current Status

The OPA and TCE have been attempting to negotiate an exit arrangement related to the Southwest GTA Clean Energy Supply Contract for the construction of a natural gas plant in Oakville.

In an April 19, 2011 letter, TCE stated its intention to commence a formal legal process against the OPA and Ontario to determine reasonable damages, including the anticipated value of the contract.

TCE provided notice under section 7 of the *Proceedings Against the Crown Act* advising of its intent to claim against Ontario for intentional interference with contractual relations on April 27, 2011.

C. Background

On October 9, 2009 the OPA and TCE entered into an agreement for the construction of a natural gas plant in Oakville referred to as the Southwest GTA Clean Energy Supply Contract (the "Contract"). A year later, the Minister of Energy announced that Ontario would not proceed with the project.

The OPA and Ontario have a common interest in this potential litigation going forward. It is anticipated that legal and factual issues will arise which are common to both the OPA and Ontario. The Agreement would allow the Parties' to exchange information, to pool their individual work product and to pursue a joint or compatible defence. Cooperation in a joint defence effort will necessitate the exchange of confidential information which is otherwise privileged, including solicitor/client communications and/ or communications and materials made or prepared in contemplation of litigation. The Agreement would document the Parties' mutual intention and agreement that neither party shall suffer any

waiver or loss of privilege as a result of disclosure to each other of privileged information by signing the attached agreement.

D. Analysis

i) The Purpose of the Common Interest Privilege Agreement:

A Common Interest Privilege Agreement extends the sphere of privilege over confidential legal information and/or communications to parties with shared interests pertaining to legal claims or litigation.

Generally, parties risk waiving privilege over confidential legal information including solicitor-client communications and/or communications and materials obtained or prepared in contemplation of litigation where they share these communications with third parties. In cases where the privilege has been waived parties may be obliged to disclose confidential information which is integral to their defence against claims and or potential litigation.

ii) Key Provisions of the Common Interest Privilege Agreement:

The Agreement would enable the Parties to share between them privileged information without risk of prejudice or waiver in whole or in part of any of the privileged information protected from disclosure (s. 2). The Agreement prohibits disclosure of privileged information by the receiving party to third parties without prior written consent for the disclosing party unless the disclosure is court ordered or required by law (s. 6). Once signed, the Agreement would also apply to communications exchanged prior to entering into the Agreement (s. 4).

The Parties would not be obligated to share privileged information and would have sole discretion as to whether they wished to do so under the Agreement (s. 3). While Ontario would agree to cooperate with OPA in respect to the defence of TCE's claims, Ontario would have the right to determine what information would be shared and under what circumstances (s. 10).

Privileged information would remain confidential and privileged prior to the final resolution of all outstanding TCE claims and thereafter both Parties would agree not to use the information for any purpose unrelated to the defence of TCE claims (ss. 7 and 11). Either party could withdraw from the agreement at any time provided that they gave 20 days written notice to the other party (s. 12).

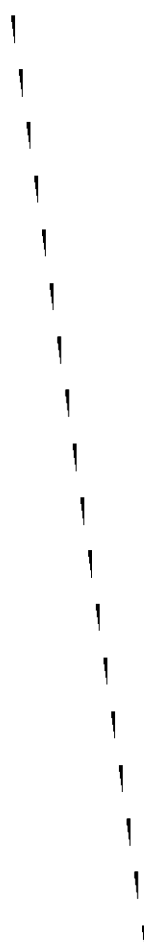
The Parties would agree not to disclose the existence of the Agreement nor its terms (s. 8).

E. Recommendation

Legal Services recommends execution of the Agreement. The Agreement would: (i) encourage efficiency by providing an opportunity for the Province and the OPA to pool their individual work product; (ii) increase information flow through the exchange of information and materials; and (iii) strengthen each parties' defence to TCE claims by providing the opportunity to pursue a joint defence effort.

Prepared by: Carolyn Calwell Deputy Director
Legal Services Branch

Originated: May 26, 2011



Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: May 30, 2011 10:27 AM
To: MacLennan, Craig (MEI); Perun, Halyna N. (MEI)
Cc: Wismer, Jennifer (MEI); Lindsay, David (ENERGY)
Subject: RE: TCE

Confidential/Solicitor-Client Privileged

TCE has taken a hard line and said that it will only consider arbitration on the question of damages. Ontario and the OPA would be required to agree that we will not raise defences based on TCE's ability to complete the Supply Contract (in question because of TCE's difficulty in obtaining various approvals) and based on the limitation of liability clause in the Supply Contract. The OPA wants arbitration on all issues and wants to be able to raise these defences.

As such, the OPA and TCE are at an impasse. The OPA is looking for the Province's confirmation that we support arbitration on all issues which, in practical terms, is unlikely to lead to arbitration and is likely to result in litigation.

However, if the Province may want to soften its position and concede to TCE's demands for arbitration, it would be better to do so now rather than later. As you know, TCE will be in a position to issue a Statement of Claim, starting the litigation process, at the end of June. The OPA and we are in a better position to negotiate terms of reference for limited scope arbitration now than we will be when we get closer to the June deadline. Essentially, the OPA is looking for confirmation that the Province isn't going to change its position as litigation looms.

Carolyn

-----Original Message-----

From: MacLennan, Craig (MEI)
Sent: May 30, 2011 9:48 AM
To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI)
Subject: Re: TCE

How are the terms of arbitration discussions going?

----- Original Message -----

From: Lindsay, David (ENERGY)
To: Perun, Halyna N. (MEI); MacLennan, Craig (MEI)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Sent: Mon May 30 09:46:59 2011
Subject: Re: TCE

Mistakes happen. Thanks for clarification. I was wondering why nobody replied yesterday?

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: MacLennan, Craig (MEI)

Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI); Lindsay, David (ENERGY)
Sent: Mon May 30 09:44:33 2011
Subject: RE: TCE

Confidential and Solicitor-Client Privileged

Please see below. Unfortunately, I sent the first email to you to the wrong Craig and the Deputy responded to it. I have asked the Craig at MGS to delete from his email system and to notify me.

My apologies

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
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-----Original Message-----

From: Lindsay, David (ENERGY)
Sent: May 29, 2011 12:16 PM
To: Perun, Halyna N. (MEI); McLellan, Craig (MGS)
Cc: Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Subject: Re: TCE

Thanks for this Halyna.

Craig, wonder if we should create a "four corners" opportunity so that we are all singing from the same song sheet.

I would suggest we ask Cabinet office to coordinate a meeting so all parties within government understand the positioning. We might want to include representatives from OPA.

David

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: McLellan, Craig (MGS)
Cc: Lindsay, David (ENERGY); Calwell, Carolyn (MEI); Wismer, Jennifer (MEI)
Sent: Sun May 29 11:11:58 2011
Subject: TCE

Confidential and Solicitor-Client Privileged

Hi Crag: TCE counsel have asked to meet with our counsel (CLOC - John Kelly) as well as ADAG Malliha Wilson. The MAG MO has asked that this meeting proceed and in any event it's normal for government counsel to meet with opposing counsel on a matter. The meeting is scheduled for Wed June 1. Our counsel has been advised that TCE counsel is working on a draft statement of claim and plans to share a draft of it with CLOC at that meeting. Given MAG MO's involvement you likely know of this already but wanted to make you aware.

Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Kelly, John (JUS)
Sent: June 1, 2011 9:33 AM
To: Perun, Halyna N. (MEI)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Halyna, as I told Carolyn, I am not available tomorrow. I have a witness on a large piece of litigation coming in from out of town to be prepared for examinations for discovery. This has been planned for months and involves 5 parties. I briefed Carolyn on the aspects of arbitration pro and con. I also advised that I could not give any advice as to whether Ontario should agree to Arbitration until I know what our client said or didn't say to Trans Canada.

-----Original Message-----

From: Perun, Halyna N. (MEI)
Sent: May 31, 2011 1:52 PM
To: Kelly, John (JUS)
Cc: Calwell, Carolyn (MEI); Machado, Eunice (JUS)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Hi John - The Thursday morning meeting that Carolyn mentions is pretty critical - attendees include the Secretary of the Cabinet, the Deputy Minister of Energy, the Chief of Staff for the Minister of Energy, the Deputy Minister of Finance, the Premier's Chief of Staff - so, if you are asked to attend it would be good to be available to go - it's usually first thing in the morning.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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-----Original Message-----

From: Kelly, John (JUS)
Sent: May 31, 2011 11:54 AM
To: Calwell, Carolyn (MEI); Machado, Eunice (JUS)
Cc: Perun, Halyna N. (MEI)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Thanks Carolyn. I am not available Thurs. as I am in meetings all day.

-----Original Message-----

From: Calwell, Carolyn (MEI)

Sent: May 31, 2011 11:23 AM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Cc: Perun, Halyna N. (MEI)
Subject: TCE - Cooperation and Common Interest Privilege Agreement

Fully executed copy attached for your file. I understand that the OPA will be in a position to share documentation tomorrow.

Further to my message to John, there have been some discussions about how to proceed that I would like to fill you in on. My ENERGY clients are looking for recommendation about the scope of arbitration and would like to meet either Thursday or Friday with you, the OPA and OPA outside counsel in this regard. They have asked for a deck that includes a recommendation. I would suggest that we work from the version that we sent up last week.

Finally, John, you may be invited to a regular meeting of ENERGY officials, the PO and the SOC that is scheduled for Thursday. I will confirm when I hear.

I look forward to speaking with you.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure Legal Services Branch Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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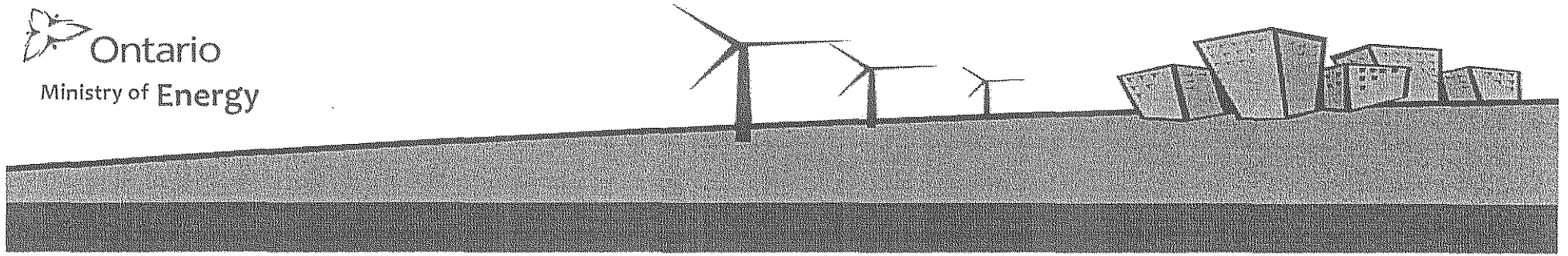
Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: June 1, 2011 10:20 AM
To: Perun, Halyna N. (MEI)
Subject: TCE Deck
Attachments: TransCanada Options.01 06 2011.ppt

For your review. Due to DMO by 4 p.m.

Carolyn

This communication may be solicitor/client privileged and contain confidential information only intended for the person(s) to whom it is addressed. Any dissemination or use of this information by others than the intended recipient(s) is prohibited. If you have received this message in error please notify the writer and permanently delete the message and all attachments. Thank you.

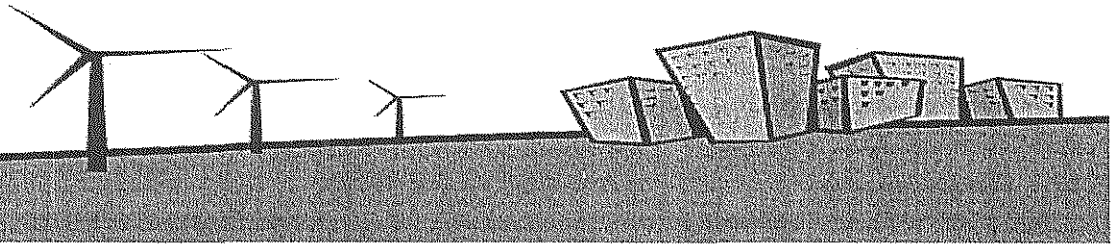


TransCanada Energy & the Southwest GTA Clean Energy Supply Contract Arbitration

Confidential/Solicitor-Client Privileged

Prepared in contemplation of litigation

Legal Services Branch
Ministry of Energy/Ministry of
Infrastructure



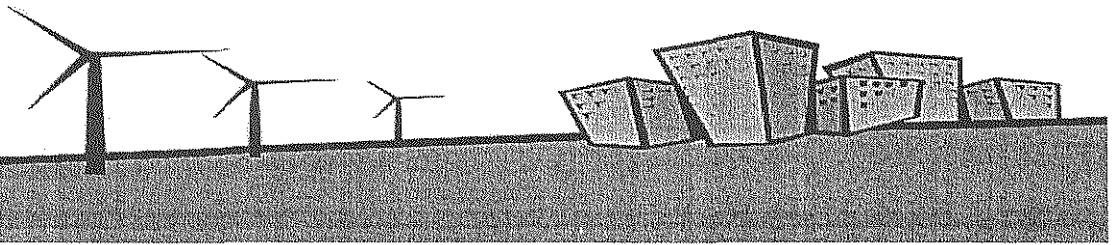
Background & Current Status

- ◆ On October 9, 2009, the Ontario Power Authority (OPA) and TransCanada Energy Ltd. (TCE) signed the Southwest GTA Clean Energy Supply Contract (the Supply Contract) for the development of a 850 MW gas fired electricity generation facility in Oakville.
- ◆ On October 7, 2010, the Minister of Energy announced that the Southwest GTA generation facility would not proceed.
- ◆ The OPA wrote to TCE on October 7th and acknowledged that “you are entitled to your reasonable damages from the OPA, including the anticipated financial value of the Contract”.
- ◆ The OPA and TCE have been negotiating exit arrangements and a possible alternative to the Southwest GTA generation facility since October 2010.
- ◆ The OPA and TCE have reached an impasse on the question of a possible alternative, a smaller generation facility in the Kitchener Waterloo Cambridge area.
- ◆ TransCanada served a PACA notice on the Crown on or about April 27, 2011 and will be in a position to serve and file a Statement of Claim against the Crown on or after June 27th.
- ◆ Allegations against the Province relate to intentional interference with the Supply Contract.
- ◆ The OPA and TransCanada have discussed the possibility of proceeding to arbitration to resolve the dispute.



Decision Points & Considerations

- ◆ The OPA has asked the Province to advise on the following questions:
 - ◆ Does the Crown want to be involved in arbitration?
 - ◆ What is the appropriate scope of arbitration?
- ◆ The decision on the scope of arbitration will determine the answer to the question of whether the Crown should be involved.
- ◆ TCE has suggested that it is only willing to use arbitration if the parties agree that damages are not limited by the Supply Contract and there will be no assertion that TransCanada could not complete the Supply Contract . In other words, the OPA and the Province would be required to waive the two defences available to them. Arbitration on this basis would be a duel of experts on valuation of the Supply Contract.
- ◆ TCE has suggested to Crown counsel that it will not alter its conditions for arbitration.
- ◆ Nevertheless, the OPA believes that it can move TCE to broaden the scope of arbitration.
 - ◆ TCE remains interested in doing other business in Ontario and may be adverse to litigation.
- ◆ The OPA's and the Crown's leverage in negotiating terms of reference for arbitration weakens toward the end of the PACA notice period at the end of June.



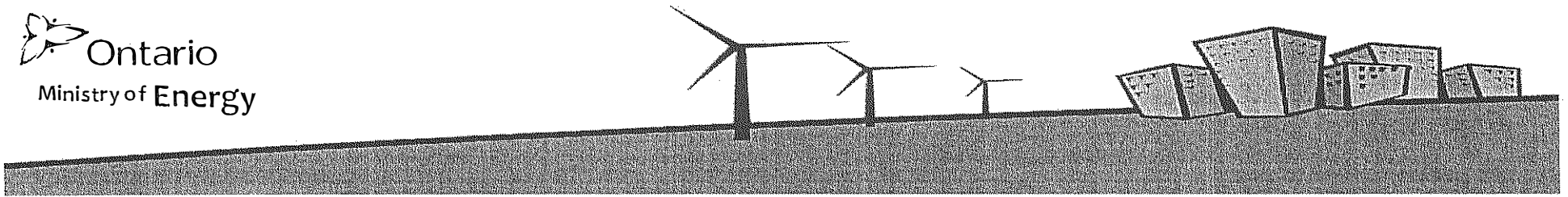
Option 1: No position on arbitration

- ◆ **Option 1:** The Crown declines to take a position on arbitration
- ◆ **Assumptions**
 - ◆ The Crown will prepare to defend a law suit from TCE
 - ◆ Litigation will deal with the meanings of statements that TCE would be “made whole” and the reference to the “anticipated financial value of the Contract”
 - ◆ Defences will include arguments that TCE could not complete the Supply Contract because of its inability to get various approvals and that damages are limited by the terms of the Supply Contract
 - ◆ Evidence will be required around the conversations between representatives of the Crown and TCE in and around October 2010
- ◆ **Expected outcome:** Highly likely to result in litigation between TCE, the OPA and the Crown
- ◆ **Advantages**
 - ◆ Sends clear signal to TCE that the Crown is not concerned about litigation
 - ◆ Court proceeding will be protracted
- ◆ **Disadvantages**
 - ◆ Timing of next steps is controlled by TCE
 - ◆ Court proceeding will be public



Option 2: Arbitration on damages

- ♦ **Option 2:** Arbitration on damages alone
- ♦ **Assumptions**
 - ♦ The Crown would take the position that arbitration should be limited to determining the value of statements that TCE would be “made whole” and the reference to the “anticipated financial value of the Contract”
 - ♦ The defences that TransCanada could not have completed the Supply Contract or that damages are limited by the Supply Contract will not be available
 - ♦ Arbitration will focus on expert valuations of TCE’s lost opportunity
- ♦ **Expected outcome:** Likely to lead to arbitration and, in due course, resolution of the dispute
- ♦ **Advantages**
 - ♦ TCE has said this is the only basis on which it will agree to arbitration
 - ♦ The Crown may not need to participate in arbitration of limited scope
 - ♦ Evidence will not be required around the conversations between representatives of the Crown and TCE in and around October 2010
 - ♦ Arbitration could be confidential
- ♦ **Disadvantages**
 - ♦ Creates highest financial exposure for the Crown and the OPA
 - ♦ Inconsistent with the OPA’s position



Option 3: Arbitration on all issues

- ◆ **Option 3:** Arbitration on all issues
- ◆ **Assumptions**
 - ◆ The Crown would take the position that arbitration must consider:
 - ◆ TCE's ability to deliver on its obligations under the Supply Contract
 - ◆ The terms of the Supply Contract, including the limitation of liability
 - ◆ Meanings of statements that TCE would be “made whole” and the reference to the “anticipated financial value of the Contract”
 - ◆ Evidence will be required around the conversations between representatives of the Crown and TCE in and around October 2010
- ◆ **Expected outcome:** Likely to result in litigation between TCE, the OPA and the Crown
- ◆ **Advantages**
 - ◆ Financial exposure to the OPA and the Province is likely less if all defences are pursued than if arbitration proceeded on damages alone
 - ◆ Aligns with the OPA's position
 - ◆ Arbitration could be confidential
- ◆ **Disadvantages**
 - ◆ Success of this option depends on whether TCE will move on its conditions for limited arbitration

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Ministry of the Attorney General

Briefing Note

Legal Services Division

Legal Services Branch – Energy/Infrastructure

ISSUE: Whether damage to Unit 2 Equipment on May 7, 2012 constitutes Force Majeure under the Bruce Power Refurbishment Implementation Agreement (the “Issue”)

CURRENT STATUS:

Bruce Power submitted a Force Majeure notice to the Ontario Power Authority (“OPA”) under the Bruce Power Refurbishment Implementation Agreement as amended (the “Bruce Power Contract”) in respect of damage sustained to Unit 2 generating equipment on May 7, 2012 that caused delays in bringing both Unit 2 and Unit 1 into Commercial Operation.

CONCLUSION:

A legal assessment of the Issue concluded that the damage sustained by Unit 2 generating equipment on May 7, 2012 appeared to qualify as a “Type 3 Force Majeure” under section 10.3 of the Bruce Power Contract – that is, an event beyond Bruce Power’s reasonable control that prevented it from bringing Units 1 and 2 into Commercial Operation by the Milestone Date of June 1, 2012.

As a result of this Force Majeure, the Milestone Date for achieving Commercial Operation for Units 1 and 2 under the Bruce Power Contract would be extended for the period of reasonable delay resulting from the Force Majeure.

BACKGROUND:

The legal assessment of whether the damage to Unit 2 on May 7, 2012 (and the resulting impact on work on Unit 1) qualifies as a “Force Majeure” under the Bruce Power Contract is highly dependent on the underlying facts and events. The legal assessment was based on the facts and events set out below (taken from discussions with OPA legal counsel and the June 29, 2012 deck prepared by the OPA for the Ministry of Energy titled “Bruce Unit 2 Force Majeure Event”). Note that if these facts and events are in any way incorrect or incomplete, that could affect the legal assessment of the Issue and the resulting legal conclusions.

Also note that the OPA will be receiving a legal opinion from their external legal counsel sometime during the week of July 3 – 6, 2012 in respect of the Issue. Understanding that legal opinion could assist in rounding out the legal assessment outlined in this Briefing Note.

Overview of the Force Majeure Event

- On May 7, 2012 when a new excitation system on Unit 2 was being commissioned (prior to connecting Unit 2 to the grid), the process was stopped because a part of the equipment - the generator stator (the “**Equipment**”) - had sustained damage as a result of overheating (the “**FM Event**”)
- Bruce Power submitted a “Force Majeure” notice to the OPA (the “**FM Notice**”), advising the OPA that as a result of the FM Event, both Units 1 and 2 would fail to achieve Commercial Operation by the applicable Milestone Date (June 1, 2012)
 - Unit 2 would not achieve Commercial Operation by this date owing to the damage caused by the FM Event
 - Unit 1 would not achieve Commercial Operation by this date because skilled workers on Unit 1 would need to be dispatched to Unit 2 to repair the damage
 - In the FM Notice, Bruce Power confirmed that it was not seeking to recover refurbishment costs or repair costs that might be attributable to the FM Event
 - In the FM Notice, Bruce Power also outlined three remedial options
- Bruce Power has been remedying the FM Event by pursuing Option 1 set out in the FM Notice
 - Option 1 involves repairing the damaged Equipment – which is estimated to take 20 weeks (meaning that Unit 2 can be prepared to connect to the grid again in November 2012)

Acquisition of the Equipment

- The Equipment was originally purchased by Ontario Hydro in the 1980's as a spare for the generating station.
 - The Equipment was transferred to Ontario Power Generation (“**OPG**”) when Ontario Hydro was split up into five separate entities
 - The Equipment became one of the assets leased by OPG to Bruce Power.
 - Bruce Power's lease did not make it responsible for any of the legal risks associated with the manufacture of the Equipment.

Bruce Power Investigation and Assessment

- Bruce Power engaged a generator expert to investigate the root cause of the FM Event
 - The investigation revealed a drafting error on a drawing prepared for the manufacturing of the Equipment, which was determined to be the root cause of the FM Event
 - The drafting error involved reversing certain wiring connections
 - The drawing was relied upon in manufacturing the Equipment
 - The same company designed the Equipment, prepared the manufacturing drawing and manufactured the Equipment

- The expert expressed the opinion that none of the normal industry practice's acceptance testing would have found such a problem, unless the Equipment was excited in the configuration in which the generation unit would be used
 - However, the expert expressed the view that the cost of such acceptance testing would have outweighed the risk of a failure because there had never been a failure of this type anywhere in the world
- Based on the results of the investigation, Bruce Power submitted a root cause report to the OPA on June 20, 2012 (the "BP Report")

OPA Technical Due Diligence

- The OPA undertook technical due diligence to assess the validity and completeness of the BP Report
 - This due diligence included retaining a technical advisor and an industry expert
- The OPA technical advisor provided the OPA with a report dated June 25, 2012, which included the following advice/opinions:
 - Concur that a drawing error made by the Equipment manufacturer was the root cause of the Equipment failure
 - Opined that it would have been unreasonable to have expected Bruce Power to find this error prior to the FM Event
 - Advised that there was no evidence that Bruce Power had failed to perform any of the standard industry tests required to commission the generator prior to the FM Event or to otherwise assure itself that the generator was fit for service
 - Opined that there was no wilful misconduct by Bruce Power in relation to the FM Event
- The OPA industry expert made the following comments on the BP Report to the OPA:
 - The stated root cause reasonably accounts for the damage to the Equipment
 - Bruce Power had no knowledge of a potential reversal of wiring connections after it conducted condition assessments of the Equipment windings for Units 1 and 2 in 2009
 - There were no other tests that a prudent operator or manufacturer should have conducted that might have uncovered the problem before the FM Event

Additional Information Assumed

- In providing the legal assessment of the Issue, the following additional key facts were assumed:
 - as asserted in Bruce Power's FM Notice, skilled workers on Unit 1 needed to be dispatched to Unit 2 to repair the damage
 - this has caused a delay in bringing Unit 1 into Commercial Operation
 - there was no other commercially reasonable way to obtain the necessary skilled workers for the repair work on

- Unit 2, and thus the resulting delay in bringing Unit 1 into Commercial Operation was beyond Bruce Power's reasonable control
 - there were no commercially reasonable options for remedying the FM Event more quickly than the time required under Option 1 in Bruce Power's FM Notice (i.e. the remedial approach adopted by Bruce Power)
- These assumptions should be validated.

LEGAL ASSESSMENT OF THE ISSUE:

Analysis of Bruce Power Contract Provisions

Article 10 of the Bruce Power Contract deals with "Force Majeure".

Section 10.3 defines "Force Majeure". There are three types. Section 10.3(d) provides that Type 3 applies if the affected Party has not claimed a Type 1 or Type 2 Force Majeure. OPA legal counsel has advised that Bruce Power has not claimed the FM Event as a Type 1 or Type 2 Force Majeure.

"Type 3 Force Majeure" is defined as any act, event, cause or condition that prevents a Party from performing its obligations (other than payment obligations) under the Bruce Power Contract. The "act, event, cause or condition" must be beyond the affected Party's reasonable control.

"Reasonable control" is not defined in the Bruce Power Contract. However, based on the BP Report and the OPA technical due diligence summarized above, it would appear that the FM Event could not reasonably have been anticipated by Bruce Power, and Bruce Power could not reasonably have been expected to have taken any other steps to prepare for or prevent the FM Event from occurring. Therefore, it would appear that the FM Event was beyond Bruce Power's reasonable control.

Section 10.2 of the Bruce Power Contract sets out some exclusions from Force Majeure, including:

- events of Force Majeure caused by the wilful misconduct or negligence of the affected Party
- failure of the affected Party to use Commercially Reasonable Efforts to prevent or remedy the events and remove Force Majeure within a reasonable time (so far as that is possible)

Based on the OPA technical due diligence, it would appear that the FM Event was not caused by any wilful misconduct or negligence on the part of Bruce Power, and that Bruce Power did not fail to use Commercially Reasonable Efforts to prevent the FM Event from occurring.

As noted under "Additional Information Assumed" (above), for purposes of the legal assessment the assumption has been made that Bruce Power's remedial actions

(Option 1 in its FM Notice) constitute Commercially Reasonable Efforts to remedy the FM Event and remove the Force Majeure within a reasonable time. This assumption should be confirmed.

Legal Conclusions

Based on the legal assessment undertaken in respect of the Issue, it was concluded that the FM Event would qualify as a Force Majeure under section 10.3 of the Bruce Power Contract in respect of the delay in bringing Unit 2 into Commercial Operation.

It was also concluded that the need to dispatch skilled workers from Unit 1 to Unit 2 to repair the damage to the Equipment appeared to qualify as a Force Majeure under section 10.3 of the Bruce Power Contract in respect of the delay in bringing Unit 1 into Commercial Operation.

Prepared by: Dan Shear
Legal Counsel,
Legal Services Branch
Ministry of Energy/Ministry of Infrastructure
416-325-6685

Date: July 4, 2012

Approved by: Carolyn Calwell
Deputy Legal Director,
Legal Services Branch
Ministry of Energy/Ministry of Infrastructure
416-212-5409

Date: July 4, 2012

Privileged and Confidential

Transcribed voicemail messages from Michael Murphy & Lourdes Valenton to Halyna Perun

Dated: 28th June 2012

Hi Halyna, it's Lourdes. I'm attaching a voicemail coming from Internal Audit about the procurement that we had spoken about the other day. Basically, audit, internal audit is saying it's not a show stopper. It's complicated, it's unusual, but they don't see that there is any major problem for us to proceed or for the program area to proceed using the procurement of the agency. OK, so thanks very much, I will also give Rick the same feedback and the same with Betty. Bye, Bye.

Hi Lourdes, it's Mike here. I'm very sorry I wasn't able to get back to you last night. I wanted desperately to discuss the matter with Sonia and I've just done that this morning and I gave her the revised, the updated version, and she said that short of looking at the RFP herself, she can't see a major problem with this arrangement. It is complicated, it is unusual, but as long as everything is made fairly explicit and that is an assumption on our part because we haven't seen the RFP then she doesn't see the real mischief in this, and presumably Legal has had a chance to look at it. That was Sonia's take on it.

If you need to get a hold of us, I realize this is probably past midnight on this one, but do get back to me if you want, 314-9518. It is messy, it is unusual, but haven't seen anything that makes it absolutely stoppable. Haven't seen a show stopper yet. There you have it Lourdes. Give me a call if you need anything. Bye for now.

Perun, Halyna N. (ENERGY)

From: Wilson, Malliha (JUS)
Sent: June 1, 2011 11:59 AM
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS)
Subject: FW: TCE - Cooperation and Common Interest Privilege Agreement
Attachments: doc20110531111436.pdf

Halyna - we need to slow this down. Can you please call me asap

-----Original Message-----

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Sent: June 1, 2011 9:19 AM
To: Wilson, Malliha (JUS)
Subject: FW: TCE - Cooperation and Common Interest Privilege Agreement

I told her I was not available until Friday and explained that , until we know what was said in the PO or by a Minister , Deputy or assistant thereto, it would not be possible to give advice on Arbitration. I explained the scope of an arbitration and the pros and cons. She is to get back to me with an alternative date.

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Sent: May 31, 2011 11:23 AM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Cc: Perun, Halyna N. (MEI)
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Fully executed copy attached for your file. I understand that the OPA will be in a position to share documentation tomorrow.

Further to my message to John, there have been some discussions about how to proceed that I would like to fill you in on. My ENERGY clients are looking for recommendation about the scope of arbitration and would like to meet either Thursday or Friday with you, the OPA and OPA outside counsel in this regard. They have asked for a deck that includes a recommendation. I would suggest that we work from the version that we sent up last week.

Finally, John, you may be invited to a regular meeting of ENERGY officials, the PO and the SOC that is scheduled for Thursday. I will confirm when I hear.

I look forward to speaking with you.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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**COOPERATION AND
COMMON INTEREST PRIVILEGE AGREEMENT**

THIS AGREEMENT is effective as of the 1st day of April, 2011 (the "Effective Date").

BETWEEN:

ONTARIO POWER AUTHORITY
("OPA")

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTER OF ENERGY
("ONTARIO")

RECITALS:

- A. The OPA and TransCanada Energy Ltd. ("TCE") entered into the Southwest GTA Clean Energy Supply Contract dated as of October 9, 2009 (the "SWGTA Contract").
- B. The OPA and Ontario have concluded that, in connection with the threatened claims and potential litigation by TCE relating to the SWGTA Contract, legal and factual issues could arise with respect to which they have common interests and joint or compatible defences.
- C. The OPA and Ontario have undertaken, and will undertake, factual, legal and other research, and are of the opinion that it is in their best interest to exchange information, pool their individual work product and cooperate in a joint defence effort.
- D. Cooperation in such a joint defence effort will necessarily involve the exchange of confidential information as well as information which is otherwise privileged such as, amongst others, solicitor/client communication and/or communications made and materials obtained or prepared in contemplation of litigation.
- E. In light of their common interest, and the fact that litigation by TCE against the OPA and Ontario is anticipated, OPA and Ontario wish to proceed cooperatively in the preparation of joint or compatible defences, and by this Agreement seek to document their mutual intention and agreement that neither OPA nor Ontario shall suffer any waiver or loss of privilege as a result of disclosure to each other of their Privileged Information (as defined

below) or as a result of their cooperation in the preparation of positions, responses and defences to the Claims (as defined below).

AGREEMENT

In consideration of the promises and the mutual covenants and agreements herein, the Parties agree as follows:

DEFINITIONS

1. In the foregoing Recitals and in this Agreement, the following terms have the meanings set forth in this Section:
 - (a) **"Claims"** means any and all claims made or filed by TCE relating to, arising out of, or in connection with the SWGTA Contract, and any and all arbitration, mediation, or litigation that arises out of any and all such claims.
 - (b) **"Effective Date"** means the effective date as defined above.
 - (c) **"Parties"** means the OPA and Ontario and, for the purpose of giving effect to this Agreement, includes their legal counsel, agents, consultants and experts.
 - (d) **"Privileged Information"** means information and communications, whether written or electronically recorded, in respect of the preparation of positions, responses and defences to the Claims which are or would be otherwise in law privileged and protected from disclosure or production to Third Parties made between OPA (or its employees, legal counsel, agents, consultants, experts or any other person or entity acting on OPA's behalf) and Ontario (or its employees, legal counsel, agents, consultants, experts or any other person or entity acting on Ontario's behalf), including but not limited to:
 - (i) information and communications contained in documents, memoranda, correspondence, drafts, notes, reports, factual summaries, transcripts;
 - (ii) communications between counsel, or counsel and clients including their employees, consultants, board members or advisors;
 - (iii) any joint or several interview of prospective witnesses, and summaries or reports thereof;
 - (iv) any analyses, document binders, files, compilations or databases;
 - (v) the sharing or exchange via any media, including but not limited to electronic media;
 - (vi) theories, impressions, analyses, legal research, or legal opinions;
 - (vii) communications to and from experts, and documentation relating to or setting out expert commentary and opinion; and

- (viii) any other material, communications and information which would otherwise be protected from disclosure to Third Parties.
- (e) "TCE" has the meaning defined in paragraph A of the Recitals.
- (f) "Third Party" or "Third Parties" means any person or entity that is not a Party. Third Party includes TCE, their employees, agents, counsel, subcontractors, consultants, experts, or any other person or entity acting on TCE's behalf.

COMMON INTEREST OF THE PARTIES

2. The Parties have a common, joint, and mutual interest in the defence of the Claims, wish to cooperate with each other in respect of the defence of the Claims, and due to the anticipated litigation with TCE, wish to share between them Privileged Information without risk of prejudice to or of waiver in whole or in part of their respective privileges and rights to hold such Privileged Information protected from disclosure.
3. The Parties are under no obligation to share Privileged Information. However, from time to time, either Party (the "Disclosing Party") in its sole discretion may choose to share Privileged Information with the other Party (the "Receiving Party").
4. To the extent that exchanges of Privileged Information have been made prior to entering into this Agreement, it is the Parties' intention that all such exchanges be subject to the terms of this Agreement as if they had occurred after the Effective Date.
5. The execution of this Agreement, the cooperation between the Parties in respect of the defences to the Claims and the exchange of Privileged Information under this Agreement, where the materials would otherwise be protected by law against disclosure by solicitor-client (attorney client) privilege, litigation privilege, work product doctrine, without prejudice privilege, or any other applicable rule of privilege or confidentiality:
 - (i) are not intended to, do not and shall not constitute a waiver in whole or in part in favour of any Third Party by either Party of any applicable privilege or other rule of protection from disclosure; and
 - (ii) will not be asserted at any time by either Party as a waiver of any such privilege or other rule of protection from disclosure.
6. Disclosure of Privileged Information by the Receiving Party to Third Parties without the prior written consent of counsel for the Disclosing Party is expressly prohibited, unless the disclosure is ordered by a court of competent jurisdiction or is otherwise required by law. If disclosure of any Privileged Information is sought from a Receiving Party in any arbitration, litigation or other legal proceedings, the Receiving Party [from whom disclosure is sought] shall take all steps necessary to preserve and invoke, to the fullest extent possible, all applicable privileges, immunities and protections against disclosure, and shall immediately provide written notice of such legal proceedings to the Disclosing Party. The Receiving Party shall not voluntarily surrender or disclose the Privileged

Information without first providing the Disclosing Party a reasonable opportunity to protect its interests before the applicable court or arbitral tribunal.

7. All of the Privileged Information shall be preserved as confidential and privileged both prior to resolution of all outstanding Claims and thereafter, and shall not be used for any purpose other than the stated sole purpose of cooperation in the defence of the Claims.
8. Neither Party shall disclose to a Third Party the existence of this Agreement, nor its terms, unless both Parties consent in writing or unless compelled by order of a court or arbitral tribunal.
9. The Parties acknowledge and agree that their common interest in the defence of the Claims and their intention that no waiver of privilege shall result from their exchange of Privileged Information between them shall in no way be affected or deemed to be negated in whole or in part by the existence now or in the future of any adversity between the Parties relating to or arising out of the SWGTA Contract, whether in connection with the Claims or otherwise, and that any such adversity shall not affect this Agreement.

COOPERATION

10. The Parties shall cooperate in respect of the defence of the Claims, including providing access to information, materials and employees as may be reasonably necessary from time to time, as the case may be, provided that each of the Parties reserves the right to determine what information will be shared and under what circumstances, and no obligation or duty to share any such information is created by this Agreement.

WITHDRAWAL

11. It is the intent of the Parties that this Agreement shall remain in effect until final resolution of the Claims, either by litigation in a final, non-appealable judgment or arbitral award or by a final negotiated settlement, whichever is later.
12. Notwithstanding the foregoing, any Party may withdraw from this Agreement by giving twenty (20) days advance written notice to the other Party, which 20 days is calculated beginning on the day after the notice is received by a Party. For greater certainty, withdrawal from this Agreement by a Party is not effective until the expiration of the 20 days' notice period required by this provision.
13. Any withdrawal from this Agreement shall be prospective in effect only and the withdrawing Party and any Privileged Information made available by or to the other Party prior to that Party's withdrawal shall continue to be governed by the terms of this Agreement whether or not the Parties are, in any respect in relation to the SWGTA Contract, adverse in interest.
14. On or before the effective date of a withdrawal from this Agreement, the withdrawing Party shall return to the Disclosing Party all Privileged Information received from the Disclosing Party. In the case of copies, with the consent of the Disclosing Party, the Receiving Party may destroy such copies in a secure manner, and confirm in writing to the Disclosing Party that it has done so.

WAIVER OF CONFLICT OF INTEREST

15. The Parties agree that this Agreement and the sharing of Privileged Information between them shall not be used as a basis for a motion to disqualify a Party's counsel (including for certainty the Party's counsel's law firm and any partner or associate thereof) after a Party has withdrawn from this Agreement for any reason, including without limitation, due to any conflict of interest which arises or becomes known to the withdrawing Party after the Effective Date, adversity between the Parties or any other reason whatsoever based on this Agreement or the cooperation and disclosure of Privileged Information hereunder.
16. The Parties confirm that there is no and shall not be deemed to be any solicitor-client relationship between counsel for the OPA and Ontario, nor any solicitor-client relationship between counsel for Ontario and the OPA, as a result of any communications, sharing of Privileged Information, cooperation or any other action taken in furtherance of the Parties' common interests or under and in reliance upon this Agreement.

NOTICE

17. All notices and other communications between the Parties, unless otherwise specifically provided, shall be in writing and deemed to have been duly given when delivered in person or telecopied or delivered by overnight courier, with postage prepaid, addressed as follows:

To: Ontario Power Authority

120 Adelaide Street West, Suite 1600
Toronto, ON M5H 1T1

Attention: Michael Lyle, General Counsel

Tel. No.: (416) 969-6035

Fax No.: (416) 967-1947

E-Mail: michael.lyle@powerauthority.on.ca

To: Her Majesty the Queen in Right of Ontario as Represented by the Minister of Energy

777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5

Attention: Halyna Perun, A/ Legal Director, Legal Services Branch
Ministries of Energy & Infrastructure

Tel. No.: (416) 325-6681

Fax No.: (416) 325-1781
E-mail: halyna.perun2@ontario.ca

GENERAL PROVISIONS

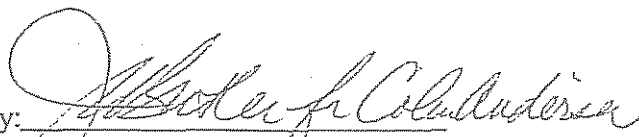
18. This Agreement shall be construed in accordance with the laws of the Province of Ontario and the Parties to this Agreement irrevocably attorn to the jurisdiction of Ontario with respect to any and all matters arising under this Agreement.
19. If any of the provisions of this Agreement or portions thereof should be determined to be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
20. Any failure of any Party to enforce any of the provisions of this Agreement or to require compliance with any of its terms at any time while this Agreement is in force shall in no way affect the validity of this Agreement, or any part hereof, and shall not be deemed a waiver of the right of such Party thereafter to enforce any and each such provisions.
21. Nothing contained in or done further to this Agreement shall be deemed either expressly or by implication to create a duty of loyalty between any counsel and anyone other than the client of that counsel.
22. This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof. There are no other oral understandings, terms, or conditions and neither Party has relied upon any representation, express or implied, not contained in this Agreement.
23. No change, amendment, or modification of this Agreement shall be valid or binding upon the Parties hereto unless such change, amendment, or modification is in writing and duly executed by both Parties hereto.
24. The headings contained in this Agreement are for convenience and reference only and in no way define, describe, extend, or limit the scope or intent of this Agreement or the intent of any provision contained herein.
25. This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the Parties.

Privileged & Confidential

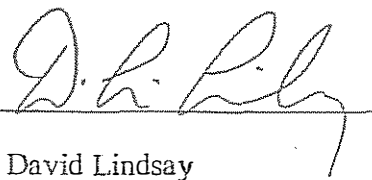
26. This Agreement may be signed in counterparts and by facsimile and all counterparts together shall constitute the Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

ONTARIO POWER AUTHORITY

By: 
Name: T. C. ANDERSEN FOR COUNCIL ANDERSEN
Title: Acting C.E.O.
signed May 31, 2011

HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO AS REPRESENTED BY THE
MINISTER OF ENERGY

By: 
Name: David Lindsay
Title: Deputy Minister

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 1, 2011 9:40 AM
To: Kelly, John (JUS)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Thanks John - Carolyn explained as well - you're a very popular fellow these days!

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Kelly, John (JUS)
Sent: June 1, 2011 9:33 AM
To: Perun, Halyna N. (MEI)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Halyna, as I told Carolyn, I am not available tomorrow. I have a witness on a large piece of litigation coming in from out of town to be prepared for examinations for discovery. This has been planned for months and involves 5 parties. I briefed Carolyn on the aspects of arbitration pro and con. I also advised that I could not give any advice as to whether Ontario should agree to Arbitration until I know what our client said or didn't say to Trans Canada.

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From: Perun, Halyna N. (MEI)
Sent: May 31, 2011 1:52 PM
To: Kelly, John (JUS)
Cc: Calwell, Carolyn (MEI); Machado, Eunice (JUS)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Hi John - The Thursday morning meeting that Carolyn mentions is pretty critical - attendees include the Secretary of the Cabinet, the Deputy Minister of Energy, the Chief of Staff for the Minister of Energy, the Deputy Minister of Finance, the Premier's Chief of Staff - so, if you are asked to attend it would be good to be available to go - it's usually first thing in the morning.

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Sent: May 31, 2011 11:54 AM
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Cc: Perun, Halyna N. (MEI)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 1, 2011 9:41 AM
To: Calwell, Carolyn (MEI)
Subject: FW: TCE - Cooperation and Common Interest Privilege Agreement

Fyi - it's understandable

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 1, 2011 12:05 PM
To: Calwell, Carolyn (MEI)
Subject: FW: TCE - Cooperation and Common Interest Privilege Agreement
Attachments: doc20110531111436.pdf

FYI -

Halyna

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A/Director
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Subject: TCE - Cooperation and Common Interest Privilege Agreement

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Further to my message to John, there have been some discussions about how to proceed that I would like to fill you in on. My ENERGY clients are looking for recommendation about the scope of arbitration and would like to meet either Thursday or Friday with you, the OPA and OPA outside counsel in this regard. They have asked for a deck that includes a recommendation. I would suggest that we work from the version that we sent up last week.

Finally, John, you may be invited to a regular meeting of ENERGY officials, the PO and the SOC that is scheduled for Thursday. I will confirm when I hear.

I look forward to speaking with you.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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**COOPERATION AND
COMMON INTEREST PRIVILEGE AGREEMENT**

THIS AGREEMENT is effective as of the 1st day of April, 2011 (the "Effective Date").

BETWEEN:

**ONTARIO POWER AUTHORITY
("OPA")**

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTER OF ENERGY
("ONTARIO")**

RECITALS:

- A. The OPA and TransCanada Energy Ltd. ("TCE") entered into the Southwest GTA Clean Energy Supply Contract dated as of October 9, 2009 (the "SWGTA Contract").
- B. The OPA and Ontario have concluded that, in connection with the threatened claims and potential litigation by TCE relating to the SWGTA Contract, legal and factual issues could arise with respect to which they have common interests and joint or compatible defences.
- C. The OPA and Ontario have undertaken, and will undertake, factual, legal and other research, and are of the opinion that it is in their best interest to exchange information, pool their individual work product and cooperate in a joint defence effort.
- D. Cooperation in such a joint defence effort will necessarily involve the exchange of confidential information as well as information which is otherwise privileged such as, amongst others, solicitor/client communication and/or communications made and materials obtained or prepared in contemplation of litigation.
- E. In light of their common interest, and the fact that litigation by TCE against the OPA and Ontario is anticipated, OPA and Ontario wish to proceed cooperatively in the preparation of joint or compatible defences, and by this Agreement seek to document their mutual intention and agreement that neither OPA nor Ontario shall suffer any waiver or loss of privilege as a result of disclosure to each other of their Privileged Information (as defined

below) or as a result of their cooperation in the preparation of positions, responses and defences to the Claims (as defined below).

AGREEMENT

In consideration of the promises and the mutual covenants and agreements herein, the Parties agree as follows:

DEFINITIONS

1. In the foregoing Recitals and in this Agreement, the following terms have the meanings set forth in this Section:
 - (a) **"Claims"** means any and all claims made or filed by TCE relating to, arising out of, or in connection with the SWGTA Contract, and any and all arbitration, mediation, or litigation that arises out of any and all such claims.
 - (b) **"Effective Date"** means the effective date as defined above.
 - (c) **"Parties"** means the OPA and Ontario and, for the purpose of giving effect to this Agreement, includes their legal counsel, agents, consultants and experts.
 - (d) **"Privileged Information"** means information and communications, whether written or electronically recorded, in respect of the preparation of positions, responses and defences to the Claims which are or would be otherwise in law privileged and protected from disclosure or production to Third Parties made between OPA (or its employees, legal counsel, agents, consultants, experts or any other person or entity acting on OPA's behalf) and Ontario (or its employees, legal counsel, agents, consultants, experts or any other person or entity acting on Ontario's behalf), including but not limited to:
 - (i) information and communications contained in documents, memoranda, correspondence, drafts, notes, reports, factual summaries, transcripts;
 - (ii) communications between counsel, or counsel and clients including their employees, consultants, board members or advisors;
 - (iii) any joint or several interview of prospective witnesses, and summaries or reports thereof;
 - (iv) any analyses, document binders, files, compilations or databases;
 - (v) the sharing or exchange via any media, including but not limited to electronic media;
 - (vi) theories, impressions, analyses, legal research, or legal opinions;
 - (vii) communications to and from experts, and documentation relating to or setting out expert commentary and opinion; and

- (viii) any other material, communications and information which would otherwise be protected from disclosure to Third Parties.
- (e) "TCE" has the meaning defined in paragraph A of the Recitals.
- (f) "Third Party" or "Third Parties" means any person or entity that is not a Party. Third Party includes TCE, their employees, agents, counsel, subcontractors, consultants, experts, or any other person or entity acting on TCE's behalf.

COMMON INTEREST OF THE PARTIES

2. The Parties have a common, joint, and mutual interest in the defence of the Claims, wish to cooperate with each other in respect of the defence of the Claims, and due to the anticipated litigation with TCE, wish to share between them Privileged Information without risk of prejudice to or of waiver in whole or in part of their respective privileges and rights to hold such Privileged Information protected from disclosure.
3. The Parties are under no obligation to share Privileged Information. However, from time to time, either Party (the "Disclosing Party") in its sole discretion may choose to share Privileged Information with the other Party (the "Receiving Party").
4. To the extent that exchanges of Privileged Information have been made prior to entering into this Agreement, it is the Parties' intention that all such exchanges be subject to the terms of this Agreement as if they had occurred after the Effective Date.
5. The execution of this Agreement, the cooperation between the Parties in respect of the defences to the Claims and the exchange of Privileged Information under this Agreement, where the materials would otherwise be protected by law against disclosure by solicitor-client (attorney client) privilege, litigation privilege, work product doctrine, without prejudice privilege, or any other applicable rule of privilege or confidentiality:
 - (i) are not intended to, do not and shall not constitute a waiver in whole or in part in favour of any Third Party by either Party of any applicable privilege or other rule of protection from disclosure; and
 - (ii) will not be asserted at any time by either Party as a waiver of any such privilege or other rule of protection from disclosure.
6. Disclosure of Privileged Information by the Receiving Party to Third Parties without the prior written consent of counsel for the Disclosing Party is expressly prohibited, unless the disclosure is ordered by a court of competent jurisdiction or is otherwise required by law. If disclosure of any Privileged Information is sought from a Receiving Party in any arbitration, litigation or other legal proceedings, the Receiving Party [from whom disclosure is sought] shall take all steps necessary to preserve and invoke, to the fullest extent possible, all applicable privileges, immunities and protections against disclosure, and shall immediately provide written notice of such legal proceedings to the Disclosing Party. The Receiving Party shall not voluntarily surrender or disclose the Privileged

Privileged & Confidential

Information without first providing the Disclosing Party a reasonable opportunity to protect its interests before the applicable court or arbitral tribunal.

7. All of the Privileged Information shall be preserved as confidential and privileged both prior to resolution of all outstanding Claims and thereafter, and shall not be used for any purpose other than the stated sole purpose of cooperation in the defence of the Claims.
8. Neither Party shall disclose to a Third Party the existence of this Agreement, nor its terms, unless both Parties consent in writing or unless compelled by order of a court or arbitral tribunal.
9. The Parties acknowledge and agree that their common interest in the defence of the Claims and their intention that no waiver of privilege shall result from their exchange of Privileged Information between them shall in no way be affected or deemed to be negated in whole or in part by the existence now or in the future of any adversity between the Parties relating to or arising out of the SWGTA Contract, whether in connection with the Claims or otherwise, and that any such adversity shall not affect this Agreement.

COOPERATION

10. The Parties shall cooperate in respect of the defence of the Claims, including providing access to information, materials and employees as may be reasonably necessary from time to time, as the case may be, provided that each of the Parties reserves the right to determine what information will be shared and under what circumstances, and no obligation or duty to share any such information is created by this Agreement.

WITHDRAWAL

11. It is the intent of the Parties that this Agreement shall remain in effect until final resolution of the Claims, either by litigation in a final, non-appealable judgment or arbitral award or by a final negotiated settlement, whichever is later.
12. Notwithstanding the foregoing, any Party may withdraw from this Agreement by giving twenty (20) days advance written notice to the other Party, which 20 days is calculated beginning on the day after the notice is received by a Party. For greater certainty, withdrawal from this Agreement by a Party is not effective until the expiration of the 20 days' notice period required by this provision.
13. Any withdrawal from this Agreement shall be prospective in effect only and the withdrawing Party and any Privileged Information made available by or to the other Party prior to that Party's withdrawal shall continue to be governed by the terms of this Agreement whether or not the Parties are, in any respect in relation to the SWGTA Contract, adverse in interest.
14. On or before the effective date of a withdrawal from this Agreement, the withdrawing Party shall return to the Disclosing Party all Privileged Information received from the Disclosing Party. In the case of copies, with the consent of the Disclosing Party, the Receiving Party may destroy such copies in a secure manner, and confirm in writing to the Disclosing Party that it has done so.

WAIVER OF CONFLICT OF INTEREST

15. The Parties agree that this Agreement and the sharing of Privileged Information between them shall not be used as a basis for a motion to disqualify a Party's counsel (including for certainty the Party's counsel's law firm and any partner or associate thereof) after a Party has withdrawn from this Agreement for any reason, including without limitation, due to any conflict of interest which arises or becomes known to the withdrawing Party after the Effective Date, adversity between the Parties or any other reason whatsoever based on this Agreement or the cooperation and disclosure of Privileged Information hereunder.
16. The Parties confirm that there is no and shall not be deemed to be any solicitor-client relationship between counsel for the OPA and Ontario, nor any solicitor-client relationship between counsel for Ontario and the OPA, as a result of any communications, sharing of Privileged Information, cooperation or any other action taken in furtherance of the Parties' common interests or under and in reliance upon this Agreement.

NOTICE

17. All notices and other communications between the Parties, unless otherwise specifically provided, shall be in writing and deemed to have been duly given when delivered in person or telecopied or delivered by overnight courier, with postage prepaid, addressed as follows:

To: Ontario Power Authority

120 Adelaide Street West, Suite 1600
Toronto, ON M5H 1T1

Attention: Michael Lyle, General Counsel

Tel. No.: (416) 969-6035

Fax No.: (416) 967-1947

E-Mail: michael.lyle@powerauthority.on.ca

To: Her Majesty the Queen in Right of Ontario as Represented by the Minister of Energy

777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5

Attention: Halyna Perun, A/ Legal Director, Legal Services Branch
Ministries of Energy & Infrastructure

Tel. No.: (416) 325-6681

Fax No.: (416) 325-1781
E-mail: halyna.perun2@ontario.ca

GENERAL PROVISIONS

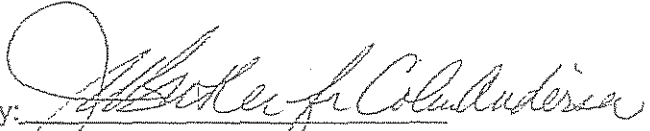
18. This Agreement shall be construed in accordance with the laws of the Province of Ontario and the Parties to this Agreement irrevocably attorn to the jurisdiction of Ontario with respect to any and all matters arising under this Agreement.
19. If any of the provisions of this Agreement or portions thereof should be determined to be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
20. Any failure of any Party to enforce any of the provisions of this Agreement or to require compliance with any of its terms at any time while this Agreement is in force shall in no way affect the validity of this Agreement, or any part hereof, and shall not be deemed a waiver of the right of such Party thereafter to enforce any and each such provisions.
21. Nothing contained in or done further to this Agreement shall be deemed either expressly or by implication to create a duty of loyalty between any counsel and anyone other than the client of that counsel.
22. This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof. There are no other oral understandings, terms, or conditions and neither Party has relied upon any representation, express or implied, not contained in this Agreement.
23. No change, amendment, or modification of this Agreement shall be valid or binding upon the Parties hereto unless such change, amendment, or modification is in writing and duly executed by both Parties hereto.
24. The headings contained in this Agreement are for convenience and reference only and in no way define, describe, extend, or limit the scope or intent of this Agreement or the intent of any provision contained herein.
25. This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the Parties.

Privileged & Confidential

26. This Agreement may be signed in counterparts and by facsimile and all counterparts together shall constitute the Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

ONTARIO POWER AUTHORITY

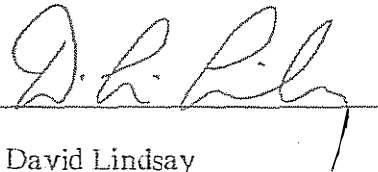
By: 

Name: J.C. BUTLER FOR COUNCILLOR

Title: Chief C.E.O.

signed May 31, 2011

HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO AS REPRESENTED BY THE
MINISTER OF ENERGY

By: 

Name: David Lindsay

Title: Deputy Minister

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 1, 2011 12:05 PM
To: Calwell, Carolyn (MEI)
Subject: FW: TCE - Cooperation and Common Interest Privilege Agreement
Attachments: doc20110531111436.pdf

FYI -

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

Notice

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-----Original Message-----

From: Wilson, Malliha (JUS)
Sent: June 1, 2011 11:59 AM
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS)
Subject: FW: TCE - Cooperation and Common Interest Privilege Agreement

Halyna - we need to slow this down. Can you please call me asap

-----Original Message-----

From: Kelly, John (JUS)
Sent: June 1, 2011 9:19 AM
To: Wilson, Malliha (JUS)
Subject: FW: TCE - Cooperation and Common Interest Privilege Agreement

I told her I was not available until Friday and explained that , until we know what was said in the PO or by a Minister , Deputy or assistant thereto, it would not be possible to give advice on Arbitration. I explained the scope of an arbitration and the pros and cons. She is to get back to me with an alternative date.

-----Original Message-----

From: Calwell, Carolyn (MEI)
Sent: May 31, 2011 11:23 AM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Cc: Perun, Halyna N. (MEI)
Subject: TCE - Cooperation and Common Interest Privilege Agreement

Fully executed copy attached for your file. I understand that the OPA will be in a position to share documentation tomorrow.

Further to my message to John, there have been some discussions about how to proceed that I would like to fill you in on. My ENERGY clients are looking for recommendation about the scope of arbitration and would like to meet either Thursday or Friday with you, the OPA and OPA outside counsel in this regard. They have asked for a deck that includes a recommendation. I would suggest that we work from the version that we sent up last week.

Finally, John, you may be invited to a regular meeting of ENERGY officials, the PO and the SOC that is scheduled for Thursday. I will confirm when I hear.

I look forward to speaking with you.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
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416.212.5409

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Perun, Halyna N. (ENERGY)

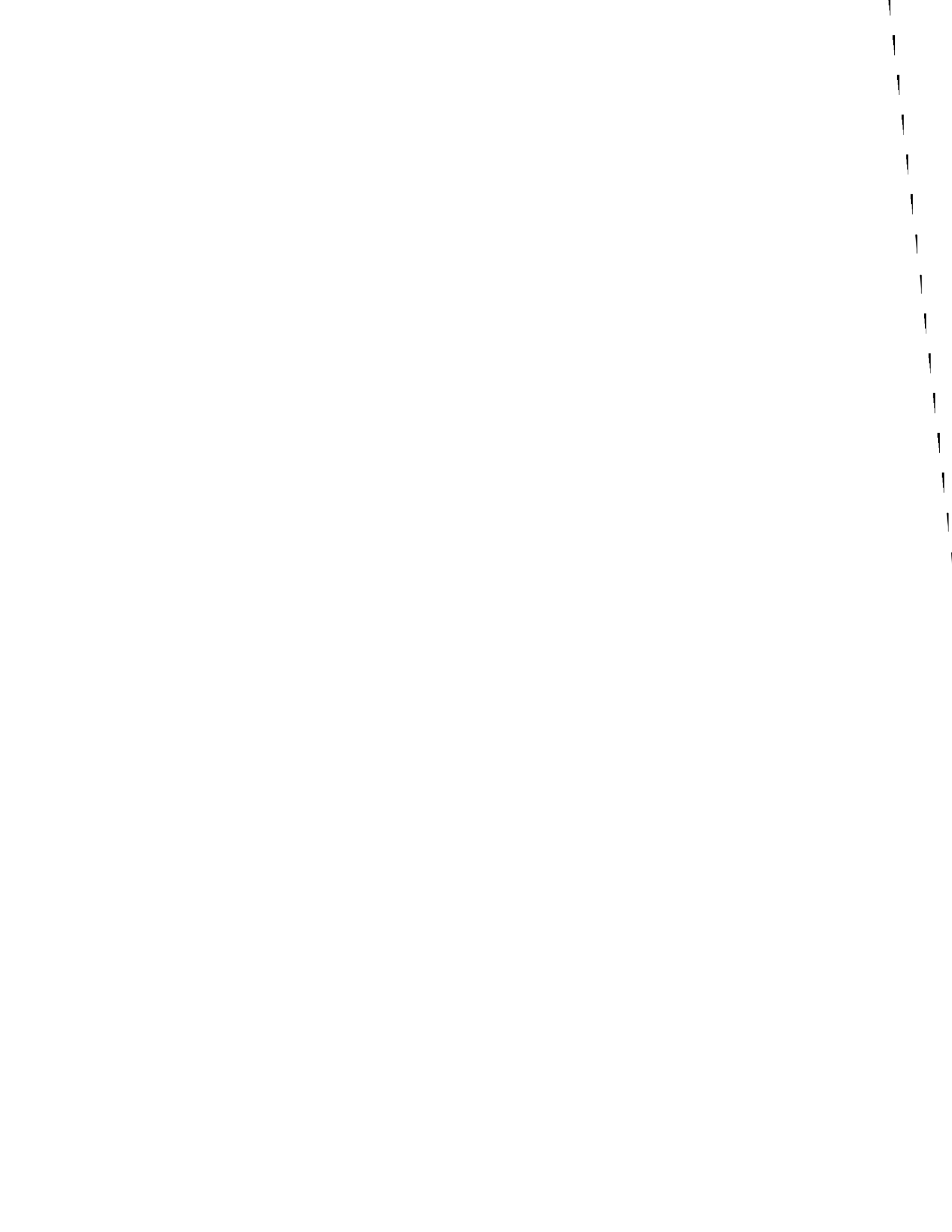
From: Perun, Halyna N. (MEI)
Sent: June 1, 2011 1:15 PM
To: Wilson, Malliha (JUS)
Cc: Lung, Ken (JUS); Calwell, Carolyn (MEI)
Subject: TCE

Hi – The TCE item has been **removed** from the agenda for the Energy/PO/SOC table tomorrow. We heard from the DMO just after the call you had with us and the preference was to deal with other more urgent matters tomorrow.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 1, 2011 1:18 PM
To: Wilson, Malliha (JUS)
Subject: RE: TCE

My apologies for causing you grief – certainly learned a few lessons today!

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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From: Wilson, Malliha (JUS)
Sent: June 1, 2011 1:17 PM
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS); Calwell, Carolyn (MEI)
Subject: RE: TCE

Excellent – we will then – after the meeting figure out how to deal with things – when we have all the facts

From: Perun, Halyna N. (MEI)
Sent: June 1, 2011 1:15 PM
To: Wilson, Malliha (JUS)
Cc: Lung, Ken (JUS); Calwell, Carolyn (MEI)
Subject: TCE

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 2, 2011 8:37 PM
To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Subject: TCE

Privileged and Confidential

As we discussed, Carolyn and I spoke with the Deputy and his EA briefly late this afternoon and advised him of our meeting with TCE counsel and that we anticipate a draft statement of claim next week. We proposed that no further steps be taken until we receive the draft in order to allow it to convey the messages about TCE's assertions of what transpired and its view of the Crown's involvement. We believe that the DMO conveyed this information to the Minister's Office. Nonetheless, that office has called an "agenda setting" conference call this evening for tomorrow morning at 10 (with OPA, DM, Min Office, and Sean Mullin from PO). We have been invited and John Kelly has as well (though I recall he's not available). There is no further information about the nature of this call from the M O. We are not in a position to refuse to participate. So we plan to attend and will send you and John a report of what transpires on the call. We will keep our speaking role to a very minimum.

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 3, 2011 6:58 AM
To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Subject: Re: TCE

There is a com int priv agreement in place - signed by opa and energy and witnessed. I know that communication by our office to John gave rise to your involvement earlier this week but fact is that it's in place - though we can amend it or withdraw it in accordance with its terms. When I get into the office - I'll forward the agreement that was executed again (will also involve Fateh). But anyway, please be assured that our role in this con call will be minimal.

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Thu Jun 02 21:39:16 2011
Subject: Re: TCE

Keep in mind that there is no common interest privilege doc signed with OPA. Therefore - there is no privilege attached and may in fact be a waiver. I wld keep your conversation to simply a report of what transpired and don't offer any legal advice or opinion

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Thu Jun 02 20:36:37 2011
Subject: TCE

Privileged and Confidential

As we discussed, Carolyn and I spoke with the Deputy and his EA briefly late this afternoon and advised him of our meeting with TCE counsel and that we anticipate a draft statement of claim next week. We proposed that no further steps be taken until we receive the draft in order to allow it to convey the messages about TCE's assertions of what transpired and its view of the Crown's involvement. We believe that the DMO conveyed this information to the Minister's Office. Nonetheless, that office has called an "agenda setting" conference call this evening for tomorrow morning at 10 (with OPA, DM, Min Office, and Sean Mullin from PO). We have been invited and John Kelly has as well (though I recall he's not available). There is no further information about the nature of this call from the M O. We are not in a

position to refuse to participate. So we plan to attend and will send you and John a report of what transpires on the call. We will keep our speaking role to a very minimum.

Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 3, 2011 7:43 AM
To: Wilson, Malliha (JUS); Lung, Ken (JUS)
Subject: Re: TCE

I understand completely -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS)
Sent: Fri Jun 03 07:15:35 2011
Subject: Re: TCE

I have raised this with Murray. The only advice I can give you is to tell your client that the com int privilege agreement has not been reviewed by mag and therefore we cannot speak to its validity and that they may be waiving privilege. If you are compelled to attend you keep your part in it - at a very high level - summarize the top three points of the discussion. Be aware that someone will be taking notes - or that this conversation may be called into evidence - so don't say anything that you may regret having to testify to. Am on my way to Guelph - but am available by phone

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS)
Sent: Fri Jun 03 07:00:57 2011
Subject: Re: TCE

Halyna, we have not reviewed it. The simple signing of an agreement does not mean that there is a com int privilege! I think I have made it clear where mag stands. If you wish to proceed on your own you do so at your peril

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Fri Jun 03 06:58:03 2011
Subject: Re: TCE

There is a com int priv agreement in place - signed by opa and energy and witnessed. I know that communication by our office to John gave rise to your involvement earlier this week but fact is that it's in place - though we can amend it or withdraw it in accordance with its terms. When I get into the office - I'll forward the agreement that was executed again (will also involve Fateh). But anyway, please be assured that our role in this con call will be minimal.

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Thu Jun 02 21:39:16 2011
Subject: Re: TCE

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From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Thu Jun 02 20:36:37 2011
Subject: TCE

Privileged and Confidential

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Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 3, 2011 8:05 AM
To: Calwell, Carolyn (MEI)
Subject: Re: TCE

I have talked to him - please forward the agreement thks

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

----- Original Message -----

From: Calwell, Carolyn (MEI)
To: Perun, Halyna N. (MEI)
Sent: Fri Jun 03 08:00:32 2011
Subject: Fw: TCE

Should I call Ken? Or you could suggest that he call me - 647-883-7091. I will send him the agmt.

----- Original Message -----

From: Lung, Ken (JUS)
To: Perun, Halyna N. (MEI); Calwell, Carolyn (MEI)
Sent: Fri Jun 03 07:42:18 2011
Subject: Fw: TCE

Please call me asap. 416-455-6263.

I know you mentioned common interest priv agreement but cannot remember details. Need to resolve before your planned meeting.

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS)
Sent: Fri Jun 03 07:15:35 2011
Subject: Re: TCE

I have raised this with Murray. The only advice I can give you is to tell your client that the com int privilege agreement has not been reviewed by mag and therefore we cannot speak to its validity and that they may be waiving privilege. If you are compelled to attend you keep your part in it - at a very high level - summarize the top three points of the discussion. Be aware that someone will be taking notes - or that this conversation may be called into evidence - so don't say anything that you may regret having to testify to. Am on my way to guelph - but am available by phone

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS)
Sent: Fri Jun 03 07:00:57 2011
Subject: Re: TCE

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Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Fri Jun 03 06:58:03 2011
Subject: Re: TCE

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Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

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To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Thu Jun 02 21:39:16 2011
Subject: Re: TCE

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Sent from my BlackBerry Wireless Device

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To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Thu Jun 02 20:36:37 2011

Subject: TCE

Privileged and Confidential

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Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 3, 2011 8:05 AM
To: Calwell, Carolyn (MEI)
Subject: Fw: TCE

Fyi

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS); Lung, Ken (JUS)
Sent: Fri Jun 03 07:43:25 2011
Subject: Re: TCE

I understand completely -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

----- Original Message -----

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Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 3, 2011 10:27 AM
To: Calwell, Carolyn (MEI)
Subject: TCE

Here 's what I have. Ken has asked to be briefed around the agreement and steps taken – so you might as well set this out in an email –Thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Kelly, John (JUS)
Sent: April 26, 2011 8:29 AM
To: Perun, Halyna N. (MEI)
Subject: RE: TCE

I don't have any. What is happening with this file?

From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 4:22 PM
To: Kelly, John (JUS); Machado, Eunice (JUS)
Cc: Carson, Cheryl (MEI)
Subject: RE: TCE

Hi – OPA is asking about the common interest privilege agreement. Please let us know your proposed changes – thank you

Halyna

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From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 9:09 AM
To: Kelly, John (JUS)
Subject: Re: TCE

We'll need to get instructions as to whether the ministry wants to reply independently of the opa - my guess is not but we'll need to ask -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Kelly, John (JUS)
To: Perun, Halyna N. (MEI)
Sent: Thu Apr 21 08:56:49 2011
Subject: RE: TCE

I think it says they are expecting a proposal from OPA

From: Perun, Halyna N. (MEI)
Sent: April 21, 2011 8:47 AM
To: Kelly, John (JUS)
Subject: Re: TCE

It's addressed to the minister as well

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Kelly, John (JUS)
To: Perun, Halyna N. (MEI)
Sent: Thu Apr 21 08:38:45 2011
Subject: RE: TCE

This requests a reply from OPA ,not the Ministry.

From: Perun, Halyna N. (MEI)
Sent: April 20, 2011 8:55 PM

To: Kelly, John (JUS); Machado, Eunice (JUS); Carson, Cheryl (MEI)

Subject: Fw: TCE

Received this via OPA not ministry. Request for response by Tuesday. We'll need instructions from clients re reply - references to "formal process" rather oblique. There is a proposal that OPA board was considering this evening to be put to TCE I guess tomorrow. I don't know much more than this but will connect with you tomorrow at some point once know more thanks

Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

From: Nimi Visram <Nimi.Visram@powerauthority.on.ca>

To: Perun, Halyna N. (MEI)

Cc: Michael Lyle <Michael.Lyle@powerauthority.on.ca>

Sent: Wed Apr 20 15:45:38 2011

Subject: TCE

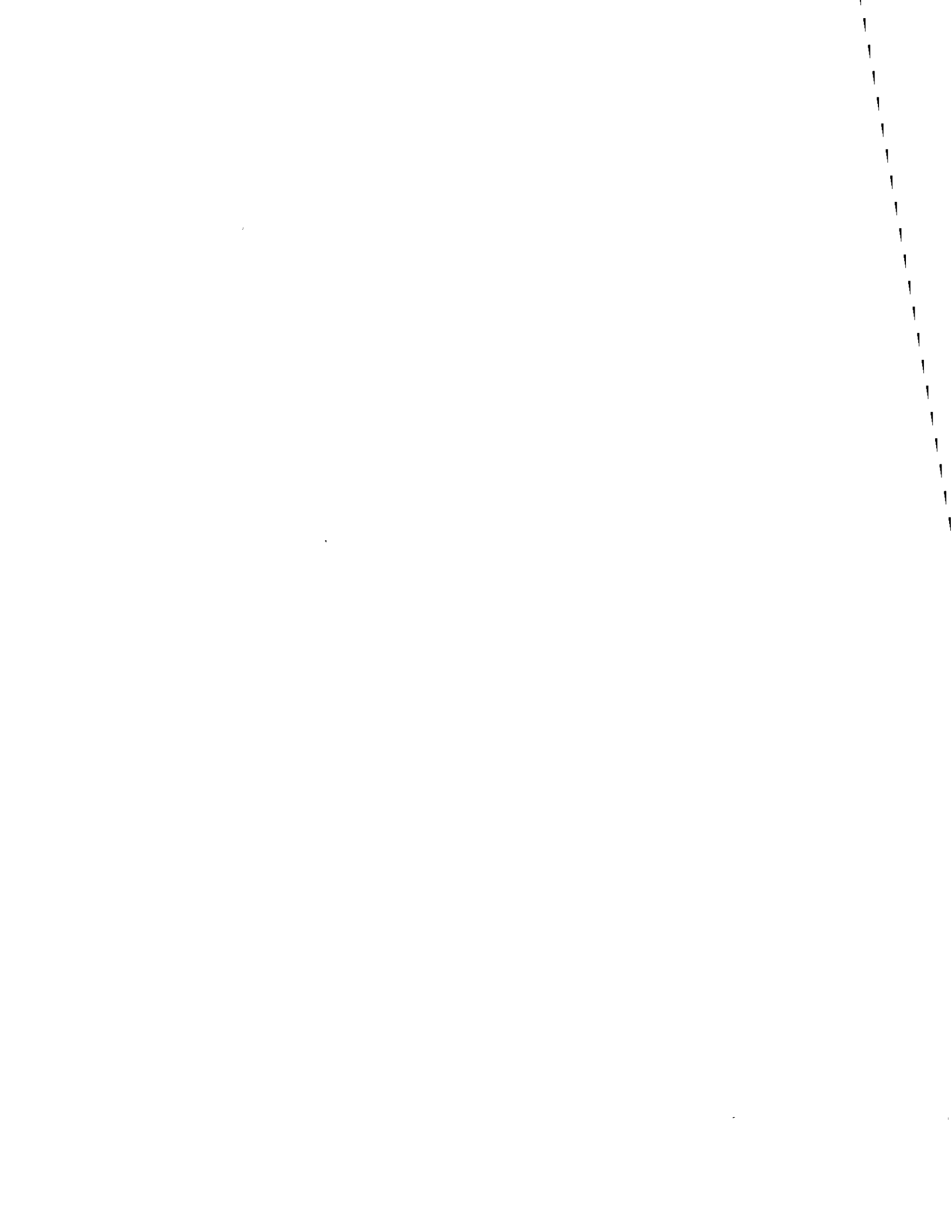
Please find attached correspondence from Thornton Grout Finnigan LLP dated April 19, 2011.

Nimi Visram | Ontario Power Authority | Executive Assistant & Board Coordinator, to General Counsel & Vice President, Legal, Aboriginal and Regulatory Affairs

120 Adelaide St W., Suite 1600 | Toronto, Ontario, M5H 1T1

☎ Phone: 416.969.6027 | 📠 Fax: 416.967.3683 | ✉ Email: nimi.visram@powerauthority.on.ca

♻️ Please consider your environmental responsibility before printing this email.



Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 3, 2011 1:09 PM
To: Salim, Fateh (JUS)
Subject: RE: TCE - Cooperation and Common Interest Privilege Agreement

Thanks Fateh -

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
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From: Salim, Fateh (JUS)
Sent: June 3, 2011 1:01 PM
To: Perun, Halyna N. (MEI)
Subject: TCE - Cooperation and Common Interest Privilege Agreement

Hi Halyna

We have been advised that the CIP Agreement should have received MAG approval prior to execution. Given the heightened sensitivity on this file, we are going to need MAG approval on anything that is to be shared or discussed with the OPA or TCE. This should apply to everything even if your Ministry is holding the pen or taking the lead. Please copy me on all emails to John and/or Eunice in this matter. I will let John and Eunice know that CLOC will be responsible for seeking MAG instructions.

Let me know if you would like to discuss this further.

Fateh Salim
Counsel & Deputy Director
Ministry of the Attorney General
Crown Law Office-Civil
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1

Tel: (416) 314-4569
Fax: (416) 326-4181

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 6, 2011 5:57 PM
To: Wilson, Malliha (JUS)
Cc: Lung, Ken (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Kelly, John (JUS); Slater, Craig (JUS)
Subject: TCE

Confidential and Solicitor-Client Privileged

Hi Malliha – Deputy Lindsay just called me and he indicated that he may be calling Deputy Segal (as Murray apparently offered to help Deputy Lindsay out at DMC last week)..

This morning, I had conveyed to Deputy Lindsay the conversation that we had had i.e. (1) that Premier's Office is the client and (2) that you needed 48 hours to get to the bottom of what the PO may want to say about what was said to OPA/TCE at the time of the announcement that Oakville was not proceeding. I also reminded him that the CIP Agreement is under review and that we are awaiting the draft statement of claim.

Deputy Lindsay spoke to Energy's Chief of Staff who then spoke to Sean Mullin. Sean has requested an analysis of options. He is apparently requesting that Energy coordinate the development of options that would inform his office as to what could be put on the table in arbitration. He knows what TCE wants but is asking for advice on what would be a reasonable counter-proposal - to move the matter to arbitration. The desire is to arbitrate and not litigate. What would be a reasonable counter-offer requires input from the OPA (as they have all the facts and figures). This can happen once we hear that your office is OK with the CIP Agreement.

Though folks know to hang tight for a short while, Deputy Lindsay continues to feel pressured to have a range of options in the works to advance arbitration in very short order. He's worried that nothing will happen until it's "too late". He's looking for assistance to advance a discussion at least with the OPA to work up advice for PO's consideration.

I told him that I would seek to speak with you as soon as possible. Please let me know when we'd be able to connect – thank you!

Halyna

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From: Perun, Halyna N. (MEI)
Sent: June 6, 2011 6:15 PM
To: Wilson, Malliha (JUS)
Cc: Lung, Ken (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Kelly, John (JUS); Slater, Craig (JUS)
Subject: RE: TCE

Thank you – and will do. There is a legal component to the options but also a significant policy component, which ultimately will need to be informed by OPA's analysis (the Deputy advises that there is no one at Energy that can assist – it's with OPA alone).. I look forward to hearing from you on the CIP agreement and in the meantime will work with what we have with Fateh and John.

Halyna

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To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Kelly, John (JUS); Slater, Craig (JUS)
Subject: RE: TCE

Of course. We can look at the document (com int priv doc) tomorrow – and get that out of the way. I think we have our instructions – which is to arbitrate – but the issue is the parameters – but can work on options – so proceed to work with CLOC on it and then send to me to review. I think work on all of this can happen even now

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To: Wilson, Malliha (JUS)
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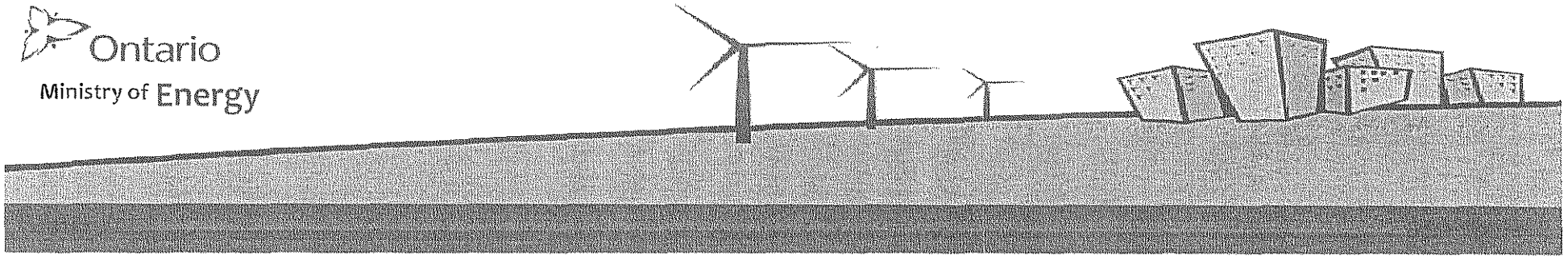
From: Perun, Halyna N. (MEI)
Sent: June 6, 2011 6:25 PM
To: Perun, Halyna N. (MEI)
Subject: FW: TCE Deck
Attachments: TransCanada Options.01 06 2011.ppt

Halyna

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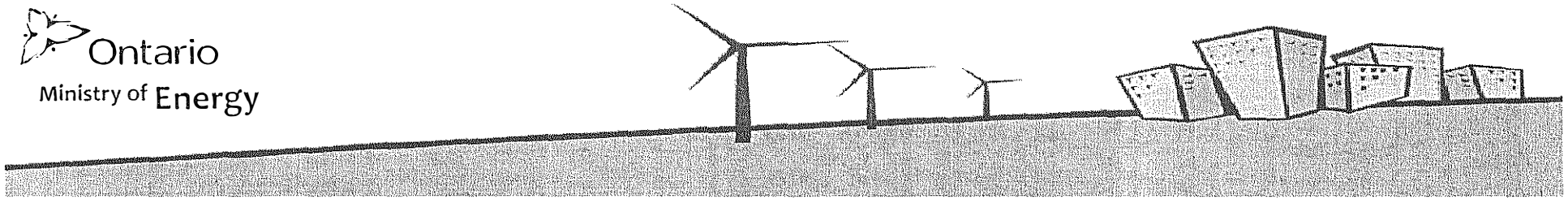
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TransCanada Energy & the Southwest GTA Clean Energy Supply Contract Arbitration

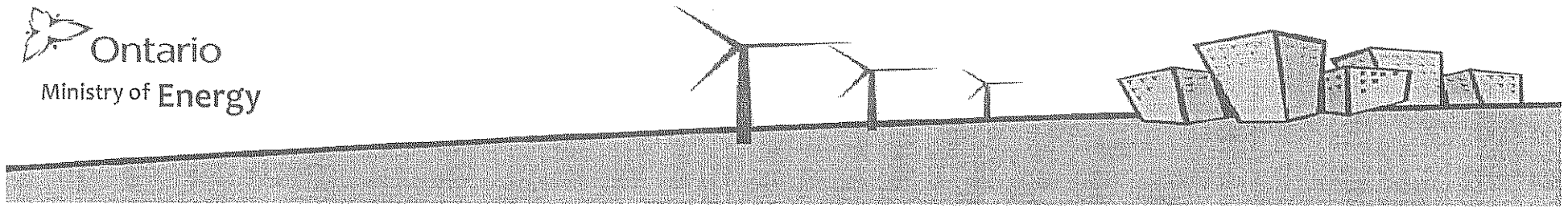
Confidential/Solicitor-Client Privileged
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Ministry of Energy/Ministry of
Infrastructure



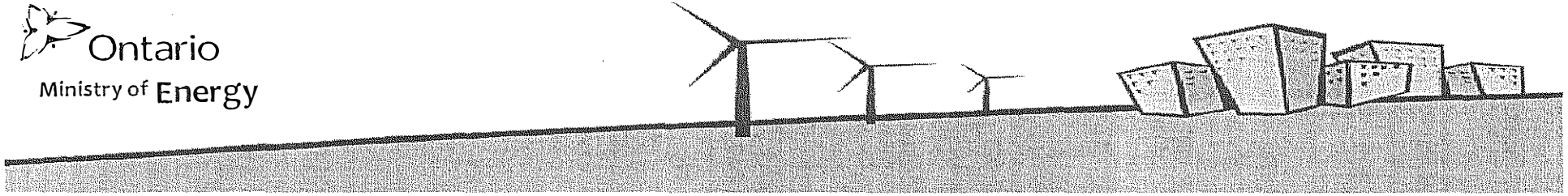
Background & Current Status

- ♦ On October 9, 2009, the Ontario Power Authority (OPA) and TransCanada Energy Ltd. (TCE) signed the Southwest GTA Clean Energy Supply Contract (the Supply Contract) for the development of a 850 MW gas fired electricity generation facility in Oakville.
- ♦ On October 7, 2010, the Minister of Energy announced that the Southwest GTA generation facility would not proceed.
- ♦ The OPA wrote to TCE on October 7th and acknowledged that “you are entitled to your reasonable damages from the OPA, including the anticipated financial value of the Contract”.
- ♦ The OPA and TCE have been negotiating exit arrangements and a possible alternative to the Southwest GTA generation facility since October 2010.
- ♦ The OPA and TCE have reached an impasse on the question of a possible alternative, a smaller generation facility in the Kitchener Waterloo Cambridge area.
- ♦ TransCanada served a PACA notice on the Crown on or about April 27, 2011 and will be in a position to serve and file a Statement of Claim against the Crown on or after June 27th.
- ♦ Allegations against the Province relate to intentional interference with the Supply Contract.
- ♦ The OPA and TransCanada have discussed the possibility of proceeding to arbitration to resolve the dispute.



Decision Points & Considerations

- ◆ The OPA has asked the Province to advise on the following questions:
 - ◆ Does the Crown want to be involved in arbitration?
 - ◆ What is the appropriate scope of arbitration?
- ◆ The decision on the scope of arbitration will determine the answer to the question of whether the Crown should be involved.
- ◆ TCE has suggested that it is only willing to use arbitration if the parties agree that damages are not limited by the Supply Contract and there will be no assertion that TransCanada could not complete the Supply Contract . In other words, the OPA and the Province would be required to waive the two defences available to them. Arbitration on this basis would be a duel of experts on valuation of the Supply Contract.
- ◆ TCE has suggested to Crown counsel that it will not alter its conditions for arbitration.
- ◆ Nevertheless, the OPA believes that it can move TCE to broaden the scope of arbitration.
 - ◆ TCE remains interested in doing other business in Ontario and may be adverse to litigation.
- ◆ The OPA's and the Crown's leverage in negotiating terms of reference for arbitration weakens toward the end of the PACA notice period at the end of June.



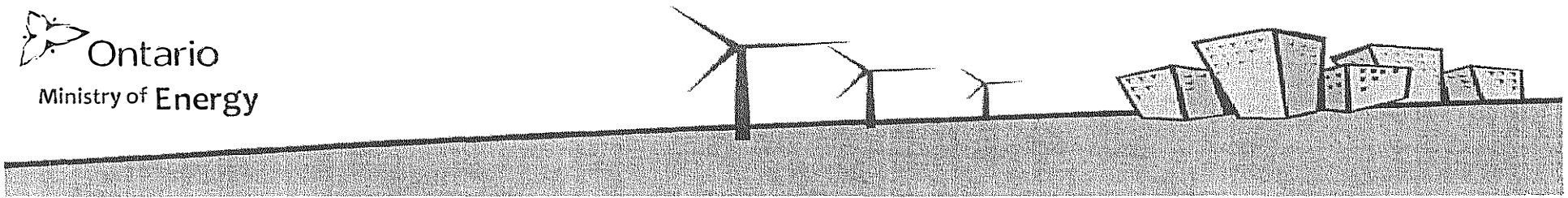
Option 1: No position on arbitration

- ◆ **Option 1:** The Crown declines to take a position on arbitration
- ◆ **Assumptions**
 - ◆ The Crown will prepare to defend a law suit from TCE
 - ◆ Litigation will deal with the meanings of statements that TCE would be “made whole” and the reference to the “anticipated financial value of the Contract”
 - ◆ Defences will include arguments that TCE could not complete the Supply Contract because of its inability to get various approvals and that damages are limited by the terms of the Supply Contract
 - ◆ Evidence will be required around the conversations between representatives of the Crown and TCE in and around October 2010
- ◆ **Expected outcome:** Highly likely to result in litigation between TCE, the OPA and the Crown
- ◆ **Advantages**
 - ◆ Sends clear signal to TCE that the Crown is not concerned about litigation
 - ◆ Court proceeding will be protracted
- ◆ **Disadvantages**
 - ◆ Timing of next steps is controlled by TCE
 - ◆ Court proceeding will be public



Option 2: Arbitration on damages

- ◆ **Option 2:** Arbitration on damages alone
- ◆ **Assumptions**
 - ◆ The Crown would take the position that arbitration should be limited to determining the value of statements that TCE would be “made whole” and the reference to the “anticipated financial value of the Contract”
 - ◆ The defences that TransCanada could not have completed the Supply Contract or that damages are limited by the Supply Contract will not be available
 - ◆ Arbitration will focus on expert valuations of TCE’s lost opportunity
- ◆ **Expected outcome:** Likely to lead to arbitration and, in due course, resolution of the dispute
- ◆ **Advantages**
 - ◆ TCE has said this is the only basis on which it will agree to arbitration
 - ◆ The Crown may not need to participate in arbitration of limited scope
 - ◆ Evidence will not be required around the conversations between representatives of the Crown and TCE in and around October 2010
 - ◆ Arbitration could be confidential
- ◆ **Disadvantages**
 - ◆ Creates highest financial exposure for the Crown and the OPA
 - ◆ Inconsistent with the OPA’s position



Option 3: Arbitration on all issues

- ◆ Option 3: Arbitration on all issues
- ◆ Assumptions
 - ◆ The Crown would take the position that arbitration must consider:
 - ◆ TCE's ability to deliver on its obligations under the Supply Contract
 - ◆ The terms of the Supply Contract, including the limitation of liability
 - ◆ Meanings of statements that TCE would be “made whole” and the reference to the “anticipated financial value of the Contract”
 - ◆ Evidence will be required around the conversations between representatives of the Crown and TCE in and around October 2010
- ◆ Expected outcome: Likely to result in litigation between TCE, the OPA and the Crown
- ◆ Advantages
 - ◆ Financial exposure to the OPA and the Province is likely less if all defences are pursued than if arbitration proceeded on damages alone
 - ◆ Aligns with the OPA's position
 - ◆ Arbitration could be confidential
- ◆ Disadvantages
 - ◆ Success of this option depends on whether TCE will move on its conditions for limited arbitration

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 6, 2011 7:02 PM
To: Calwell, Carolyn (MEI)
Subject: Re: TCE

I think the deck will need to be reframed a bit - I will send u another email on this before the morning -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Calwell, Carolyn (MEI)
To: Perun, Halyna N. (MEI)
Sent: Mon Jun 06 18:47:57 2011
Subject: Re: TCE

Does our existing deck speak to the options sufficiently (perhaps subject to re-packaging) or do the options need to be frames in a different manner? I'm not sure that I understand what changed - if anything.

Carolyn

From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS)
Cc: Lung, Ken (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Kelly, John (JUS); Slater, Craig (JUS)
Sent: Mon Jun 06 18:15:09 2011
Subject: RE: TCE

Thank you – and will do. There is a legal component to the options but also a significant policy component, which ultimately will need to be informed by OPA's analysis (the Deputy advises that there is no one at Energy that can assist – it's with OPA alone).. I look forward to hearing from you on the CIP agreement and in the meantime will work with what we have with Fateh and John.

Halyna

Halyna N. Perun
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From: Wilson, Malliha (JUS)
Sent: June 6, 2011 6:02 PM
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Kelly, John (JUS); Slater, Craig (JUS)
Subject: RE: TCE

Of course. We can look at the document (com int priv doc) tomorrow – and get that out of the way. I think we have our instructions – which is to arbitrate – but the issue is the parameters – but can work on options – so proceed to work with CLOC on it and then send to me to review. I think work on all of this can happen even now

From: Perun, Halyna N. (MEI)
Sent: June 6, 2011 5:57 PM
To: Wilson, Malliha (JUS)
Cc: Lung, Ken (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Kelly, John (JUS); Slater, Craig (JUS)
Subject: TCE

Confidential and Solicitor-Client Privileged

Hi Malliha – Deputy Lindsay just called me and he indicated that he may be calling Deputy Segal (as Murray apparently offered to help Deputy Lindsay out at DMC last week)..

This morning, I had conveyed to Deputy Lindsay the conversation that we had had i.e. (1) that Premier's Office is the client and (2) that you needed 48 hours to get to the bottom of what the PO may want to say about what was said to OPA/TCE at the time of the announcement that Oakville was not proceeding. I also reminded him that the CIP Agreement is under review and that we are awaiting the draft statement of claim.

Deputy Lindsay spoke to Energy's Chief of Staff who then spoke to Sean Mullin. Sean has requested an analysis of options. He is apparently requesting that Energy coordinate the development of options that would inform his office as to what could be put on the table in arbitration. He knows what TCE wants but is asking for advice on what would be a reasonable counter-proposal - to move the matter to arbitration. The desire is to arbitrate and not litigate. What would be a reasonable counter-offer requires input from the OPA (as they have all the facts and figures). This can happen once we hear that your office is OK with the CIP Agreement.

Though folks know to hang tight for a short while, Deputy Lindsay continues to feel pressured to have a range of options in the works to advance arbitration in very short order. He's worried that nothing will happen until it's "too late". He's looking for assistance to advance a discussion at least with the OPA to work up advice for PO's consideration.

I told him that I would seek to speak with you as soon as possible. Please let me know when we'd be able to connect – thank you!

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 11:29 AM
To: Salim, Fateh (JUS)
Subject: RE: Time today?

Fateh - I will be ten min late - just advised that there is some material on TCE for you and waiting for it to be copied so I can take it with me

Halyna

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-----Original Message-----

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 11:10 AM
To: Salim, Fateh (JUS)
Subject: RE: Time today?

See you soon

Halyna

Halyna N. Perun
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-----Original Message-----

From: Salim, Fateh (JUS)
Sent: June 9, 2011 11:06 AM
To: Perun, Halyna N. (MEI)
Subject: RE: Time today?

That will be great!

-----Original Message-----

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 11:06 AM
To: Salim, Fateh (JUS)
Subject: RE: Time today?

Hi - Is 11:30 OK?

Halyna

Halyna N. Perun
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-----Original Message-----

From: Salim, Fateh (JUS)
Sent: June 9, 2011 8:59 AM
To: Perun, Halyna N. (MEI)
Subject: RE: Time today?

I have a mtg from 9:30 to 10:30 then am free. Let me know what works best for you.

-----Original Message-----

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 8:50 AM
To: Salim, Fateh (JUS)
Subject: Time today?

Do you have any time today to chat about the japan wto matter? Looks like I have no mtgs this morning so I could come by for half hour at your convenience - thanks!!

Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 3:28 PM
To: Lung, Ken (JUS)
Cc: Slater, Craig (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI)
Subject: TCE

Confidential

Hi Ken - The ENERGY MO advises that there is a high level (political staff, SOC and deputies) meeting on Monday on TCE. We have not been invited to attend but we understand that the DAG is invited.

As you know, TCE has said that it is only willing to consider arbitration if the OPA and the Crown waive their rights to rely on 2 defences: 1) the limitation of liability provision in the Supply Contract; and 2) the argument that TCE would never have been able to complete the Supply Contract in any event because of TCE's inability to get municipal approvals for the project. The OPA's position has been that arbitration should only occur if both defences may be raised.

ENERGY MO is looking to understand the two defences and what it means to take them off the table, including the financial implications.

CLOC is likely to be asked to provide advice on this in advance of Monday's meeting. We will certainly support CLOC's work as required.

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 5:17 PM
To: Lung, Ken (JUS)
Cc: Slater, Craig (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Wong, Taia (JUS)
Subject: Re: TCE

Hi - Energy is looking for an answer in the context of the meeting on Monday but has not asked us to provide a product. The DAG may very well be asked these questions. We would think CLOC has the lead and we'd be happy to assist John where we can.

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Lung, Ken (JUS)
To: Perun, Halyna N. (MEI)
Cc: Slater, Craig (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Wong, Taia (JUS)
Sent: Thu Jun 09 17:07:28 2011
Subject: RE: TCE

Thanks Halyna for information. Has ENE client asked you for legal product for this meeting, whether from your branch or CLOC?

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 3:28 PM
To: Lung, Ken (JUS)
Cc: Slater, Craig (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI)
Subject: TCE

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 5:24 PM
To: Salim, Fateh (JUS)
Subject: Re: TCE

Hi Fateh - John called me earlier and he's on the questions and was going to speak with OPA counsel re financial implications

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Salim, Fateh (JUS)
To: Lung, Ken (JUS); Perun, Halyna N. (MEI)
Cc: Slater, Craig (JUS); Calwell, Carolyn (MEI); Wong, Taia (JUS)
Sent: Thu Jun 09 17:09:17 2011
Subject: RE: TCE

Nothing has been requested from CLOC.

From: Lung, Ken (JUS)
Sent: June 9, 2011 5:07 PM
To: Perun, Halyna N. (MEI)
Cc: Slater, Craig (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Wong, Taia (JUS)
Subject: RE: TCE

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From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 3:28 PM
To: Lung, Ken (JUS)
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Subject: TCE

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 5:59 PM
To: Calwell, Carolyn (MEI)
Subject: Fw: TCE

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Salim, Fateh (JUS)
To: Perun, Halyna N. (MEI)
Sent: Thu Jun 09 17:32:06 2011
Subject: RE: TCE

My email below was that we have not been asked by ENE or anyone else for a product. Just found out that John is looking into the issues because MW asked him.

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 5:24 PM
To: Salim, Fateh (JUS)
Subject: Re: TCE

Hi Fateh - John called me earlier and he's on the questions and was going to speak with OPA counsel re financial implications

Halyna Perun
A\Director
Ph: 416 325 6681
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Sent using BlackBerry

From: Salim, Fateh (JUS)
To: Lung, Ken (JUS); Perun, Halyna N. (MEI)
Cc: Slater, Craig (JUS); Calwell, Carolyn (MEI); Wong, Taia (JUS)
Sent: Thu Jun 09 17:09:17 2011
Subject: RE: TCE

Nothing has been requested from CLOC.

From: Lung, Ken (JUS)
Sent: June 9, 2011 5:07 PM
To: Perun, Halyna N. (MEI)
Cc: Slater, Craig (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Wong, Taia (JUS)
Subject: RE: TCE

Thanks Halyna for information. Has ENE client asked you for legal product for this meeting, whether from your branch or CLOC?

From: Perun, Halyna N. (MEI)
Sent: June 9, 2011 3:28 PM
To: Lung, Ken (JUS)
Cc: Slater, Craig (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI)
Subject: TCE

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 13, 2011 9:20 AM
To: Lung, Ken (JUS)
Cc: Calwell, Carolyn (MEI)
Subject: TCE

Hi Ken – originally we planned to meet with Malliha and others this aft @4 to give her a briefing on the TCE file – background etc. Events have certainly overtaken and Malliha is indeed aware of the background. Additionally, we've been asked to attend an Energy MO briefing this aft at the same time on another matter so we're trying to figure out our schedules on this end for today. Does Malliha still want to keep the 4 pm slot with us? Please let us know (I know Anupa is working with Diana on this but I don't think they're making progress re landing on whether that meeting is still needed). Many thanks for your assistance with this

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 13, 2011 1:54 PM
To: Calwell, Carolyn (MEI)
Subject: TCE

Hi – just fyi - in my one on one with DM – he said he'd call me about the meeting – it was at noon. Haven't heard back as yet and you might hear sooner from Craig.

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 13, 2011 4:17 PM
To: 'Michael Lyle'
Cc: Calwell, Carolyn (MEI)
Subject: TCE

Pirvileged and Confidential

Hi Mike – CLOC is asking whether the OPA was served with a Notice of Action by TCE. We don't think so – and have said so, but we need your confirmation – can you please advise as soon as possible? Thank you

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 13, 2011 4:31 PM
To: Slater, Craig (JUS)
Subject: tce

I've left a call with Mike Lyle and have emailed him and will let you know as soon as I hear back from him..

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 13, 2011 5:32 PM
To: Slater, Craig (JUS)
Subject: FW: TCE

FYI

Halyna

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From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: June 13, 2011 5:17 PM
To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI)
Subject: Re: TCE

That is correct and I confirmed this with John Kelly in a discussion this afternoon.

From: Perun, Halyna N. (MEI) [<mailto:Halyna.Perun2@ontario.ca>]
Sent: Monday, June 13, 2011 04:16 PM
To: Michael Lyle
Cc: Calwell, Carolyn (MEI) <Carolyn.Calwell@ontario.ca>
Subject: TCE

Privileged and Confidential

Hi Mike – CLOC is asking whether the OPA was served with a Notice of Action by TCE. We don't think so – and have said so, but we need your confirmation – can you please advise as soon as possible? Thank you

Halyna

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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (MEI)
Sent: June 13, 2011 5:40 PM
To: 'Michael Lyle'
Subject: RE: TCE

Thanks Mike

Halyna

Halyna N. Perun
A/Director
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E-mail: Halyna.Perun2@ontario.ca

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Perun, Halyna N. (ENERGY)

From: Lung, Ken (JUS)
Sent: June 3, 2011 8:10 AM
To: Perun, Halyna N. (MEI)
Subject: Re: TCE

Please call. 416-455-6263.

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS); Lung, Ken (JUS)
Sent: Fri Jun 03 07:43:25 2011
Subject: Re: TCE

I understand completely -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS)
Sent: Fri Jun 03 07:15:35 2011
Subject: Re: TCE

I have raised this with Murray. The only advice I can give you is to tell your client that the com int privilege agreement has not been reviewed by mag and therefore we cannot speak to its validity and that they may be waiving privilege. If you are compelled to attend you keep your part in it - at a very high level - summerize the top three points of the discussion. Be aware that someone will be taking notes - or that this conversation may be called into evidence - so don't say anything that you may regret having to testify to. Am on my way to guelph - but am available by phone

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS)
Sent: Fri Jun 03 07:00:57 2011
Subject: Re: TCE

Halyna, we have not reviewed it. The simple signing of an agreement does not mean that there is a com int privilege! I think I have made it clear where mag stands. If you wish to proceed on your own you do so at your peril

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Fri Jun 03 06:58:03 2011
Subject: Re: TCE

There is a com int priv agreement in place - signed by opa and energy and witnessed. I know that communication by our office to John gave rise to your involvement earlier this week but fact is that it's in place - though we can amend it or withdraw it in accordance with its terms. When I get into the office - I'll forward the agreement that was executed again (will also involve Fateh). But anyway, please be assured that our role in this con call will be minimal.

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

----- Original Message -----

From: Wilson, Malliha (JUS)
To: Perun, Halyna N. (MEI)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Thu Jun 02 21:39:16 2011
Subject: Re: TCE

Keep in mind that there is no common interest privilege doc signed with OPA. Therefore - there is no privilege attached and may in fact be a waiver. I wld keep your conversation to simply a report of what transpired and don't offer any legal advice or opinion

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Perun, Halyna N. (MEI)
To: Wilson, Malliha (JUS)
Cc: Calwell, Carolyn (MEI); Kelly, John (JUS); Lung, Ken (JUS)
Sent: Thu Jun 02 20:36:37 2011
Subject: TCE

Privileged and Confidential

As we discussed, Carolyn and I spoke with the Deputy and his EA briefly late this afternoon and advised him of our meeting with TCE counsel and that we anticipate a draft statement of claim next week. We proposed that no further steps be taken until we receive the draft in order to allow it to convey the messages about TCE's assertions of what transpired and its view of the Crown's involvement. We believe that the DMO conveyed this information to the Minister's Office. Nonetheless, that office has called an "agenda setting" conference call this evening for tomorrow morning at 10 (with OPA, DM, Min Office, and Sean Mullin from PO). We have been invited and John Kelly has as well (though I recall he's not available). There is no further information about the

✓ nature of this call from the M O. We are not in a position to refuse to participate. So we plan to attend and will send you and John a report of what transpires on the call. We will keep our speaking role to a very minimum.

Halyna Perun

A\Director

Ph: 416 325 6681

BB: 416 671 2607

Sent using BlackBerry

Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: June 3, 2011 12:49 PM
To: Lung, Ken (JUS)
Cc: Perun, Halyna N. (MEI)
Subject: OPA Common Interest Privilege Agreement

Ken,

I understand that you asked for information about the Common Interest Privilege Agreement with the OPA related to the TCE potential litigation.

The OPA and its external counsel (Paul Ivanoff and Rocco Sebastiano from Oslers) requested a meeting with ENE and CLOC counsel in April. The OPA had advised that its direct negotiations with TCE were approaching an impasse and we knew that a PACA notice could be forthcoming. During that meeting, a Common Interest Privilege Agreement was discussed in principle and a draft proffered. The draft was prepared by the OPA's outside counsel.

Subsequently, CLOC reviewed the draft and had no comments. We also reviewed and required the removal of a remedy for injunctive and declaratory relief, among other minor changes.

In late May, the OPA general counsel asked to meet with us and CLOC again. At that meeting the OPA asked about the Province's views on arbitration with TCE (scope and parties) and described the OPA's and TCE's positions on arbitration. CLOC advised that a recommendation could not be made without understanding the facts and who said what to whom when. The OPA offered to share documentation with CLOC once the Common Interest Privilege Agreement was signed.

I understand that CLOC and the OPA had a subsequent call in which they discussed the need to get the Common Interest Privilege Agreement resolved in order to facilitate the OPA's sharing of documentation. CLOC had spoken to counsel for TCE, who indicated that they had numerous emails showing the negotiation and various drafts of the October 7, 2010 letter from the OPA to TCE that ultimately acknowledged that TCE was "entitled to your reasonable damages from the OPA, including the anticipated financial value of the contract". The OPA also had that documentation and offered to provide it, again once the Common Interest Privilege Agreement was signed. As we understand it, ENERGY wasn't party to those emails and we have never seen them. CLOC asked us of the status of the Agreement, which CLOC wanted signed so that this documentation could be provided. CLOC did not indicate at any time that the agreement needed to be prepared or vetted through MAG.

The OPA subsequently agreed to take out the injunctive and declaratory relief provision and we proceeded to brief the ENE DM and have it signed in aid of the OPA's provision of documentation to facilitate CLOC's understanding of the facts.

I hope this assists your purposes. We are happy to answer further questions.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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Perun, Halyna N. (ENERGY)

From: Salim, Fateh (JUS)
Sent: June 3, 2011 1:01 PM
To: Perun, Halyna N. (MEI)
Subject: TCE - Cooperation and Common Interest Privilege Agreement

Hi Halyna

We have been advised that the CIP Agreement should have received MAG approval prior to execution. Given the heightened sensitivity on this file, we are going to need MAG approval on anything that is to be shared or discussed with the OPA or TCE. This should apply to everything even if your Ministry is holding the pen or taking the lead. Please copy me on all emails to John and/or Eunice in this matter. I will let John and Eunice know that CLOC will be responsible for seeking MAG instructions.

Let me know if you would like to discuss this further.

Fateh Salim
Counsel & Deputy Director
Ministry of the Attorney General
Crown Law Office-Civil
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1

Tel: (416) 314-4569
Fax: (416) 326-4181

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Perun, Halyna N. (ENERGY)

From: Wilson, Malliha (JUS)
Sent: June 6, 2011 6:02 PM
To: Perun, Halyna N. (MEI)
Cc: Lung, Ken (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Kelly, John (JUS); Slater, Craig (JUS)
Subject: RE: TCE

Of course. We can look at the document (com int priv doc) tomorrow – and get that out of the way. I think we have our instructions – which is to arbitrate – but the issue is the parameters – but can work on options – so proceed to work with CLOC on it and then send to me to review. I think work on all of this can happen even now

From: Perun, Halyna N. (MEI)
Sent: June 6, 2011 5:57 PM
To: Wilson, Malliha (JUS)
Cc: Lung, Ken (JUS); Salim, Fateh (JUS); Calwell, Carolyn (MEI); Kelly, John (JUS); Slater, Craig (JUS)
Subject: TCE

Confidential and Solicitor-Client Privileged

Hi Malliha – Deputy Lindsay just called me and he indicated that he may be calling Deputy Segal (as Murray apparently offered to help Deputy Lindsay out at DMC last week)..

This morning, I had conveyed to Deputy Lindsay the conversation that we had had i.e. (1) that Premier's Office is the client and (2) that you needed 48 hours to get to the bottom of what the PO may want to say about what was said to OPA/TCE at the time of the announcement that Oakville was not proceeding. I also reminded him that the CIP Agreement is under review and that we are awaiting the draft statement of claim.

Deputy Lindsay spoke to Energy's Chief of Staff who then spoke to Sean Mullin. Sean has requested an analysis of options. He is apparently requesting that Energy coordinate the development of options that would inform his office as to what could be put on the table in arbitration. He knows what TCE wants but is asking for advice on what would be a reasonable counter-proposal - to move the matter to arbitration. The desire is to arbitrate and not litigate. What would be a reasonable counter-offer requires input from the OPA (as they have all the facts and figures). This can happen once we hear that your office is OK with the CIP Agreement.

Though folks know to hang tight for a short while, Deputy Lindsay continues to feel pressured to have a range of options in the works to advance arbitration in very short order. He's worried that nothing will happen until it's "too late". He's looking for assistance to advance a discussion at least with the OPA to work up advice for PO's consideration.

I told him that I would seek to speak with you as soon as possible. Please let me know when we'd be able to connect – thank you!

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Perun, Halyna N. (ENERGY)

From: Calwell, Carolyn (MEI)
Sent: June 6, 2011 3:20 PM
To: Kelly, John (JUS)
Cc: Machado, Eunice (JUS); Blom, Chantelle (JUS); Salim, Fateh (JUS); Perun, Halyna N. (MEI)
Subject: Notes from June 2 meeting
Attachments: Notes to file ENE.consolidated.June 6-2011.doc

For your reference, attached are Halyna's and my notes from our meeting with Michael Barrack and John Finnegan last week.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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Notes to file – Meeting with Michael Barrack and John Finnegan on June 2, 2011

Malliha Wilson, John Kelly, Halyna Perun, Carolyn Calwell

Without Prejudice

Michael & John are counsel for TransCanada Energy Ltd.

They see 4 constituencies in play: OPA, civil servants, political staff and politicians and each has distinct role to play re how Supply Contract came to an end

They want to give us a sense of what they have, without prejudice but not off the record so can share what they tell us

They have developed a chronology of events

They sent preservation notices to 82 people within TCE – ask that we take the same step

They could provide us with a list of people at our end to whom notices should go

June 3, 210 meeting (Michael read handwritten notes of Chris Breen, political relations staff for TCE, formerly with Harris government)

Meet with Jameson Stevie, Sean Mullin

TCE presented Oakville Generating Station alternatives – Oakville North,

Oakville base line

JS recognized responsibility of Ontario

Explore options: Mississauga a non-starter, Nanticoke, double Halton Hills

Cost not separate from politics

Need one month to feed information

Not about Bruce

Decision to be made July 29th

5 people, no public servants, will make the decision

Public policy & political analysis [re HP: I have “calculus” not “analysis”]

MB: Political problem with political solution

July 15, 2010 (handwritten notes of Chris Breen) [HP: my notes are confusing here as though initially I too had July 15, subsequently, MB explained I thought that this was another presentation of June 3rd? so I crossed off “July 15” and changed this to “June 3”]

TCE presentation to political staff - Jameson Stevie, Sean Mullin

Sets out risk [HP: I have “baseline Oakville Generation Station/Oakville North”]

Further proposal [HP: I have that this is made on July 15] – lands in Oakville North and adds Halton Hills

JS says my boss says: yeses good, nos not bad, maybes will kill us

Flynn wants decision yesterday

Ford not going to happen [reference to location of SWGTA plant]

Will give you a decision [HP: I have “an indication” as opposed “a decision”] next week

Coal retirement and new gas at risk here

“HST people don’t celebrate good public policy”

We hear # [30,000?] people before we make a decision

MB: each of TCE’s written proposals talk about permitting risk in Oakville

Each proposes to deal with this risk through gov’t action, as in York Region

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August 30, 2010

Further presentation

Nanticoke alternative

[Notes not read to us]

Re MB: How would gov't solve this risk? Through existing powers or through legislation. We've been told Oakville is dead. Presenting alternatives to this decision.

October 1, 2010 (Chris Breen's notes)

Meeting with Alex Pourbaix (senior business guy), Carl ____ (senior operations guy), Chris Breen, Sean Mullin, Jameson Stevie. Below is from CB's notes:

Thanks for patience – very confidential

Call by end of next week – no SWGTA plant

Rationale – all about supply and demand; power plan provides options

AP - How to keep TCE as whole as possible

TCE needs language re: commitment to contract

TCE must be kept mostly whole

[HP: I also have: JS: so we what have to do under contract but not more re spending]

JS/SM to draft language

AP - Value of contract vs. moving to another town

MB: received assurance that TCE would be kept mostly whole and consideration was to keep quiet and work on alternatives. [HP: I have: TCE made it clear that needed letter that would be kept mostly whole on the contract. Received assurance on that. Would put it in writin and quid pro quo was to lay low and work on alternatives]

October 5, 2010 – 2 meetings

First meeting– Girling (TCE), Pourbaix, Stevie & Mullin

[Discussion of] language you are content with

Push on protecting value

TCE needs letter from OPA – OPA needs to know

Draft

Letter required prior to announcement

Must preserve value for TCE

[Another option] Portland sale at book value

JS: we are open; threat of litigation is a motivator; spoken to Colin Andersen & Ben Chin (OPA)

Second meeting– with Brad Duguid, Sean Mullin, David Lindsay

Thank you for your professionalism

[TCE] Must not be about safety

BD: system has changed; energy plan by end of year at latest [answer on SWGTA]

MB: TCE responds angrily [HP – I have MB says TCE “blew a gasket”] – we already have a deal – go talk to your bosses

AP: we have already spent \$60M and will spend \$100 M more in the next month

Conversation about the letter

Then, draft letters exchanged

Sean Mullin sends first draft to TCE, copies Mike Lyle (OPA)

Letter talks about OPA and TCE negotiating in good faith

Ben Chin & Chris Breen exchange messages

Breen says go find out what the PO said

OPA goes away, [HP I also have: Ben Chin checks with boss] – comes back and they have the October 7 letter from Colin Andersen

“as whole as possible”, “financial value of the contract”

Costs thrown away and discounted cash stream

No directive from the Minister (told by Oslers)

Don’t know if the OPA board approved the letter

Don’t plan to sue the board but fiduciary issues

Province induced breach of contract. Won’t plead misfeasance of office or tort of indignation

Chronology will be in Statement of Claim

Under Supply Contract, no mandatory arbitration

TCE prepared to agree to arbitration on damages - what is the financial value of the contract

Won’t discuss permitting problems

Elements to damages

MB: Costs thrown away – turbines

Mitsubishi (MPS) Contract

TCE was required to buy them -- ordered and bought for Oakville

Cambridge plant couldn’t use them

Buy them once or buy them twice (JF)

\$200 - \$250M

Value of stream of payments for 20 years of Supply Contract

Terminal value of contract

Difference contract: OPA funds building and leases it for 20 years; building reverts to OPA at end – there is value at that point

\$100s of millions

Mitigation

In dealing with the OPA, TCE may be willing to take a bond (tradeable security) that mirrors the 20 year payment from OPA, rather than a NPV cheque

TCE open to creative solutions once we get to an amount

Acknowledgement in letter - Government knew of opposition to the project when that line was negotiated

On words of contract, limitation of liability in Supply Contract won’t hold

Also won’t hold on the words of the letter

TCE and OPA have MOU -- expires at end of June

Very far apart on negotiations re: Cambridge

TCE told that IRR is 9% on Cambridge – its own calculations show 4%

TCE frustrated by apparent disconnect within OPA

TCE's questions not responded to

Negotiator for OPA doesn't have technical competence to discuss the numbers

Sense that negotiator brings contract administration perspective

For example, OPA not showing its model on capital costs

OPA encouraged TCE to go to the government

"to solve this you've got to talk to the gov't"

TCE's sense from the OPA is that the gov't caused the problem so the gov't should solve it

JK asked for draft Statement of Claim; MB & JF promised to send it next week (not ready yet; still finalizing chronology)

Meeting lasted about 45 minutes

| Prepared by Carolyn Calwell (with additions from Halvna Perun)
Deputy Director, Legal Services Branch
Ministry of Energy/Ministry of Infrastructure
June 3, 2011

Perun, Halyna N. (ENERGY)

From: Kelly, John (JUS)
Sent: August 9, 2011 2:04 PM
To: Perun, Halyna N. (ENERGY)
Subject: RE: TCE

I don't have a copy of the final agreement. I asked Meredith Brown in the DAG's office for one but haven't heard back yet.

From: Perun, Halyna N. (ENERGY)
Sent: August 9, 2011 2:02 PM
To: Kelly, John (JUS)
Cc: Slater, Craig (JUS); Salim, Fateh (JUS)
Subject: TCE

Hi John – OPA Counsel advises that the Energy Deputy signed a letter agreement and also that there will be an arbitration on quantum. Any chance you could update me? I would like a copy of the documents – thank you.

Halyna

Halyna N. Perun
▲/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
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Ph: (416) 325-6681 / Fax: (416) 325-1781
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Perun, Halyna N. (ENERGY)

From: Kelly, John (JUS)
Sent: August 9, 2011 2:20 PM
To: Perun, Halyna N. (ENERGY)
Subject: FW:
Attachments: Arbitration Agreement August 5 2011.pdf

From: Dermot Muir [<mailto:Dermot.Muir@infrastructureontario.ca>]
Sent: August 9, 2011 2:19 PM
To: Kelly, John (JUS)
Subject: RE:

Here you go John.

Dermot

From: Kelly, John (JUS) [<mailto:John.Kelly@ontario.ca>]
Sent: Tuesday, August 09, 2011 2:15 PM
To: Dermot Muir
Subject: FW:

Dermot, can you send me a copy? Thanks.

From: Kelly, John (JUS)
Sent: August 9, 2011 2:14 PM
To: 'michael.lyle@powerauthority.on.ca'
Subject:

Mike do you have a signed copy of the Arbitration agreement and , if so , can you send one to me by pdf? Thanks

John Kelly
Counsel
Crown Law Office - Civil
Ministry of the Attorney General
720 Bay Street - 8th Floor
Toronto, ON
M7A 2S9

Tel: 416-212-1161
Fax: 416-326-4181

email: John.Kelly@ontario.ca

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TRANSCANADA ENERGY LTD.

Claimant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and the ONTARIO
POWER AUTHORITY

Respondents

ARBITRATION AGREEMENT

WHEREAS the Ontario Power Authority (the "OPA") and the Claimant TransCanada Energy Ltd. ("TCE" or the "Claimant") entered into the Southwest GTA Clean Energy Supply Contract dated as of October 9, 2009 (the "CES Contract") for the construction of a 900 megawatt gas fired generating station in Oakville Ontario (the "OGS");

AND WHEREAS by letter dated October 7, 2010 the OPA terminated the CES Contract and acknowledged that TCE was entitled to its reasonable damages, including the anticipated financial value of the CES Contract;

AND WHEREAS the Respondents have agreed to pay TCE its reasonable damages arising from the termination of the CES Contract, including the anticipated financial value of the CES Contract;

AND WHEREAS the Claimant and the Respondents wish to submit the issue of the assessment of the reasonable damages suffered by TCE to arbitration in the event they are unable to settle that amount as between themselves;

AND WHEREAS on April 27, 2011, the Claimant provided written notice to Her Majesty the Queen in Right of Ontario (the "Province of Ontario"), under section 7 of the *Proceedings Against the Crown Act*, R.S.O., 1990, c. P. 27 ("PACA"), of its intent to commence an action against the Province of Ontario to recover the

damages the Claimant suffered because of the termination of the CES Contract (the "Claim");

AND WHEREAS the Parties have agreed that the Claimant's damages under the Claim will not be limited by: (a) any limitation on or reduction of the amount of damages which might otherwise be awarded as a result of sections 10.5 or 14.1 of the CES Contract; or (b) any limitation on or reduction of the amount of damages which might otherwise be awarded as a result of any possibility or probability that TCE may have been unable to obtain any or all government or regulatory approvals required to construct and operate its generation facility as contemplated in and in accordance with the CES Contract;

AND WHEREAS the Parties have agreed that the Respondents will not raise as a defence the Force Majeure Notices filed by the Claimant with the OPA including those issued after the Town of Oakville rejected the Claimant's site plan approval for the Oakville Generating Station and subsequently the rejection of its application for consent to sever for the Oakville Generating Station site by the Committee of Adjustment for the Town of Oakville;

AND WHEREAS the Parties have agreed to resolve the issue of the quantum of damages the Claimant is entitled to as a result of the termination of the CES Contract by way of binding arbitration in accordance with *The Arbitration Act, 1991*, S.O. 1991, c.17 (the "Act");

AND WHEREAS the Parties have agreed that all steps taken pursuant to the binding arbitration will be kept confidential and secure and will not form part of the public record;

NOW THEREFORE, in consideration of good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

ARTICLE 1 APPLICATION OF THE ACT

Section 1.1 Recitals

The recitals herein are true and correct.

Section 1.2 Act

The provisions of the *Act* shall apply to this Arbitration Agreement except as varied or excluded by this Agreement, or other written agreement of the Parties.

ARTICLE 2

Section 2.1 Consideration

In consideration of the Parties each agreeing to pursue the resolution of this matter by way of binding arbitration in accordance with the *Act*, and on the understanding that the referral to the arbitration and the satisfaction of any Final Award (as defined) is a settlement of the Claimant's claim that is the subject matter of its April 27, 2011 Notice, pursuant to section 22 (c) of the *PACA*, the Parties agree:

- (a) the Claim against the Province of Ontario and the OPA will not be pursued in the Courts; and
- (b) contemporaneous with the satisfaction by the Province of Ontario of any Final Award in favour of TCE, TCE will provide a release to the OPA and the Province of Ontario in the form of Schedule "B" attached hereto.

ARTICLE 3 ARBITRATOR

Section 3.1 Arbitrator

The Arbitration shall be conducted in Toronto, Ontario by an arbitrator mutually agreed upon by the Parties or chosen by such individual as the Parties may agree (the "Arbitrator").

ARTICLE 4 JURISDICTION OF ARBITRATOR

Section 4.1 Final Decision and Award

The decision and award of the Arbitrator shall be final and binding on the Parties, subject to the right to appeal questions of law to the Ontario Superior Court of Justice as provided in section 45(2) of the *Act*.

Section 4.2 The Disputes

The Arbitrator shall fully and finally determine the amount of the reasonable damages to which the Claimant is entitled as a result of the termination of the CES Contract, including the anticipated financial value of the CES Contract.

Section 4.3 Waiver of Defences

- (a) The Respondents agree that they are liable to pay TCE its reasonable damages arising from the termination of the CES Contract, including the anticipated financial value of the CES Contract.

- (b) The Respondents acknowledge and agree that in the determination of the reasonable damages which TCE is to be awarded there shall be no reduction of those damages by reason of either:
 - (i) any limitation on or reduction of the amount of damages which might otherwise be awarded as a result of sections 10.5 or 14.1 of the CES Contract; or
 - (ii) any limitation on or reduction of the amount of damages which might otherwise be awarded as a result of any possibility or probability that TCE may have been unable to obtain any or all government or regulatory approvals required to construct and operate its generation facility as contemplated in and in accordance with the CES Contract.
- (c) For greater certainty, the amount of the reasonable damages to which the Claimant is entitled will be based upon the following agreed facts:
 - (i) that if the CES Contract had not been terminated then TCE would have fulfilled the CES Contract and the generation facility which was contemplated by it would have been built and would have operated; and
 - (ii) the reasonable damages including the anticipated financial value of the CES Contract is understood to include the following components:
 - (A) the net profit to be earned by TCE over the 20 year life of the CES Contract;
 - (B) the costs incurred by TCE in connection with either the performance or termination of the CES Contract to the extent that these costs have not been recovered in item (A); and
 - (C) each Party reserves its rights to argue whether the Respondents are liable to compensate the Claimant for the terminal value of the OGS, if any, where terminal value is understood to mean the economic value of the OGS that may be realized by the Claimant in the period after the expiration of the twenty year term of the CES Contract for its remaining useful life.

Section 4.4

Arbitrator Jurisdiction

Without limiting the jurisdiction of the Arbitrator at law, the submission to arbitration hereunder shall confer on the Arbitrator the jurisdiction to:

- (a) determine any question as to the Arbitrator's jurisdiction including any objections with respect to the existence, scope or validity of this Agreement;
- (b) determine all issues in respect of the procedure or evidentiary matters governing the Arbitration, in accordance with this Agreement and the Act, and make such orders or directions as may be required in respect of such issues;
- (c) determine any question of law arising in the Arbitration;
- (d) receive and take into account such written or oral evidence tendered by the Parties as the Arbitrator determines is relevant and admissible;
- (e) make one or more interlocutory or interim orders;
- (f) include, as part of any award, the payment of interest from the appropriate date as determined by the Arbitrator; and
- (g) proceed in the Arbitration and make any interlocutory or interim award(s), as deemed necessary during the course of the hearing of the Arbitration, and the Final Award (defined below).

Section 4.5

Costs

The Parties agree that the Arbitrator has the jurisdiction to award costs to any of the Parties, and that the Arbitrator will make a determination with respect to any Party's entitlement to costs by analogy to the *Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194* (the "Rules") and with regard to the relevant case law, after hearing submissions from the Parties with respect to costs following the Final Award, or an interim or interlocutory order or award in relation to any interim or interlocutory motion. The Arbitrator's accounts shall be borne equally by the Parties, together with all other ancillary, administrative and technical expenses that may be incurred during the course of the Arbitration, including but not limited to costs for court reporter(s), transcripts, facilities and staffing (the "Expenses"), but the Arbitrator's accounts and the Expenses shall be ultimately determined with reference to the Rules and the case law, at the same time that other issues with respect to costs are determined following the Final Award.

Section 4.6 Timetable

Any deadlines contained in this Agreement may be extended by mutual agreement of the Parties or order of the Arbitrator, and the Arbitrator shall be advised of any changes to any deadlines.

**ARTICLE 5
SUBMISSION OF WRITTEN STATEMENTS**

Section 5.1 Statement of Claim

The Claimant shall deliver a Statement of Claim on or before September 30, 2012.

Section 5.2 Defence

The Respondents shall each deliver a Statement of Defence within 30 days following the delivery of the Statement of Claim.

Section 5.3 Reply

The Claimant shall deliver a Reply within 30 days following the delivery of the Statements of Defence.

**ARTICLE 6
CONDUCT OF THE ARBITRATION**

Section 6.1 Documentary Discovery

The Parties will meet and confer with respect to documentary production within 30 days following the last date by which a Reply is to be delivered. At the meeting with respect to documentary production, counsel for the Parties will discuss and attempt to agree on the format of the documents to be delivered.

The scope of documentary production is to be determined by the Parties when they meet and confer. For greater clarity, the scope of documentary production is not as broad as that contemplated by the *Rules*. Rather, the Parties are required to disclose the documentation that they intend to or may rely on at the arbitration, as well as documents which fall into the categories (relevant to the issues in dispute) identified by opposing counsel at the meet and confer meeting or as may arise out of the examinations for discovery.

In preparation of witnesses for discovery and in connection with documentary production the Parties will use all relevant powers to ensure that all documents in their power, possession or control are produced in the Arbitration.

When they meet and confer, the Parties shall determine a date by which each shall deliver to the other a list identifying any and all records and documents, whether written, electronic or otherwise, being produced for the purpose of this

Arbitration, and by which each shall deliver the documents in the format agreed to by the Parties. In the event that the Parties cannot come to an agreement on these dates or the extent or nature of production they will refer the decision back to the Arbitrator.

Section 6.2 Evidence by Witness Affidavits

On a date to be determined by the Parties when they meet and confer, the Parties shall deliver to each other sworn affidavits of each of their witnesses.

On a date to be determined by the Parties when they meet and confer, the Parties shall deliver to each other responding sworn affidavits from their witnesses.

Section 6.3 Cross Examinations on Affidavits

The Parties agree that cross examinations of the affiants will take place on a date to be agreed, with each Party limited to one day of cross examination per witness, or such other time as may be agreed between the Parties upon review of the affidavits or may be ordered by the Arbitrator.

Within 30 days following cross examinations, the Parties will come to an agreement on hearing procedure with respect to calling *viva voce* evidence, or will attend before the Arbitrator to determine such procedure (the "Hearing Procedure").

Section 6.4 Expert Reports

The Parties agree that experts shall meet prior to the preparation of expert reports to confer and, if possible, agree and settle the assumptions and facts to be used in the expert reports.

The Parties agree on the following timetable for delivery of expert reports:

- (a) expert reports of each Party shall be delivered within 45 days after completion of cross examinations;
- (b) responding (reply) expert reports of each Party shall be exchanged within 30 days of the exchange of expert reports; and
- (c) all expert reports delivered and filed in the Arbitration shall include and attach a copy of the expert's Curriculum Vitae and a declaration of independence.

Section 6.5 Arbitration Hearing

The Arbitration Hearing shall take place in Toronto on dates to be agreed by the Parties. The Arbitration Hearing shall be conducted in an expeditious manner and in accordance with the Hearing Procedure. A court reporter will be present at

each day of the Arbitration Hearing and the court reporter will provide the Parties with real-time transcription of the day's evidence, and the court reporter will also provide the Parties with copies of daily transcripts of each day's evidence. The costs of the court reporter will be divided between the Parties during the course of the Arbitration and it will form part of the costs of the Arbitration, which will ultimately be decided with reference to Section 4.5 above.

Section 6.6 Witness Statements

The Parties will attempt to reach agreement with regard to whether the evidence-in-chief of witnesses will be provided by way of Affidavit rather than oral testimony. If the evidence of a witness is to be provided by way of Affidavit, the witness will nevertheless, if requested, be available at the hearing for cross-examination.

Each witness who gives oral testimony at the Arbitration Hearing will do so under oath or affirmation.

Section 6.7 Examinations and Oral Submissions

Unless otherwise agreed, each Party may examine-in-chief and re-examine its own witnesses and cross-examine the other Party's witnesses at the Arbitration Hearing. The Parties shall agree upon, failing which the Arbitrator shall impose, time limits upon both examination-in-chief and cross examination of witnesses. Each Party shall be entitled to present oral submissions at the Arbitration Hearing.

Section 6.8 Applicable Law

The Arbitrator shall apply the substantive law applicable in the Province of Ontario. The Arbitrator shall apply the procedural rules set out in this Arbitration agreement and the *Act* and by analogy to the *Rules*, to the extent that procedures are not dealt with in this Arbitration Agreement or in the *Act*.

Section 6.9

Subject to the terms of this Arbitration Agreement, the Arbitrator may conduct the Arbitration Hearing in such manner as he/she considers appropriate, provided that the Parties are treated with equality, and that at any stage of the proceedings each Party is given full opportunity to present its case.

Section 6.10

Each Party may be represented by legal counsel at any and all meetings or hearings in the Arbitration. Each person who attends the Arbitration Hearing is deemed to have agreed to abide by the provisions of Article 8 of this Arbitration Agreement with respect to confidentiality. Any person who attends on any date upon which the Arbitration Hearing is conducted shall, prior to attending, execute a confidentiality agreement substantially in the form attached hereto as Schedule "A".

ARTICLE 7 AWARD

Section 7.1 Decision(s) Timeline

Any interlocutory or interim award(s) shall be given in writing at Toronto, with reasons and shall be rendered within forty five (45) days of the conclusion of the relevant motion.

The Arbitrator shall provide the Parties with his/her decision in writing at Toronto, with reasons, within six (6) months from the delivery of the communication of the final submissions from the parties (the "**Final Award**"). The Arbitrator shall sign and date the Final Award.

Within fifteen (15) days after receipt of the Final Award, any Party, with notice to the other Parties, may request the Arbitrator to interpret the Final Award; correct any clerical, typographical or computation errors, or any errors of a similar nature in the Final Award; or clarify or supplement the Final Award with respect to claims which were presented in the Arbitration but which were not determined in the Final Award. The Arbitrator shall make any interpretation, correction or supplementary award requested by either Party that he/she deems justified within fifteen (15) days after receipt of such request. All interpretations, corrections, and supplementary awards shall be in writing, and the provisions of this Article shall apply to them.

Section 7.2

Subject to the right of appeal in Section 4.1 above, the Final Award shall be final and binding on the Parties, and the Parties undertake to carry out the Final Award without delay. If an interpretation, correction or additional award is requested by a Party, or a correction or additional award is made by the Arbitrator on his/her own initiative as provided under this Article, the Award shall be final and binding on the Parties when such interpretation, correction or additional award is made by the Arbitrator or upon the expiration of the time periods provided under this Article for such interpretation, correction or additional award to be made, whichever is earlier. The Final Award shall be enforceable in accordance with its terms, and judgment upon the Final Award entered by any court of competent jurisdiction that possesses jurisdiction over the Party against whom the Final Award is being enforced.

Section 7.3

The Parties agree that it is in their mutual interests that a Final Award [or an interim final award] in favour of the Claimant be satisfied in a manner that furthers both the energy interests of the Province of Ontario and the interests of TCE. Therefore, subject to the foregoing and the following terms and conditions, a Final

Award [or an interim final award] in favour of the Claimant may be satisfied by way of the transfer to the Claimant of an asset that has an equivalent value to TCE, after due consideration for the tax implications to TCE of the transaction, being equal to the Final Award [or interim final award] (the “**Equivalent Value**”).

- (a) Upon the request of the Respondent, the Province of Ontario, to satisfy the Final Award [or interim final award] as against either of the Respondents by the transfer of an asset of Equivalent Value, TCE shall within ten (10) business days submit a list of assets of interest (the “**Assets of Interest**”) to the Respondent for consideration. Such list to consist of assets owned by the Province of Ontario, the OPA or an agency of the Province of Ontario and at a minimum to include assets in which TCE has an equity interest or that has been subject to prior discussion amongst the Parties. Assets which will provide partial Equivalent Value may be considered.
- (b) If an asset of interest is mutually agreed as being a suitable asset for transfer to TCE, and the asset is not one in which TCE (or a wholly owned affiliate) owns an equity interest in at that time, then TCE shall be permitted a reasonable and customary period of time for an asset purchase transaction of this type in order to conduct due diligence and to confirm its continued interest in the asset transfer. If TCE remains interested in acquiring the asset after having completed its due diligence then the Parties shall use commercially reasonable efforts to attempt to agree on the value of the asset to TCE.
- (c) If an asset of interest is mutually agreed as being a suitable asset for an equivalent exchange and is an asset in which TCE (or a wholly owned affiliate) owns an equity interest at that time, then the Parties shall use commercially reasonable efforts to attempt to agree on the value of the asset to TCE.
- (d) In respect of any proposed asset transfer under subsection (b) or (c) above TCE acting reasonably must be satisfied that:
 - (i) the transfer will be in compliance with all relevant covenants relating to the asset and in compliance with all applicable laws;
 - (ii) all necessary consents, permits and authorizations are available to transfer the asset to TCE and for TCE to own and operate the asset;
 - (iii) there are no restrictions on TCE’s ability to develop, operate, sell or otherwise dispose of the asset; and

- (iv) TCE does not become liable for any pre-closing liabilities relating to the asset.
- (e) If the Parties have agreed to the transfer and if the value of the asset to TCE is agreed, then the Parties will use commercially reasonable efforts to negotiate and settle the form of such definitive documents as may be required to give full effect to such asset transfer. Such documents are to be in conventional form for the type of asset to be transferred and will contain conventional representations, warranties, covenants, conditions, and indemnities for an asset transfer between arm's length commercial parties.
- (f) If more than ninety (90) days have passed after the date of the issuance of the Final Award [or an interim final award] of the Arbitrator, and the Parties have not agreed on the terms of the asset transfer or settled the form of the definitive documents for transfer, then TCE shall be permitted to issue a demand letter to the Respondents demanding immediate payment of the Final Award [or interim final award] in cash and such payment shall be made within three (3) days of receipt of such demand letter.

Section 7.4

Release

Contemporaneous with compliance by the Respondents with the terms of the Final Award and in consideration therefore, TCE shall deliver a Release in favour of each of the Respondents in the form attached hereto as Schedule "B".

ARTICLE 8 CONFIDENTIALITY

Section 8.1

Confidentiality

Except as may be otherwise required by law, all information disclosed in the Arbitration shall be treated by all Parties, including their respective officers and directors, and by the Arbitrator, as confidential and shall be used solely for the purposes of the Arbitration and not for any other or improper purpose. The Parties agree further that for the purposes of this Arbitration, they shall abide by and be bound by the "deemed undertaking" rule as stipulated in Rule 30.1 of the *Rules*.

For greater certainty, the Arbitrator and the Parties, including their respective officers and directors, employees, agents, servants, administrators, successors, members, subsidiaries, affiliates, insurers, assigns and related parties from time to time agree that they shall not disclose or reveal any information disclosed in the Arbitration to any other person, except to their legal, or financial advisors, or experts or consultants retained by a party for the purpose of this arbitration, or as required by law including, for example, the Claimant's obligation to make disclosures under

applicable securities law. The Parties also agree that they will use best efforts to ensure that they have effective procedures in place to ensure that information disclosed in the Arbitration is not disclosed or revealed contrary to the provisions of this Article. Each Party agrees to be responsible for any breach by its officers, directors, employees, agents, servants, administrators, successors, members, subsidiaries, affiliates, insurers, and assigns of the terms and conditions of this Article. Notwithstanding the foregoing, the OPA and the Province of Ontario are entitled to share confidential information for the purpose of defending the Claim.

ARTICLE 9 MISCELLANEOUS

Section 9.1 Amendment

This Arbitration Agreement may be amended, modified or supplemented only by a written agreement signed by the Parties.

Section 9.2 Governing Law

This Arbitration Agreement shall be governed by, interpreted and enforced in accordance with the laws of the Province of Ontario.

Section 9.3 Binding the Crown

The Respondent Her Majesty the Queen in Right of Ontario, shall be bound by this agreement.

Section 9.4 Extended Meanings

In this Agreement words importing the singular number include the plural and *vice versa*, words importing any gender include all genders and words importing persons include individuals, corporations, limited and unlimited liability companies, general and limited partnerships, associations, trusts, unincorporated organizations, joint ventures and governmental authorities. The terms "include", "includes" and "including" are not limiting and shall be deemed to be followed by the phrase "without limitation".

Section 9.5 Statutory References

In this Agreement, unless something in the subject matter or context is inconsistent therewith or unless otherwise herein provided, a reference to any statute is to that statute as now enacted or as the same may from time to time be amended, re-enacted or replaced and includes any regulation made thereunder.

Section 9.6 Counterparts

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same instrument.

Section 9.7**Electronic Execution**

Delivery of an executed signature page to this Agreement by any party by electronic transmission will be as effective as delivery of a manually executed copy of the Agreement by such party.

Section 9.8**Counsel**

The Parties acknowledge and agree that the following shall be the counsel of record for this Arbitration.

**Counsel for the Claimant,
TransCanada Energy Ltd.**

Thornton Grout Finnigan LLP
3200 – 100 Wellington Street West
CP Tower, TD Centre
Toronto, ON M5K 1K7

Michael E. Barrack
Tel: (416) 304-1616
Email: mbarrack@tgf.ca

John L. Finnigan
Tel: (416) 304-1616
Fax: (416) 304-1313
Email: jfinnigan@tgf.ca

**Counsel for the Respondent,
The Ontario Power Authority**

Oslers, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Paul A. Ivanoff
Tel: (416) 862-4223
Fax: (416) 862-6666
Email: pivanoff@osler.com

**Counsel for the Respondent,
Her Majesty The Queen in Right of
Ontario**

**Ministry of the Attorney General
Crown Law Office -Civil**
McMurtry – Scott Building
720 Bay Street, 11th
Toronto, ON
M7A 2S9

John Kelly
Tel: (416) 601-7887
Email: john.kelly@ontario.ca

Eunice Machado
Tel: (416)601-7562
Fax : (416) 868-0673
Email: eunice.machado@ontario.ca

Section 9.9

Notices

All documents, records, notices and communications relating to the Arbitration shall be served on the Parties' counsel of record.

DATED this 5th day of August, 2011.

TRANSCANADA ENERGY LTD.

By: _____

Title

By



TERRY BENNETT

Title

Vice-President, Power, Eastern Growth

HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO

By: David Lindsay

Title Deputy Minister of Energy

ONTARIO POWER AUTHORITY

By: _____

Title

Section 9.9

Notices

All documents, records, notices and communications relating to the Arbitration shall be served on the Parties' counsel of record.

DATED this 5th day of August, 2011.

TRANSCANADA ENERGY LTD.



By: WILLIAM C. TAYLOR

Title SENIOR VICE-PRESIDENT, EASTERN POWER

By _____

Title _____

HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO

By: David Lindsay

Title Deputy Minister of Energy

ONTARIO POWER AUTHORITY

By: _____

Title _____

AUG-06-2011 10:40

(416) 325-4646

P.015

David Lindsay To David Lindsay

Section 9.9

Notices

All documents, records, notices and communications relating to the Arbitration shall be served on the Parties' counsel of record.

DATED this

day of _____, 2011.

TRANSCANADA ENERGY LTD.

By: _____

Title

By

Title

**HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO**

D. L. Lindsay

By: David Lindsay

Title Deputy Minister of Energy

ONTARIO POWER AUTHORITY

By

Colin Andersen
Colin Andersen

Title Chief Executive Officer

SCHEDULE "A"

CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT sets forth the terms pursuant to which ► will provide or receive certain confidential information during the course of participating at the Arbitration Hearing between the Claimant, TransCanada Energy Ltd., and the Respondents, Her Majesty the Queen in Right of Ontario and the Ontario Power Authority.

The information that will be disclosed is considered to be proprietary and confidential information ("Confidential Information"). For the purpose of this Agreement the party disclosing Confidential Information is referred to as the "Disclosing Party", the party receiving such Confidential Information is referred to as the "Receiving Party".

The Receiving Party agrees that he/she has been made aware of the confidentiality terms in Article 8 of the Arbitration Agreement dated August ,2011 and agrees to maintain in strict confidence all Confidential Information disclosed by the Disclosing Party. The Receiving Party shall not disclose and shall prevent disclosure of Confidential Information to any third party without the express written permission of the Disclosing Party and shall not use Confidential Information for any commercial use, except for the purpose consistent with giving evidence at the Arbitration Hearing. In the event the Receiving Party is required by judicial or administrative process to disclose Confidential Information, the Receiving Party will promptly notify the Disclosing Party and permit adequate time to oppose such process.

The obligation of confidentiality and restricted use imposed herein shall not apply to Confidential Information that:

1. is known to the public or the Receiving Party prior to disclosure;
2. becomes known to the public through no breach of this Agreement by the Receiving Party;
3. is disclosed to the Receiving Party by a third party having a legal right to make such disclosure; or
4. is developed independently of the Confidential Information by the Receiving Party.

The Receiving Party agrees that the Confidential Information disclosed by the Disclosing Party will be used solely for the purposes consistent with the Arbitration Agreement and participation at the Arbitration Hearing or providing evidence during the course of the Arbitration Hearing. The Receiving Party will restrict transmission of such Confidential Information to those advisors and representatives who need to know the Confidential Information, for the purposes of the Agreement it is being agreed by the Receiving Party that such advisors and representatives are or will be placed under similar written obligations of confidentiality and restricted use as are contained in this Agreement and in the Arbitration Agreement.

It is understood that unauthorized disclosure or use by the Receiving Party hereto of Confidential Information may cause irreparable harm to the Disclosing Party and result in significant commercial damages, which may not adequately compensate for the breach. In addition to any remedies that may be available at law, in equity or otherwise, the Receiving Party agrees that the Disclosing Party shall be entitled to obtain injunctive relief enjoining the Receiving Party from engaging in any of the activities or practices which may constitute a breach or threatened breach of this Agreement, without the necessity of proving actual damages.

Upon written request by the Disclosing Party, the Receiving Party shall promptly return to the Disclosing Party all materials furnished by the Disclosing Party pursuant to this Agreement. The Receiving Party will not retain samples, copies, extracts, electronic data storage, or other reproduction in whole or in part of such materials. All documents, memoranda, notes and other writing based on such Confidential Information shall be destroyed.

Notwithstanding anything to the contrary in this Agreement, the Receiving Party acknowledges that this Agreement, the Confidential Information, and any other document or agreement provided or entered into in connection with the Arbitration Agreement or Arbitration Hearing, or any part thereof or any information therein, may be required to be released pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended.

This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

AGREED TO as of the ► day of ►

Witness

(Name)

SCHEDULE "B"

FULL AND FINAL RELEASE

WHEREAS TRANSCANADA ENERGY LTD. ("TCE") and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AND THE ONTARIO POWER AUTHORITY (the "Respondents") have agreed to settle all matters outstanding between them in respect of and arising from the Southwest GTA Clean Energy Supply Contract dated as of October 9, 2009 ("CES Contract") the letter dated October 7, 2010 by which the Ontario Power Authority (the "OPA") terminated the CES Contract and acknowledged that TCE was entitled to its reasonable damages (the "October 7 Letter") and TCE's claim that is the subject of a Notice given by it dated April 27, 2011 pursuant to section 7 of the *Proceedings Against the Crown Act* (the "Claim");

IN CONSIDERATION of the payment of the settlement amount agreed by the parties for all claims arising out of and in relation to the CES Contract, the October 7 Letter and the Claim [as set out in the ~~Insert title of document setting out settlement terms/arbitration award~~] (the "Arbitration") and/or in consideration of the payment of the Final Award made in the arbitration proceedings between TCE and the Respondents pursuant to an Arbitration Agreement dated ►, and the payment by the Respondents to TCE of the sum of \$5.00 (five dollars) and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the undersigned, TCE, its directors, officers, employees, agents, servants, administrators, successors, shareholders, members, subsidiaries, affiliates, insurers, assigns and related parties from time to time (collectively, the "Releasor");

THE RELEASOR HEREBY RELEASES, ACQUITS, AND FOREVER DISCHARGES WITHOUT QUALIFICATION the Respondents and their respective directors, officers, employees, agents, successors, subsidiaries, affiliates, insurers and assigns (the "Releasees") from all manner of actions, causes of action, suits, proceedings, debts, dues, accounts, obligations, bonds, covenants, duties, contracts, complaints, claims

and demands for damages, monies, losses, indemnities, costs, interests in loss, or injuries howsoever arising which hereto may have been or may hereafter be sustained by the Releasor arising out of, in relation to or in connection with the CES Contract, the October 7 Letter, the Claim or the Arbitration and from any and all actions, causes of action, claims or demands of whatsoever nature, whether in contract or in tort or arising as a fiduciary duty or by virtue of any statute or otherwise or by reason of any damage, loss or injury arising out of the matters set forth above and, without limiting the generality of the foregoing, from any and all matters that were raised or could have been raised in respect to or arising out of the CES Contract, the October 7 Letter or the Claim. Notwithstanding the foregoing, nothing in this Release will limit, restrict or alter the obligations of the Respondents to comply with the terms of any settlement agreement with the Releasor or to comply with any Final Award made by the Arbitrator in favour of the Releasor pursuant to the Arbitration.

IT IS UNDERSTOOD AND AGREED that this Full and Final Release is intended to cover, and does cover: (a) not only all known injuries, losses and damages, in respect of and arising from the CES Contract, the October 7 Letter and the Claim, but also injuries, losses and damages not now known or anticipated but which may later develop or be discovered, including all the effects and consequences thereof, and (b) any and all of the claims or causes of action that could have been made at the Arbitration by the Releasor against the Releasees, in respect of and arising from the CES Contract, the October 7 Letter or the Claim, and that this Full and Final Release is to be construed liberally as against the Releasor to fulfill the said intention.

AND FOR THE SAID CONSIDERATION it is agreed and understood that, the Releasor will not make any claim in respect of and arising from the CES Contract, the October 7 Letter or the Claim or take any proceedings, or continue any proceedings against any other person or corporation who might claim, in any manner or forum, contribution or indemnity in common law or in equity, or under the provisions of any statute or regulation, from any other party discharged by this Full and Final Release.

IT IS UNDERSTOOD AND AGREED that this Full and Final Release shall operate conclusively as an estoppel in the event of any claim, action, complaint or proceeding which might be brought in the future by the Releasor with respect to the matters covered by this Full and Final Release and arising from the CES Contract, the October 7 Letter, or the Claim and the Arbitration. This Full and Final Release may be pleaded in the event any such claim, action, complaint or proceeding is brought, as a complete defence and reply, and may be relied upon in any proceeding to dismiss the claim, action, complaint or proceeding on a summary basis and no objection will be raised by any party in any subsequent action that the other parties in the subsequent action were not privy to the formation of this Full and Final Release.

AND FOR THE SAID CONSIDERATION the Releasor represents and warrants that it has not assigned to any person, firm, or corporation any of the actions, causes of action, claims, debts, suits or demands of any nature or kind arising from the CES Contract, the October 7 Letter or the Claim which it has released by this Full and Final Release.

IT IS FURTHER UNDERSTOOD AND AGREED that neither the Releasor nor the Releasees admits liability or obligation of any kind whatsoever in respect of the CES Contract, the October 7 Letter or the Claim.

IT IS FURTHER UNDERSTOOD AND AGREED that the facts and terms of this Full and Final Release and the settlement underlying it will be held in confidence and will receive no publication either oral or in writing, directly or indirectly, unless deemed essential on auditor's or accountants' written advice for financial statements or income tax purposes, or for the purpose of any judicial proceeding, in which event the fact the settlement is made without admission of liability will receive the same publication simultaneously or as may be required by law, including without limitation, the disclosure requirements of applicable securities law.

IT IS FURTHER UNDERSTOOD AND AGREED that this Full and Final Release shall be binding upon and enure to the benefit of the successors or assigns as they case may be, of all the Parties to this Full and Final Release.

IT IS FURTHER UNDERSTOOD AND AGREED that this Full and Final Release shall be governed by the laws of the Province of Ontario and the laws of Canada applicable therein. TCE attorns to the non-exclusive jurisdiction of the courts of the Province of Ontario in respect of any dispute arising from or in connection with or in consequence of this Full and Final Release.

TCE ACKNOWLEDGES AND AGREES that it fully understands the terms of this Full and Final Release and has delivered same voluntarily, after receiving independent legal advice, for the purpose of making full and final compromise and settlement of the claims and demands which are the subject of this Full and Final Release.

DATED this _____ day of _____, 2011.

TRANSCANADA ENERGY LTD.

By: _____
Title

By _____
Title

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: June 17, 2011 10:40 AM
To: Khatri, Anupa (ENERGY)
Subject: FW: Oakville Decision Tree Flowchart
Attachments: Decision Tree Flowchart - September 23 2010- v.2.doc

Please print the word document thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Perun, Halyna N. (MEI)
Sent: October 4, 2010 3:48 PM
To: Lindsay, David (ENERGY)
Cc: Wismer, Jennifer (MEI)
Subject: FW: Oakville Decision Tree Flowchart

Privileged and Confidential

Hello Deputy – Further to our conversation this morning, please find attached the decision tree we produced for MO's consideration.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Linington, Brenda (MEI)

Sent: September 23, 2010 5:17 PM

To: MacLennan, Craig (MEI)

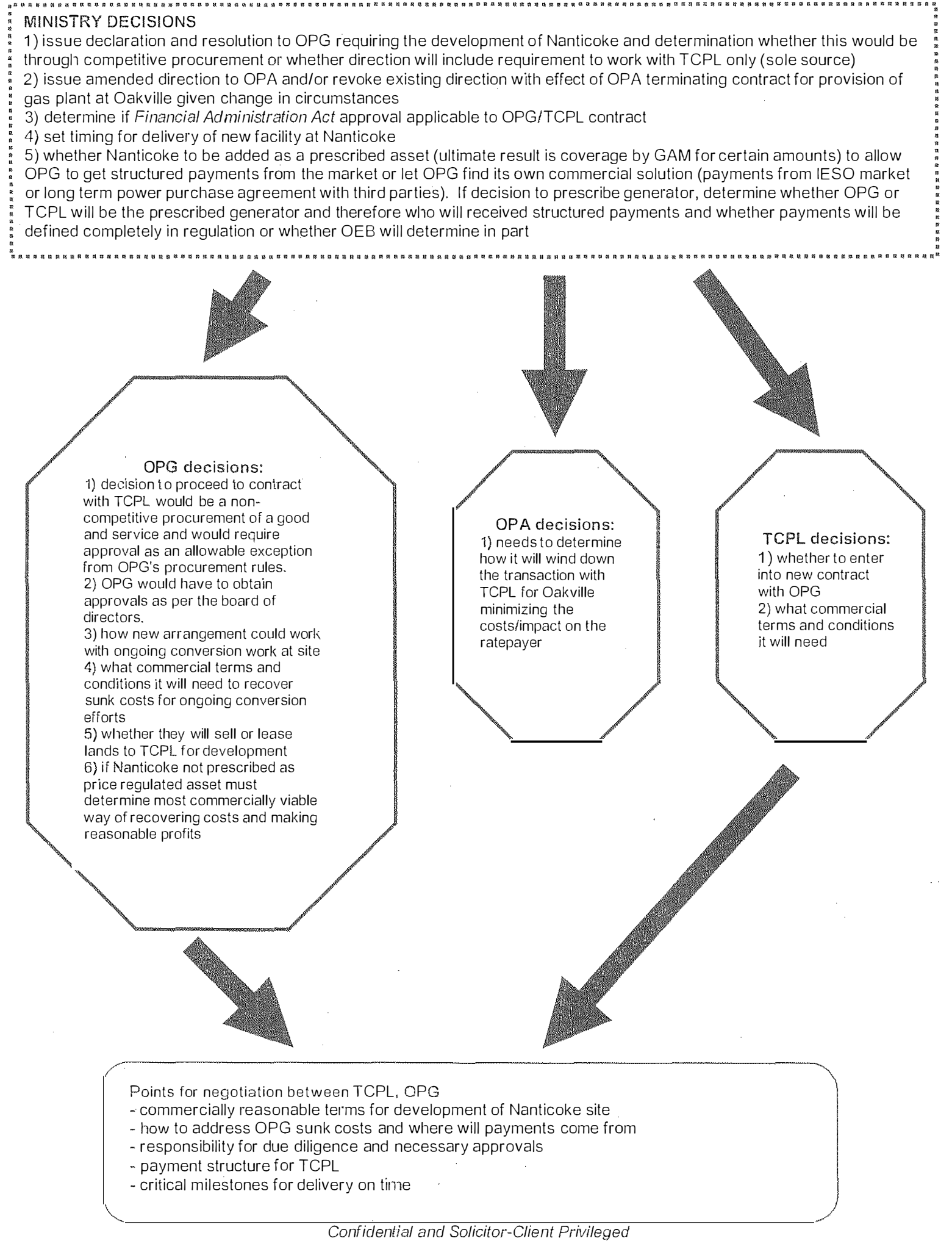
Cc: Wismer, Jennifer (MEI); Perun, Halyna N. (MEI); Calwell, Carolyn (MEI); Rehob, James (MEI); Kacaba, Jennifer (MEI)

Subject: Oakville Decision Tree Flowchart

Hi – further to your inquiry – please find attached a flow chart which sets out a decision tree. We have divided into two charts based on the type of Ministerial decisions that would affect the structure of the approach. Each flowchart canvasses a different option that we have called in short form “combined” versus “separate”. It may be best to review in print layout or print preview. Please let us know if there are any questions or if further assistance is required. Thanks Brenda

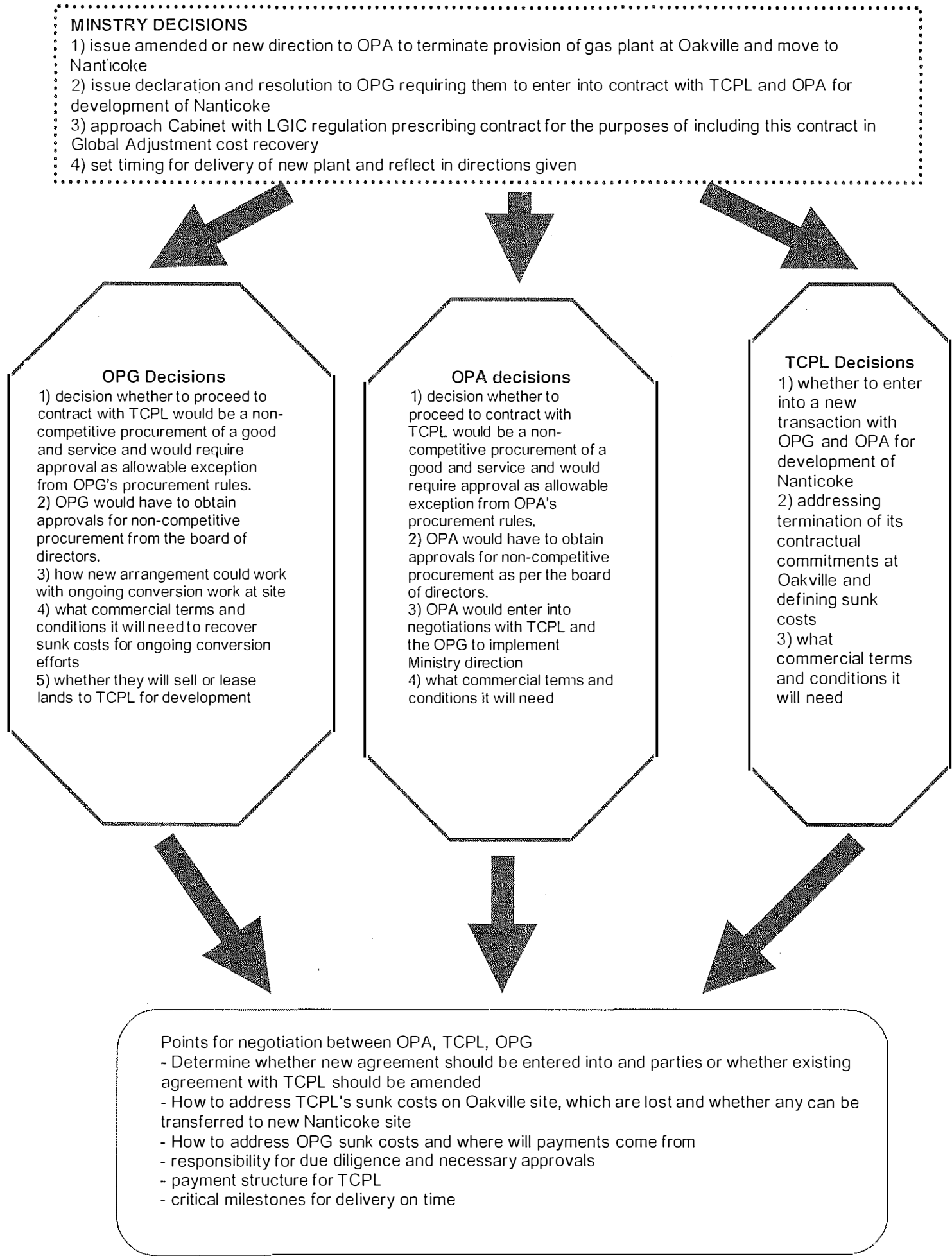
EXPLANATION OF SEPARATE AGREEMENT APPROACH:

Both options assume that the decision has been made that the procurement of the gas plant is necessary. We are calling this option the separate agreement approach as it separates the discussions regarding the termination of the Oakville agreement from the new agreement regarding development of a gas plant at Nanticoke involving OPG and TCPL. Different ministry decisions would lead to different cost recovery methodology being used as a basis for an agreement on the development of the Nanticoke site though either approach could ultimately utilize the GAM method if desired. We have assumed that the direction to OPG will include a requirement to work with TCPL at Nanticoke but the work could be a competitive procurement if desired which would lead to TCPL having to compete with other proponents and bearing the risk of not ultimately being the selected proponent. This would also leave OPA to resolve its existing contract with TCPL separately. This approach is contingent on feedback from Ministry staff, OPG and OPA.



EXPLANATION OF COMBINED AGREEMENT APPROACH

Both options assume that the decision has been made that the procurement of the gas plant is necessary. We are calling this option the combined agreement approach as it involves a single further agreement or amended existing agreement between TCPL and OPA being negotiated to move the gas plant from the Oakville to Nanticoke sites. The Ministry decisions would lead to a cost recovery methodology that requires involvement of the OPA. This approach is contingent on feedback from Ministry staff, OPG and OPA.



Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: June 17, 2011 1:29 PM
To: Girling, James (MCS)
Subject: oakville gas plant

Hi Jim – I need to speak with you urgently about the Oakville gas plant and legal branch's advice – please let me know when you would be free - I need five minutes of your time – thank you

Halyna

Halyna N. Perun
A/Director
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Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: June 17, 2011 3:52 PM
To: Dunning, Rebecca (MEI)
Cc: Khatri, Anupa (ENERGY); Wismer, Jennifer (ENERGY)
Subject: call with the DM?

Hi Rebecca – any chance that I could speak to the Deputy before he leaves for the day (for five minutes) – on TCE and Japan matter (two items – quick update).

Thank you!

Halyna

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Subject: call with the DM?

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Halyna

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11/11/11

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: June 20, 2011 11:49 AM
To: Khatri, Anupa (ENERGY)
Subject: FW: OPA et al (part two)
Attachments: Oakville - Email from James Rehob dated April 13, 2010.pdf

Please print thanks

Halyna

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From: Miceli, Martina (ENERGY)
Sent: June 20, 2011 11:45 AM
To: Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY)
Subject: OPA et al (part two)

Hi Halyna and Carolyn,

Please find the last attachment, as apparently it was missed due to the Printer rejecting it. Thank you for understanding and hope you are enjoying the beautiful weather.

Kindest Regards,

Martina Miceli
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Ministry of the Attorney General
Ministry of Energy/Ministry of Infrastructure
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Please consider the environment before printing this e-mail message

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8

11
2
4

Montano, Teresita (MEI)

From: Rehob, James (MEI)
Sent: April 13, 2010 12:54 PM
To: Montano, Teresita (MEI)
Subject: FW: Oakville
Importance: High
Attachments: Attachment 1 BRIEFING NOTE 2 on Oakville and King energy plants March 22.10.doc; Attachment 2 B20 - Southwest GTA Supply - March 31 2010 (2).doc; Attachment 3 MN - TransCanada Oakville 19-04-10r2 (2).doc; CO Comp note on Oakville April 13 10.doc

Hi, T! Please print two copies – one for me and one for file.
Thanks!
James

From: Vidal-Ribas, Victoria (MEI)
Sent: April 13, 2010 12:53 PM
To: Wismer, Jennifer (MEI)
Cc: Rehob, James (MEI); Girling, James (MEI); Linington, Brenda (MEI); Jennings, Rick (MEI); McKeever, Garry (MEI); Bishop, Ceiran (MEI)
Subject: Oakville
Importance: High

Jenn, attached is the summary note that I promised yesterday. Attached are some additional materials that may be of assistance to CO. The options note that Brenda prepared was the discussion document that arose from the luncheon meeting that we attended a while back. You'll see that the legal note doesn't recommend a course of action but simply reflects various options and their elements. Hope this is helpful. Please let me know if you or CO need anything else.

Thanks to the team (with Brenda holding the pen) for pulling this together.

04/13/2010

BRIEFING NOTE

ISSUE: Options for facilitating development of Gas Fired peaking plants in the Town of Oakville and King Township

CURRENT STATUS:

- Ontario Power Authority directed to procure peaking plants in area to south west of Toronto including Oakville (900 MW in service date of no later than December 31, 2013) and one in York Region (350MW in service no later than December 31, 2011).
- Contracts for the two plants awarded and power companies undertook obtaining all necessary approvals.
- Proponents of both plants have approached province for assistance given local resistance.
- MPP Kevin Flynn introduced Bill to establish minimum separation distances between gas fired power plants and sensitive uses such as residential and day care facilities.

York Energy Centre Project:

- Has received all necessary approvals except site plan approval, development permit from the Lake Simcoe Region Conservation Authority for access, and building permit. Permit to take water also raised but it will not be addressed as it is not required prior to financial close.
- King Township has passed interim control by-law preventing locating of plant for at least one year while issue studied. Outcome of study could be rezoning of lands preventing use for plant. Proponent has made application to the Court asking that the interim control by-law be quashed.

Oakville Project:

- Town of Oakville has passed Interim Control By-law prohibiting for one year any new power generating facility greater than 10 MW, while the Town studies the impact and a by-law to control the emissions of fine particulate matter. Ontario Municipal Board upheld Interim Control By-law and proponent has now requested leave to appeal to Divisional Court.
- Town of Oakville has also passed a by-law regulating fine particulate matter. The plant as designed would not meet the emission standards set by the municipal by-law.
- TransCanada is in the process of completing its Environmental Screening Process to complete requirements of regulation under the Environmental Assessment Act.

Options for Addressing Municipal Actions to Prevent Development of Plants:

Proposed Action	Accomplishes - Pros	Does not Accomplish - Cons
Planning Act:		
Ministers Zoning Order under s. 47 of the Planning Act	<ul style="list-style-type: none"> - would zone land to permit peaking plant - would take precedence over interim control by-law so any further appeals/court actions regarding the interim control by-laws could be abandoned 	<ul style="list-style-type: none"> - site plan approval would still be required and would be required prior to building permit being issued - does not address application of a municipal emission control by-law to prevent operation once plant is constructed. Additional response to this type of by-law would still be required if plant unable to meet standards - does not address requirement for Development Permit from Conservation Authority required in York - any person could apply to amend MZO and this application can be appealed to Ontario Municipal Board
LGIC Regulation pursuant to s. 62.0.1 of the Planning Act setting out that peaking plants are not subject to the Planning Act once they have received approval under the Environmental Assessment Act.	<ul style="list-style-type: none"> - consistent with policy that government energy projects are not subject to Planning Act if approved under Environmental Assessment Act - would allow development of plants subject only to other approvals that may be required such as building permits - applications for site plan approval would not require approval but developer could still plan 	<ul style="list-style-type: none"> - would need to obtain consent of Minister of Municipal Affairs and Housing to request Regulation - does not address application of a municipal emission control by-law to prevent operation once plant is constructed. Additional response to this type of by-law would still be required if plant unable to meet standards - does not address requirement for Development Permit from

	to meet municipal requirements - appeals/court actions regarding the interim control by-laws could be abandoned	Conservation Authority required in York
Conservation Authorities Act:		
If CA does not approve development permit based on information provided - An Order in Council or Regulation pursuant to the Conservation Authorities Act providing that the Lake Simcoe Region Conservation Authority does not have jurisdiction over the entry road to the site. Other option is to return appeal decision making authority to the Minister of Natural Resources so that decision could be obtained more quickly.	- if access road not within regulated area then CA would not have jurisdiction and could not issue development permit - if development permit application remains outstanding then providing MNR with approval authority could remove possible political considerations from decision	- unclear what implications would be on Conservation Authority to remove a small portion of regulated area – could be seen as contrary to public safety - changing appeal decision making authority may not necessarily secure approval.
Municipal Act:		
- Possible fine particulate matter by-law – in place in Oakville but not in King Township. Possible legal avenues to prevent application of fine particulate matter by-law to peaking plant: - Province could attempt to use regulation making authority to set a standard for emissions that must be followed. - The Lieutenant Governor in Council may where desirable in the provincial interest make a	- may put in place provincial limits that would take precedence over municipal by-laws	- it is unclear if there is regulation making authority available to implement this option. Municipal by-law would be of no effect if it was in clear conflict with provincial requirements and this would only occur if it was impossible to implement both. Would be difficult to establish provincial requirement that conflicted with municipal by-law. - ability to restrict municipal powers for 18

regulation pursuant to the Municipal Act, 2001 restricting municipal powers for 18 months.		months limited given authority used to pass municipal by-law.
Comprehensive:		
Legislation to provide that the Planning Act requirements, Conservation Authority Development Permits and any municipal by-laws pursuant to the Municipal Act do not apply to peaking plants. Would be possible to do legislation in combination with other options – for instance a Planning Act regulation providing that its processes do not apply to peaking plants followed up with legislation that addresses municipal by-laws regulating air emissions.	<ul style="list-style-type: none"> - single comprehensive action that would clearly provide authority to locate plants subject to the Environmental Assessment Act approval process - alternatively could be used in combination with regulation under Planning Act so that construction could commence and then air emissions standards could be addressed by legislation 	<ul style="list-style-type: none"> - time required to approve proposed legislation. If used in combination with Planning Act regulation could allow construction to commence but risk that if proposed legislation not introduced that plants may not be able to be used as designed.

Prepared by:

Brenda Linington, Senior Counsel, LSB MEI 416 325-1785

Date:

March 22, 2010

March 31, 2010 – B(20)

Southwestern GTA Supply

ISSUE:

Oakville council voted on March 29, 2010 to extend the interim control bylaw by an additional year citing need for further study of environmental and safety issues.

TransCanada announced on March 30, 2010 that it will take legal action against the bylaw.

For matters relating to York Region Supply please see B(04); for other gas-fired generation not in the Southwest GTA please see B(15).

SUGGESTED RESPONSE:

- The Ontario government remains committed to both improving power supply and reducing harmful emission in the southwest GTA – a region which requires local generation to assure long-term reliability and where urban expansion has resulted in above-average growth in peak demand.
- The new 900 MW gas-fired generation facility in Oakville is essential to meeting the need for new, clean, reliable power in southwest GTA, an area of rapid growth.
- We recognize the community's concerns and have launched a clear air plan that will help improve air quality in the region. As part of this comprehensive plan:
 - The Ministry of Environment has launched a new task force, led by Dr. David Balsillie, that will be required to develop and report back on a detailed action plan to improve air quality by the end of June 2010. The report will include air quality improvement targets, strategies and timelines.
 - The Ontario Power Authority (OPA) will invest \$30 million over five years in a new industrial energy efficiency program to reduce both electricity and gas consumption.
 - Establish a Working Group on Cleaner Energy and Industrial Efficiency with Holcim Canada Inc., a local cement company, to explore energy efficiency and cleaner industrial emissions. MEI and the OPA will also participate in the group.
 - The OPA will work closely with local distribution companies to identify opportunities for renewable energy generation under the new Feed In Tariff program
 - The OPA will work to achieve 500 megawatts (MW) of conservation in west GTA by 2014.

IF ASKED ABOUT MPP FLYNN'S PRIVATE MEMBER'S BILL/SETBACKS:

- We recognize that MPP Flynn's private members' bill aims to address his constituents concerns and we look forward to debate in the Legislature on this bill.
- All gas-fired generation projects must meet or exceed Ontario's safety requirements.
- Natural gas projects must also complete the Environmental Screening Process which requires proponents to identify potential and mitigate environment effects as well as consult with members of the public.
- Plants are sited according to existing zoning laws, which determine where industrial projects can be located.
- Municipalities (like Oakville), through their Official Plans, have the ability to work with proponents to establish zoning standards like setbacks.
- There are dozens of gas-fired generation facilities in Canada and hundreds in the U.S. There are over 15 gas plants operating within the core area of New York City alone within similar distance or even closer to residences and other buildings.

IF ASKED ABOUT DETAILS OF THE GAS PLANT:

- TransCanada Corporation will build and operate a 900 MW combined-cycle, natural gas-fired power plant in Oakville by December 31, 2013
- The \$1.2 billion plant and will create approximately 600 jobs during the construction period and 25 permanent jobs.
- In addition to the construction jobs, economic benefits for the community are expected to include 25 permanent opportunities at the plant, over \$1 million annually in municipal tax revenue, along with Ontario-purchased equipment and supplies.
- This facility will provide homes and businesses with an increased security of supply and contribute to the government's goal of eliminating coal-fired generation in the Province.
- Local gas-fired generation facilities such as this one are necessary to ensure the reliability of the electricity system during periods of higher demand.

IF ASKED ABOUT THE ONTARIO MUNICIPAL BOARD DECISION TO UPHOLD THE OAKVILLE INTERIM BYLAW:

- The OMB determined that the City of Oakville had reason and precedence to take a reasonable amount of time to study the benefits and impacts of the project in order to make a better informed decision on land use requirements.

- In issuing their decision the OMB emphasized that the generating plant would serve the public interest and urged Oakville to give due consideration to this and to make timely decisions in recognition of the time constraints that TransCanada is facing.
- In this same ruling the OMB found that there was no demonstration of public benefit or authority for Oakville to make the proposed Official Plan Amendment which would have restricted the size of generating plants, and so did not allow the Amendment.

IF ASKED ABOUT PM 2.5 EMISSIONS FROM THE OGS:

- Almost all local pm 2.5 emissions in the Southwestern GTA come from vehicles, homes and small to mid-sized industrial activity.
- A gas plant would contribute less than 1 per cent of the total pm 2.5 emissions in the Southwestern GTA.
- The Oakville Generating Station would actually incrementally improve the level of pm 2.5 emissions in the Southwestern GTA compared with the old Lakeview coal-fired generating station.
- Oakville and the Southwestern GTA need a local, cleaner energy supply.
- Future generations deserve the same access to reliable electricity that Oakville and Ontario have enjoyed -- and the Oakville Generation Station is a cleaner source of power than the coal plants we've been relying on.
- Oakville has an opportunity to take advantage of Ontario's clean air strategy for the Southwestern GTA, which includes 30 million dollars over the next 5 years to help industries improve energy efficiency and a task force to address the causes of pollution including pm 2.5.

IF ASKED ABOUT THE CLARKSON AIRSHED STUDY AND OTHER ENVIRONMENTAL CONCERNS:

- Government, the OPA and all of the proponents are fully aware of the study findings and are working to be able to mitigate emissions impacts from any plant located in the SWGTA.
- That's why the Ministry of the Environment has launched a new task force, led by Dr. David Balsillie that is required to develop and report back by the end of June 2010 on a detailed action plan to improve air quality in the region.
- This task force will work with a community advisory committee to establish targets, timelines and strategies to improve air quality in the southwest GTA.

- Communities and individuals also have the opportunity for input into the environmental review process. The proponent will be required to address the potential cumulative impacts of its project at the approvals stage of the process
- The proposed plant will be equipped so that emissions will be lower than the Ministry of Environment's limits by at least 70%.
- The emission standards in this RFP mean that the plant's technology will be amongst the best lowest emitting technologies available.

IF ASKED ABOUT THE INTEGRITY OF THE RFP PROCESS:

- Each proposal was evaluated against a number of factors, including community outreach, engineering, procurement/construction agreements, fuel supply, etc.
- An independent evaluation team reviewed all submissions against the criteria.
- This team is comprised of representatives from the OPA, IESO and the OEB. The committee had an independent chair and its activities were overseen by the Fairness Advisor.

IF ASKED ABOUT LOCATING A GAS PLANT IN NANTICOKE INSTEAD OF THE SWGTA:

- Nanticoke was identified as a possible location for a new gas-plant in the OPA's 2006 IPSP
- The OPA determined it was not the most cost-effective option to meet the SWGTA's needs.
 - New transmission to and into the SWGTA would be required at an estimated cost of about \$200 million.
 - Converting Nanticoke to a gas plant would be a complex and expensive process that would result in a less efficient, more polluting and more costly gas plant.
 - SW GTA needs local generation to reliably and safely meet the needs of its growing population
 - The proposed new plant saves transmission, is more cost and operationally efficient and will better meet local needs.

IF ASKED ABOUT THE FORMER LAKEVIEW GENERATING STATION SITE:

- We were able to respect the community's wishes and rule out Lakeview because there are other suitable sites that are available for generation in southwest GTA.

IF ASKED ABOUT TRANSCANADA'S NOV 24TH PRIVATE MEETING WITH RESIDENTS' ASSOCIATIONS

- This meeting has been initiated by TransCanada as part of their outreach. They are best able to answer questions about it.
- We do understand that TransCanada has already held two public information sessions, and is planning on hosting several more in the coming weeks and months. These will be open to all members of the public.

Background

Clean Energy Supply Procurement :

Future In-Service Dates are **CONFIDENTIAL**

Project	Size (MW)	Status	In-Service Date
GTAA Cogen	90	On-line	February 2006
Loblaws DSM	10	On-line	June 2006
Greenfield Energy Centre	1005	On-line	October 2008
St. Clair Power	577	On-line	March 2009
Greenfield South	280	Approvals complete. Construction not yet started	2012-2013
TOTAL ONLINE	1682		
TOTAL	1962		

Status of Other New Contracted or Procured Gas-Fired Generation Facilities in the GTA:

Future In-Service Dates are **CONFIDENTIAL**

Project	Size (MW)	Status	In-Service Date
Portlands Energy Centre in SCGT Operation	340	On-line	June 2008
Portlands Energy Centre in CCGT Operation (Incremental)	210	On-line	April 2009
(Sithe) Goreway Station	839	On-line	June 2009
TransCanada Halton Hills Generating Station	632	Under construction	Summer 2010
TransCanada Oakville Generating Station	900	Contract announced	2013
TOTAL ONLINE	1389		
TOTAL	2921		

Southwest GTA Direction

- On August 18, 2008, Minister Smitherman directed the OPA to launch a competitive procurement process for a combined-cycle natural gas generating plant of about 850 MW in the Southwest GTA. The new facility is to have an in-service date of no later than December 31, 2013.
- The new project will be required to undergo all local, municipal and environmental approvals to ensure it meets or exceeds regulated standards, including those for air quality, noise, odour and vibration.
- The Direction also asks the OPA to arrange a public forum to provide information to local officials and residents regarding the need for a new gas-fired generation facility in the Southwest GTA, which Minister Smitherman will participate in.

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- The SWGTA RFP requires bidders to exceed Ministry of Environment's standards for emissions by 70%.

Public Meetings

- On October 28, 2008, the Minister of Energy and Infrastructure held a town hall in Mississauga on the plan for local-generation. The town hall was attended by over 200 people.
- On March 3rd, 2009, the OPA held a town hall in Mississauga to discuss the SWGTA procurement. At that meeting, the OPA presented findings of a Jacques Whitford report that was released on January 31, 2009. The report looked at the effect of displacing coal plants (Lakeview, Lambton, and Nanticoke) with gas-fired generation on local air quality.
- Mississauga's "The News" reported that at that meeting there was staunch opposition to the proposed gas-fired generation facility in the region.
- The basic findings of the Jacques Whitford study are: the SWGTA region will see a reduction in some contaminants (SO₂ and ozone); for other contaminants (NO₂, CO, and fine particulate matter), there will be little change.
- Across Ontario, displacing coal with gas-fired generation reduces emissions of heavy metals, arsenic and mercury.
- The June 24, 2009 Mississauga news reported that a rally and petition signing against the proposed plant was held in southern Mississauga. The article reported that "hundreds" of local residents attended and that Mayor Hazel McCallion received hundreds of names on a petition. The report quotes the Mayor as stating that she would fight the plant and win.
- The article also reported that Marie Trainer, the Mayor of Haldimand County, offered to host the plant in Nanticoke instead, proposing conversion of the coal plant to gas.
- Councilor Pat Mullin and M.P.P Charles Sousa were also scheduled to speak at the rally but they were not quoted in the article.

Clarkson Airshed Study:

- The Clarkson Airshed Study is being conducted by MOE to look at how emissions from local industries, vehicles, residences and sources outside the study area contribute to air quality in the Clarkson area.
- MOE recently held a public meeting in the area to report their current findings from the ongoing study. This was used as a forum for local residents and politicians to oppose the gas plant. They pointed to the study findings as a rationale to not locate the proposed plant in the SWGTA.
- Rigorous emissions limits for the proposed gas plant are being addressed in the RFP, for oxides of nitrogen (NO_x) and carbon monoxide by requiring levels to be 70% below the provincial standard. These can be achieved by using best available technology and operating

practices.

- At this time there is not a suitable technological solution for lowering small particulate matter, PM_{2.5} Particulate matter. PM_{2.5} is a contaminant of most concern to residents in relation to the proposed gas plant
- The study has found that exceedances of the standard for PM_{2.5} were similar to other urban regions such as Brampton and less than Toronto, Hamilton, St. Catharines and other urban areas of Southern Ontario.
- The three major emissions sources of PM_{2.5} in the Clarkson airshed are industry, vehicle traffic and residential furnaces. An 850 MW gas plant has been estimated to add 1% to the PM_{2.5} emissions in the Clarkson airshed, which would leave the airshed relatively unchanged and still less taxed than many other urban areas of Ontario.
- Ongoing vehicle efficiency improvements and economic redevelopment of the area away from heavy industry promises a lowering of PM_{2.5} much greater than the incremental amount a gas plant would add.
- A comparison study by environmental consultants Jacques Whitford for the OPA found that that there will be a net reduction in particulate matter from electrical generation entering the Clarkson airshed when the coal plants are closed and replaced with generation within the SWGTA / Clarkson airshed.

Southwest GTA Procurement

- On July 16, 2008, Minister Smitherman announced that he will direct the OPA to launch a competitive bidding process for a combined-cycle natural gas plant of about 850 MW in the southwest GTA.
- The new plant will provide local supply to the growing areas of Mississauga, Etobicoke and Oakville.
- With other possible sites available for a natural gas plant in the region, Minister Smitherman also announced that the former Lakeview Generating Station site in Mississauga will no longer be used for electricity generation.
- The Lakeview site being ruled out as a future location for gas-fired generation was well-covered by the media (The Toronto Star, National Post, CBC, CTV, Global, City TV).
- Mississauga Mayor Hazel McCallion praised the province for its decision on Lakeview in many news articles, but said she is readying for another battle (with respect to the plans for a new gas plant in southwest GTA).
- Sithe Global Power LLC has approvals in place to build an 800 MW natural gas-fired plant in the Southdown area between Clarkson and Oakville, and therefore would be a strong contender in the planned southwest GTA procurement.

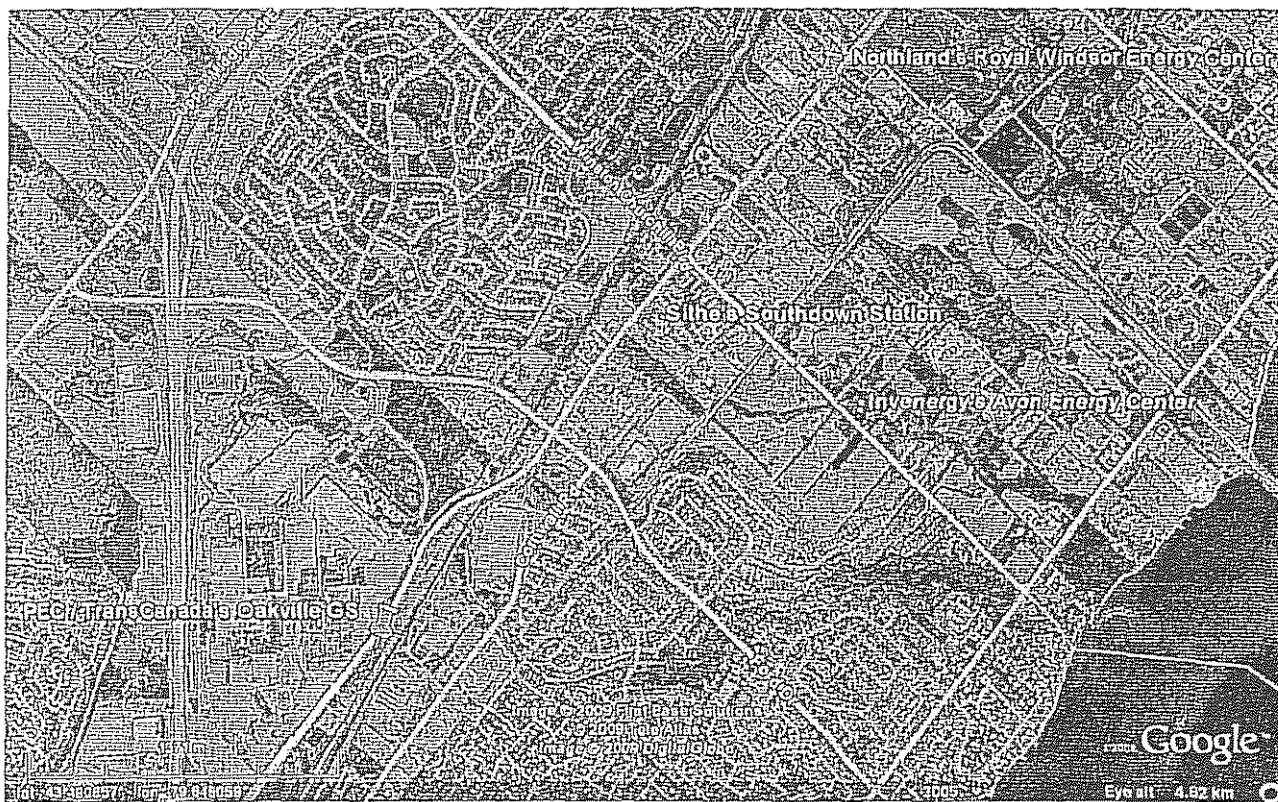
- Mayor McCallion is quoted by the Toronto Star as saying to Minister Smitherman "if Sithe is the winner... the province is going to have to answer to the Clarkson airshed study. I'm just warning you up front."
- The Ontario Power Authority (OPA) released the Southwest GTA Request for Qualifications (RFQ) on October 2, 2008. A list of 7 qualified applicants was released on January 16th 2009.
 - The RFQ determined projects that qualify for a future Request for Proposals (RFP).
 - The RFQ called for a combined cycle gas turbine (CCGT) plant of 750MW to approximately 850MW in Etobicoke, Mississauga, or Oakville.
 - Site identification was not part of the RFQ; sites will be identified early on in the RFP process.
- The qualified applicants from the SWGTA RFQ were:

Qualified Applicant Name	Proposed Project Name
Inverenergy Canada Development Partnership	GTA Southwest Energy Centre (Submission #1)
Inverenergy Canada Development Partnership	GTA Southwest Energy Centre (Submission #2)
Inverenergy Canada Development Partnership	GTA Southwest Energy Centre (Submission #3)
Northland Power Inc.	Clarkson Energy Centre
Portlands Energy Center L.P.	Manby Power Project
Portlands Energy Center L.P.	Mississauga Power Project
Sithe Global Power Southdown ULC	Southdown Station

- On February 6, 2009, the Ontario Power Authority (OPA) issued the draft Request for Proposals for comment.
- On March 13, 2009, the OPA released the Request for Proposals. The registered firms had until July 8, 2009 to submit a proposal. It was expected that the winning bidder would be named in August.

- On April 1, 2009, the OPA released the locations of the remaining four eligible firms. The sites are:

Registered Participant	Facility Name	Location of Site
Inverenergy Canada Development Partnership	Avon Energy Centre	445 Hazelhurst Road, Mississauga
Northland Power Inc.	Royal Windsor Energy Centre	2400 + 2430 Royal Windsor Drive, Mississauga
Portlands Energy Centre L.P.	Oakville Generating Station	1500 Royal Windsor Drive, Oakville
Southdown Station Partnership (a partnership of Sithe Global Power Southdown ULC and Sithe Global Power Southdown II ULC)	Southdown Station or Southdown Station – Facility B	759 – 797 Winston Churchill Boulevard, Mississauga



- All four of these sites are within the Clarkson airshed.
- The OPA issued two addenda to the RFP and Contract; the first on May 12 and the second on June 19, 2009. These addenda add clarity to the emissions requirements and strengthen the measurement and reporting requirements. Additional changes were made to better align the OPA process with the MOE environmental assessment process.

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- On July 8th, 2009, the OPA received bids from all four registered participants in response to the RFP. The OPA expects to announce the successful project in early Fall.
- On August 28th, 2009, the Ontario Power Authority announced that it was extending the deadline for the selection of a proponent for a new gas-fired generation electricity plant in the Southwestern GTA. The decision is now expected by the end of September.
- On September 30, 2009, the Ontario Power Authority announced that it will sign a contract with TransCanada Corporation to design, build and operate a 900 MW electricity generating station in Oakville. TransCanada has estimated the cost of the plan at \$1.2 billion.

TransCanada Oakville Generating Station

- The Oakville Generating Station will be located on an existing industrial site at 1500 Royal Windsor Drive, in the Town of Oakville.
- The 15-acre site is located near natural gas pipelines and the high voltage electricity grid.
- The generating station will meet or exceed all regulatory environmental requirements, including those related to air, noise, and water.
- It will be a 900 MW combined cycle natural gas-fuelled electricity generating station which includes the following major equipment:
 - Two High Efficiency Natural Gas-Fired Combustion Turbine Generators (258 MW each)
 - Two Heat Recovery System Generators with Duct Firing
 - One Steam Turbine Generator (437 MW)
 - One Mechanical Draft Cooling Tower
- The plant is undergoing an Environmental approval and has not received any municipal approvals.

Need for New Generation in the Southwest GTA

- A natural gas generation plan is essential meet the electricity needs of a region whose peak load has grown more than twice as quickly as the provincial average and to support the elimination of coal-fired generation by 2014.
- The IPSP identifies a need for 850 MW of new combined cycle gas-fired generation in the south-west GTA by 2013. Further, 550 MW of simple cycle generation is needed in the GTA area, by 2014.
- New generation is needed to address reliability issues in the area, including supply adequacy, voltage support and system security, and to support coal replacement.

- The OPA identified this need in consultation with the IESO and taking into account the plants already existing and under contract. The IPSP capacity figures assume Eastern Power/Greenfield South (280 MW) will reach completion and are in addition to this project.
- The closing of the Lakeview coal plant in 2005 removed 1,150 megawatts of supply from the grid at a time where demand in the region continued to grow.
- The lack of local generation in the SWGTA increases strain on the aging transmission system. Transformer stations in the region are forecast to exceed their capacity by 2015.

Conservation in West GTA:

- The Ontario Power Authority is working to achieve 500 MW of conservation in the region by 2014.
- Since 2006, the OPA and local distribution companies have reduced peak demand by about 150 MW.
- That's equivalent to the power used by 1.5 million 100-watt bulbs.

Greenfield South – Approvals Issues

- The proposed 280 MW Greenfield South Power Corporation (GSPC) facility was a successful project under the Province's 2,500 MW Request for Proposals for New Clean Energy completed in 2004.
- The proposed location for the project is in an industrial area west of Etobicoke Creek between Dundas Street East, Queensway East, and Loreland Avenue, immediately north of the Canadian Pacific Railway in the City of Mississauga.
- The primary fuel source for this combined cycle plant will be natural gas. Distillate fuel will be used as an alternative fuel source when there are interruptions to the natural gas supply which are estimated to occur approximately four per cent of the time.
- Officials from the City of Mississauga are opposed to the project, and the City has taken steps to delay or prevent project construction. Mayor Hazel McCallion stated, "It's in the wrong location and we've said that from day one...we have no alternative but to ask the Minister to get involved" (Toronto Star, 02/02/06, pB5).
- On March 8, 2006, City of Mississauga Council adopted a zoning by-law amendment which would eliminate power generating facilities as a permitted use on GSPC's lands.
- GSPC appealed the zoning by-law amendment to the Ontario Municipal Board (OMB). An OMB hearing on the Appeal concluded on July 18, 2007.

- On October 4, 2007 the Ontario Municipal Board ruled in favour of GSPC, stating that the City of Mississauga did not demonstrate that there were sufficient public benefits to justify taking away the zoning permission.
- The Board also found that the location of the site is within an industrial area and that power generation is an appropriate use.
- The Board, in its decision, requires the company to meet several conditions, including reducing by 50 per cent the amount of fuel oil that can be kept on site.
- After conferring with legal staff Mississauga City Council decided not to appeal the Board's decision.
- In February 2006, the City of Mississauga appealed to the Minister of the Environment, the Director of the Environmental Assessment and Approvals Branch's decision to deny requests that the project be made subject to a full Environmental Assessment. The Minister of Environment also received appeals from the Coalition of Homeowners for Intelligent Power (a local ratepayers group) and a private citizen.
- On July 16, 2008, the Minister of Environment decided not to subject the project to a full environmental site assessment.

Greenfield South – Status

- Greenfield South has completed approvals, but has to finalize financing before starting construction.
- GSPC has informed the OPA that approvals delays have harmed the economic viability of the project. The contract between GSPC and the OPA was renegotiated. As part of the renegotiation, GSPC dropped its plan for outside fuel storage.

Mississauga Mayor McCallion Requests Decision on Generation

- In response to a local citizen's group proposing residential redevelopment of the 80 hectare Lakeview lands, Mississauga Mayor Hazel McCallion sent Minister Phillips a letter on February 22, 2008 urging the Province to make a decision on the capacity and site for new generation in Mississauga.
- The letter indicated that the City is undertaking a review of the Lakeview site and that a motion which opposes using Lakeview for electricity development would be considered.
- The Lakeview site was viewed as one of the preferred sites in the area for new generation because of its access to transmission, and because it has been a generation site since the early 1960s.
- On February 27, 2008 the Minister sent a letter to Mayor McCallion advising her that there was a need for 850 MW of gas fired generation in Southwest GTA, that Lakeview was still

under consideration as a site and that a direction would be issued to the OPA by June 2008, to establish and clarify the procurement process.

Ontario Municipal Board Hearing

- Ford of Canada and TransCanada Corp. called for an Ontario Municipal Board hearing to challenge a Town of Oakville interim control bylaw and Official Plan amendment, which ban the construction or expansion of power plants with a capacity larger than 10-megawatts. The two companies are advocating that the OMB overturn the two planning measures so TransCanada can build and operate the 900-megawatt Oakville Generating Station. The natural gas-fired plant would be built on the Ford-owned lands of 1500 Royal Windsor Drive.
- According to media reports, the Town of Oakville has argued that its planning measures are necessary to give it enough time to conduct an environmental study to determine what areas of the town can best accommodate the proposed plant. Ford and TransCanada held that the Town instituted the two planning measures as a last ditch effort to withhold development rights.
- Ford lawyer Gerald Swinkin told the OMB that the measures are at odds with the Provincial Policy Statement, which calls for the promotion of opportunities for energy generation. He noted that the Ministry of the Environment already formed a panel of experts who conducted a study. According to the panel's findings, the air in the Clarkson airshed was not unusual for an urban area, and may actually be slightly better than most.
- Town legal counsel John Doherty argued that Oakville's actions were not unusual. He held that municipalities typically wait to alter their official plans to prepare for large power plants until it appears that the project in question is actually approved. TransCanada lawyer Neil Smiley said allowing the bylaw to stand would be crippling to the project, which has a contract with the Ontario Power Authority requiring them to supply 900-megawatts of power by 2013.
- Lawyers representing all three parties completed their closing statements on Tuesday, October 20, 2009.
- A decision by OMB Chair Aristotle Christou was issued on December 4, 2009. The OMB found that Oakville had the authority and that there was precedence to support the Interim Control Bylaw to allow Oakville to become better informed in making its planning and approval decisions.
- The Official Plan Amendment, that would permanently restrict generating plants within Oakville to 10 MW or less, was struck down.
- The ruling also urged, Oakville to recognize the public good being served by the plant and the time constraints that TransCanada was facing.
- On January 26, 2010, TransCanada informed MEI Legal Services Branch that they intended to file a Leave to Appeal the OMB decision on ICBL to the Ontario Divisional Court on the primary basis that the ICBL was in conflict with the Electricity Act and the MEI Ministerial

directive.

Oakville Council Extension of the Interim Control Bylaw

- Oakville council voted on March 29, 2010 to extend the interim control bylaw by one year citing the need for further study of environmental and safety concerns that were not in the terms of reference of their initial study. The bylaw would have expired on March 30, 2010.
- TransCanada announced on March 30, 2010 that they would appeal the bylaw to the Ontario Superior Court of Justice suggesting June 24th as a date for this hearing

TransCanada's Offer to Fund Independent Environmental Study

- TransCanada Corp. has offered to fund an independent environmental review its Environmental Review Report (ERR). This came in response to the Town of Oakville's interest in hiring a third party study to confirm TransCanada's plans to better the emissions limitations set by the Ontario Power Authority.
- TransCanada indicated that it fully supports a review of its ERR, and is willing to cover the cost of hiring a qualified environmental consultant to conduct a review. TransCanada also volunteered to extend the review period from 30 days to 75 days. In doing so, it is more than doubling the normal amount of time that the ministry would require to review our impact.
- In a letter to Oakville Mayor Rob Burton dated October 13, 2009, Oakville Generating Station Project Manager, Terri Steeves, wrote that the funding offer is part of the TransCanada's commitment to community consultation and informed dialogue. Further, the letter indicated that TransCanada strives to implement the best and most advanced technology for its facilities. For example, the industrial gas turbines selected for the generating station represent the most efficient and highest output units currently commercially available.
- The Oakville Beaver reported that Mayor Burton was not impressed with TransCanada's funding offer, saying that the town could pay its own way.

Private Member's Bill on Separation Distances for Natural Gas Plants

- Oakville M.P.P. Kevin Flynn is proposing to introduce through a private member's bill, legislation that would restrict the construction and operation of new natural gas generating plants that are less than 1100 meters from specified structures and properties.
- A draft of the legislation, titled Separation Distances for Natural Gas Power Plants Act, 2010, specifies a distance of 1100 meters from the property boundary of the following:
 - A building or structure used for residential purposes,
 - A building or structure used for a public purpose, including an educational facility, a day nursery, a health care facility, a community centre or a place of worship,
 - A property used for recreational purposes,
 - A property used as a campsite or campground at which overnight accommodation is provided by or on behalf of a public agency or as part of a commercial operation,

- A property used for commercial activity, including a shopping centre and an office building but not including an industrial facility.
- As written the proposed Act would only exempt plants that are already operating or that have all required permits to build and operate. Oakville (and York Energy Centre) would be subject to the act and would not be able to proceed.
- Oakville GS could not fit in an 1100 or even 550 meter setback. TransCanada would seek substantial compensation for lost revenues if such retroactive legislation were applied. The growing demand of SWGTA would have to be met from some other location. This would mean transmission lines to bring the power to SWGTA, likely crossing multiple jurisdictions and, according to the OPA, costing more. The OPA has repeatedly stressed that while there are alternatives to building a plant in the SWGTA, all are less efficient (i.e. more expensive with greater environmental impact) than the Oakville plant.
- No analysis has been shown to justify the distance of 1100 meters, which appears to be a doubling of the setback distance required of wind turbines subject to the GEGEA REA and FIT. The wind distance is based on noise made by wind turbines, not safety.
- With respect to using noise to set back a gas generating plant, gas generating equipment can be enclosed and noise mitigated such that plants can be located less than 200 meters from a receptor site such as a residence or school and still operate well below the MOE noise requirements, whereas a wind turbine cannot be enclosed or the noise otherwise mitigated except by distance.
- From the standpoint of using safety as a metric for determining separation distance for a natural gas generating plant MEI could find no other jurisdiction that does so, or any mechanism that determines the safety of a natural gas generating plant relative to any other use of piped natural gas such as a home or commercial heating.
- Natural gas as it is used by Ontario generating stations is not a stored fuel so that there is not a high amount of energy stored at any time at the plant as there would be at a coal or oil fired plant or at a propane storage facility. The natural gas is used as it is delivered.
- The safety mechanisms that apply are based on integrity of the pipelines, connections, and equipment that burns the gas, and in response to Technical Standards and Safety Authority and industry standards, these systems are operated, inspected and maintained at gas generating plant at levels exceeding the standards required for commercial and residential properties.
- TransCanada has provided information on plants it operates elsewhere, without incident and within zoning/ siting rules that are closer than 200 meters to occupied buildings - in England and in Phoenix AZ, and within 300 meters in downtown NYC. There are over 15 gas generating plants operating within the core area of NYC with similar or closer separation from residences and other buildings.
- The OPA has provided information on setbacks of contracted natural gas generating plants that are already in operation or are under construction with all permits.

Setbacks - OPA Contracted Facilities

Project	Technology	In-Service Date	Average Contract Capacity (MW)	Location	Proximity to Residential Area
Portlands Energy Centre	Combined Cycle (CC)	22-Apr-09	550.0	Toronto	<ul style="list-style-type: none"> 1 km from Leslieville community 1 km from Beach community 450 metres from marina
Goreway Station	CC	04-Jun-09	839.0	Brampton	<ul style="list-style-type: none"> 2.8 km from nearest school and church 3 km from nearest residential area 6.7 km from nearest hospital
Brighton Beach Power Station	CC	01-Jan-06	550.0	Windsor	<ul style="list-style-type: none"> 1.3 km from nearest residential area 2.3 km from nearest school 8 km from nearest hospital
Greenfield Energy Centre	CC	16-Oct-08	1005.0	Courtright	<ul style="list-style-type: none"> 1.5 km from nearest homes 12.5 km from nearest school
St. Clair Energy Centre	CC	30-Mar-09	577.0	Sarnia	<ul style="list-style-type: none"> 2.7 km from nearest homes 2.7 km from nearest school
East Windsor Cogenerating Centre	Combined Heat & Power (CHP)	06-Nov-09	84.0	Windsor	<ul style="list-style-type: none"> 300 metres from nearest residential area 380 metres from nearest church 1 km from nearest school
Great Northern Tri-Gen Facility	CHP	31-Oct-08	11.3	Kingsville	<ul style="list-style-type: none"> 2.6 km from nearest residential area 5.4 km from nearest hospital 5.2 km from nearest school and church
Sarnia Regional Cogeneration Plant	CHP	01-Jan-06	505.0	Sarnia	<ul style="list-style-type: none"> 1.7 km from nearest church 6 km from nearest hospital 4 km from nearest residential area
Sudbury District Energy, Hospital Cogeneration	CHP	01-Jan-06	6.7	Sudbury	<ul style="list-style-type: none"> 1 km from nearest church 500 metres from nearest residential area 1.6 km from nearest shopping centre
GTAA Cogeneration Plant	CHP	01-Feb-06	90.0	Mississauga	<ul style="list-style-type: none"> 3.2 km from nearest residential area 4.5 km from nearest hospital 3.2 km from nearest school
Trent Valley Cogeneration Plant	CHP	01-Jan-06	8.3	Trenton	<ul style="list-style-type: none"> 300 m from nearest residential area 500 m from nearest school 1 km from nearest hospital
Durham College District Energy Project	CHP/District Energy (CHP/DE)	11-Mar-08	2.3	Oshawa	<ul style="list-style-type: none"> Located on Durham College campus CHP site adjacent to the existing Durham College high voltage substation 100 metres from nearest homes
London Cogeneration Facility	CHP/DE	31-Dec-08	12.0	London	<ul style="list-style-type: none"> 100 m from nearest residential area 400 m from nearest school
Warden Energy	CHP/DE	04-Jun-08	5.0	Markham	<ul style="list-style-type: none"> 1.3 km from nearest residential area

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Centre					■ 1.3 km from nearest school
					■ 5.5 km from nearest hospital
Sudbury District Energy Cogeneration Plant	CHP/DE	01-Jan-06	5.0	Sudbury	■ 1 km from nearest hospital
					■ 200 metres from nearest church

OPA Facilities Under Development

Project	Technology	Average Contract Capacity (MW)	Location	Proximity to Residential Area
Oakville Generating Station	CC	900	Oakville	■ 300 metres from nearest school (academy) ■ 400 metres from nearest residential area ■ 1 km from nearest high school ■ 3 km from nearest hospital
Halton Hills	CC	631.5	Halton Hills	■ 3 km from nearest residential area ■ 200 metres from nearest home ■ 450 metres from nearest church ■ 4.7 km from nearest school ■ 2.5 km from nearest hospital
Greenfield South Power Plant	CC	280.0	Mississauga	■ 400 m from nearest residential area ■ 1.5 km from nearest school ■ 1.0 km from nearest hospital
Thorold Cogenerating Project	CHP	236.4	Thorold	■ 100 metres from nearest residential area ■ 250 metres from nearest church ■ 1.5 km from nearest school
York Energy Centre	Simple Cycle (SC)	393.0	King	■ 200 metres from nearest residence ■ 400 metres from church ■ 400 metres from Holland Marsh School ■ 4 km from child care centre ■ 500 metres from public library ■ 2 km from Cawthra Mulock Nature Reserve

OEFC NUG Facilities > 50MW

Project	Technology	In-Service Date	Average Contract Capacity (MW)	Location	Proximity to Residential Area
Ottawa Cogeneration Plant	CHP	1992	68	Downtown Ottawa	■ 800 metres from nearest school ■ 700 metres from nearest church ■ 100 metres from nearest residential area ■ 100 metres from nearest hospital
Cardinal	CHP	Nov-94	156	Cardinal	■ 350 metres from nearest residential area

Power					<ul style="list-style-type: none"> ■ 125 metres from nearest school ■ 300 metres from nearest church ■ 300 metres from nearest residence
Whitby Cogen	CHP	1996	50	Whitby	<ul style="list-style-type: none"> ■ 3 km from nearest residential area ■ 2 km from nearest school ■ 3.5 km from nearest hospital ■ 3 km from nearest church
Lake Superior Power	CHP	1993	110	Sault Ste. Marie	<ul style="list-style-type: none"> ■ 400 metres from nearest church ■ 3 km from nearest hospital ■ 1.5 km from nearest residential area
Windsor Cogeneration Plant	CHP	1996	74	Windsor	<ul style="list-style-type: none"> ■ 1 km from nearest church ■ 700 metres from nearest school ■ 700 metres from nearest residential area ■ 2 km from nearest hospital
West Windsor Power	CHP	31-May-96	116	Windsor	<ul style="list-style-type: none"> ■ 1.3 km from nearest church ■ 2.16 km from nearest school ■ 2 km from nearest residential area
Mississauga Cogeneration Plant	CHP	1992	110	Mississauga	<ul style="list-style-type: none"> ■ 1.5 km from nearest school ■ 1 km from nearest church ■ 500 metres from nearest residential area

Setbacks: SWGTA Proponents

Project	Proximity
Selected Project: Oakville Generating Station (TransCanada)	<ul style="list-style-type: none"> • 300 m from nearest school (academy) • 1 km from nearest high school • 400 m from nearest residential area • 3 km from nearest hospital
Southdown Station (Sithe)	<ul style="list-style-type: none"> • Located on Winston Churchill Boulevard, approximately 700 m from Royal Windsor Drive • 1.5 km from nearest school • 700 m from nearest residential area • 5.2 km from nearest hospital
Royal Windsor Energy Centre (Northland)	<ul style="list-style-type: none"> • Electrical switch yard will be located towards the front of the property, set back about 100 m from Royal Windsor Drive, approximately 1 km from Winston Churchill Boulevard • 700 m from nearest school • 500 m from nearest residential area • 6.2 km from nearest hospital
Avon Energy Centre (Invenergy)	<ul style="list-style-type: none"> • About 0.6 km from Winston Churchill Boulevard, 1.5 km from Royal Windsor Drive • 1.1 km from nearest school (academy) • 2.1 km from nearest high school

	<ul style="list-style-type: none"> • 1 km from nearest residential area • 5.7 km from nearest hospital
Average of three non-winning proposals	<ul style="list-style-type: none"> • 1.4 km from nearest school • 700 m from nearest residential area • 5.7 km from nearest hospital

Prepared by: Allan Jenkins, Coordinator, Clean Energy
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Approved by: Garry McKeever, Director
Energy Supply and Competition
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Rick Jennings, ADM
Office of Energy Supply
(416) 314-6190

Updated: March 31, 2010

MEETING NOTE

NAME OF ORGANIZATION: TransCanada Energy
DATE/TIME OF MEETING: April 19, 2010, 2:30 pm to 3:15 pm
LOCATION OF MEETING: 900 Bay Street, Hearst Block, 4th Floor, Executive Boardroom

PURPOSE: To discuss issues and possible solutions relating to TransCanada Energy's proposed Oakville Generating station

DESIRED OUTCOME: To understand issues affecting procedure with the generating station and discuss possible approaches to mitigation

ATTENDEES: Ministry of Energy and Infrastructure
Brad Duguid, Minister

TransCanada
Alex Pourbaix, President, Energy
Chris Breen, Senior Consultant, Government Relations

AGENDA:

- Presentation of Oakville GS issues
- Discussion of potential solutions

BACKGROUND:

Oakville Generating Station

- On September 30, 2009, the Ontario Power Authority announced that TransCanada Corporation had been chosen to design, build and operate a 900 MW combined cycle electricity generating station in Oakville. This was a result of the SWGTA procurement directive issued to the OPA by the Minister of Energy and Infrastructure on July 16, 2008.
- The Oakville GS site is part of an existing industrial site within the Ford property at 1500 Royal Windsor Drive, in the Town of Oakville.
- The 15-acre site is located near natural gas pipelines and the high voltage electricity grid.

Environmental Review

- The plant is undergoing an Environmental approval. On January 26, 2010 TransCanada published a draft Environmental Review Report (ERR) for public review.
- TransCanada has offered to fund an independent environmental review of the ERR. This was in response to the Town of Oakville's interest in hiring a third party to confirm TransCanada's plans to better the emissions limitations set by the Ontario Power Authority. Oakville declined the offer and is proceeding with its own funding.
- TransCanada also volunteered to extend the review period from 30 days to 75 days. In doing so, it is more than doubling the normal amount of time that the ministry would require to review the impact. The current plan is to issue the Draft for a 30 day review and to follow with a 60 day review period for the final version.

Public Opposition

- Significant public opposition has been expressed by the Mayor of Oakville and the residents of Oakville and nearby communities, particularly about the amount of setback from residences and schools, allowable noise limits and air emissions.
- TransCanada and the OPA have responded to these concerns and provided explanation and further information without noticeable result.
- A well funded community organization, Citizens For Clean Air (C4CA) has mounted a public relations campaign in opposition to the plant, focusing on the emissions of Particulate Matter (PM).

Town of Oakville Actions

- The Council of the Town of Oakville has taken three significant actions to date to slow or possibly stop the construction of the plant within Oakville:
 1. Interim Control By-law (ICBL) which would temporarily, but for at least one year prohibit any new power generating facility greater than 10 MW, while the Town studied the impact
 2. An Official Plan Amendment which would have allowed permanent prohibition
 3. A by-law to control the emissions of fine particulate matter within Oakville
- TransCanada and Ford appealed the first two actions to the Ontario Municipal Board (OMB) in October. The OMB decision upheld the Interim Control By-law, but struck down the Official Plan Amendment. In rendering its decision the OMB noted that they expected the OPA and the provincial government to appear at the hearing or write to explain the public need for the plant, which would appear to be a signal that they would prefer policy direction.

- On March 29 2010, Oakville council voted to extend the Interim Control By Law by the allowed period of one year.
- Oakville introduced its particulate matter by-law in late December 2009 so TransCanada has had limited opportunity to react. It is the view of TransCanada's lawyers that this by-law is not appealable to the OMB as the powers are given to the Town under the Municipal Act.

TransCanada's Expectations for Procedure Under Current Legislative Conditions

- TransCanada expects that Oakville will exploit its by-law powers to slow and if possible stop the construction of the plant.
- TransCanada and Ford have applied to the Ontario Superior Court of Justice, to appeal the Ontario Municipal Board decision on the Interim Control By-Law, seeking a June 24 2010 hearing date but have not yet received a response. TransCanada's lawyers are not confident that the appeal will be successful.
- The particulate matter by-law has set emissions limits that are so low that the plant would not be able to operate.
- It would be very difficult to challenge this by-law under current legislation. The City of Toronto pesticides by-law provides precedence that has been upheld by Ontario courts. The Municipal Act does give municipalities the authority to issue environmental bylaws if there is no conflicting provincial or federal policy.
- Ministry of Environment staff who worked on the City of Toronto by-law have given MEI an initial opinion that it would be difficult to prove Environment regulatory conflict with the Oakville by-law. Environment is examining their policies around GHG and particulates as points of conflict
- It is TransCanada's opinion that any challenge route would be lengthy and could still result in Oakville's actions being upheld.
- TransCanada also pointed out that other generating plant host communities are following Oakville; for example King Township has passed a similar Interim Control Bylaw and is likely to follow with a particulate matter by-law.

TransCanada's Proposal for Legislative Action

- TransCanada's lawyers have proposed some potential legislative responses to exempt Oakville GS from Oakville's planning and by-law authority. These changes would be applicable to other gas plants in other municipalities.
- These proposals have also been given by MEI staff to our lawyers for review and comment, together with comment on whether the GEA regulations could also be used as a model for gas plants.

- As a response to the Interim Control By-law, TransCanada has proposed their preferred approach would be for the province to use the regulation-making provisions in sections 62.01 and 70 (h) of the *Planning Act* to exempt the plant from municipal planning authority. An issue with this approach is interpretation of whether the language allows procedure on the exemption before Environment has issued the Environmental Approval. TransCanada's lawyers have interpreted that the exemption regulation could be issued before, with the exemption subject to the environmental approval being received.
- Other less-preferred approaches have been proposed such as exempting electricity projects from the *Planning Act* through the *Electricity Act*, and modifying the Halton Official Plan to require provisions for electricity projects. Less preferred means that TransCanada's lawyers see these as more complicated and/or time consuming.
- As a response to the particulates by-law, TransCanada has proposed regulation under the *Electricity Act* that exempts from municipal by-laws discharges from electricity generation that are already subject to the *Environmental Assessment Act*. This would place the Oakville particulate by-law in conflict with the provincial regulation, which is not permitted under the *Municipal Act*.
- As less-preferred alternatives, TransCanada's lawyers have proposed making regulation under the *Environmental Protection Act*, or a regulation under the *Municipal Act* which would allow an 18 month suspension of the by-law, which would allow time for statutory amendment.
- MEI legal, in consultation with MAH and MOE legal examined the options and has briefed Minister's Office staff (see attached briefing note prepared by Legal Services Branch).
- Ministry policy and legal staff are in agreement that legislation is the most effective option in ensuring that the various regulatory barriers put in place by municipalities do not prevent completion of the Oakville and North York Region plants.

SUGGESTED RESPONSE:

- Thank you for briefing me on these issues. I share your concern about the impacts of Oakville's actions, and the potential for this to be used as a model for other municipalities.
- I appreciate that you have presented some response options. We have reviewed them in consultation with the other ministries that would be involved.
- This is an urgent issue; we are giving this a priority attention.

Prepared by: Allan Jenkins
Coordinator, Clean Energy
416-325-6926
April 12, 2010

Approved by: Garry McKeever
Director, Energy Supply & Competition
416-325-8627
April 12, 2010

Approved by: Rick Jennings
Assistant Deputy Minister
Energy Supply, Transmission and Distribution Policy
April 12, 2010

BRIEFING NOTE

ISSUE: Description of legal issues relating to the development of the gas fired electricity plant in the Town of Oakville

ATTACHMENTS:

1. Note prepared by Legal Services Branch at MEI regarding legal options available to facilitate development of Oakville and York gas fired power plants dated March 22, 2010.
2. Note prepared by Energy Supply at Ministry of Energy and Infrastructure (MEI) setting out process related to the procurement of a gas fired energy plant for the southwestern GTA supply dated March 31, 2010.
3. Note prepared Energy Supply at MEI for scheduled April 19, 2010 meeting of representatives of TransCanada Energy (TransCanada) with the Minister of Energy and Infrastructure dated April 12, 2010.

SUMMARY:

- In August of 2008 the Minister of Energy and Infrastructure directed Ontario Power Authority (OPA) to procure a gas fired energy plant of approximately 850 MW capacity in southwestern GTA. In September of 2009 OPA announced that TransCanada had been chosen to develop a 900 MW plant (in service date of no later than December 31, 2013) within the Ford property at 1500 Royal Windsor Drive in the Town of Oakville.
- Residents in the area actively oppose the use of this site based mostly on air quality and proximity to nearest school (300m) and residences (400m).
- Oakville Council are taking all steps to stop use of lands for the plant including approving interim control by-law that prevents use of the site for the plant for next year and may result in by-law amendment that would not permit the use. Oakville Council has also approved a by-law regulating emissions of fine particulate matter. As designed the plant would not meet the standards set by the emission control by-law.
- TransCanada is taking all available steps both locally, at Ontario Municipal Board and in the Courts to attempt to obtain necessary approvals to allow the plant at this location. Likely that the approvals will not be obtained to allow in service date of December 31, 2013. For TransCanada to be successful it would have to successfully challenge interim control by-law and obtain zoning to permit use and successfully challenge application of emission control by-law.
- TransCanada has advised OPA that it believes that the force majeure provisions of its contract with OPA have been triggered as TransCanada is now being prevented from performing its obligations under the contract due to the actions of Oakville. The force majeure provisions set out that once triggered TransCanada would not be subject to certain payments required by the contract until the force majeure event is remedied.

- A consideration in any option chosen is the effect of Ontario's actions on any contracts undertaken or the procurement/ tender process.
- TransCanada Energy has approached the province for legislated and other assistance given local resistance.
- MPP Kevin Flynn introduced Bill to establish minimum separation distances between gas fired power plants and sensitive uses such as residential and day care facilities. Ford site would not meet the suggested separation distances.
- To date the province has taken no public steps to assist TransCanada in development of the plant at the Ford site.

Prepared by: Legal Services Branch, Ministry of Energy and Infrastructure
Date: April 13, 2010

Montano, Teresita (MEI)

From: Rehob, James (MEI)
Sent: April 30, 2010 2:24 PM
To: Montano, Teresita (MEI)
Subject: FW: FYI.

Hi, please print! Kindly, James

From: Bishop, Ceiran (MEI)
Sent: March 2, 2010 1:30 PM
To: Rehob, James (MEI)
Cc: Jenkins, Allan (MEI)
Subject: FW: FYI.

James -- see Allan's comments.

1. Would you be ok with stating explicitly that "mutually agreed termination" would be one of the outcomes from amendments to accommodate new regulatory risks?
2. I think the answer on the section numbering question is that 1.12 is the explicit clause about amendment while 1.10 is the area where you've identified potential alternate avenues through which to pursue an amendment (nuanced options). Can you confirm?

C/

From: Jenkins, Allan (MEI)
Sent: March 2, 2010 1:08 PM
To: Bishop, Ceiran (MEI)
Cc: McKeever, Garry (MEI)
Subject: RE: FYI.

James' note is OK with me, with a couple of comments: it isn't made clear by James that point 2 is discussing mutually agreed termination (he uses the phrase "to accommodate the new regulatory risks") where the OPA deck refers to 'agree on an amendment to terminate the contract'.

Wrt the same point 2 (James' note) the OPA deck refers to 1.12, while James analysis dwells only on 1.10. Is there a mis-numbering by the OPA or James in referring to the relevant section, or is there a difference of opinion as to which section is relevant?

Still awaiting feedback from OPA on damages.

From: Bishop, Ceiran (MEI)
Sent: March 2, 2010 12:22 PM
To: Jenkins, Allan (MEI)
Cc: McKeever, Garry (MEI)
Subject: FW: FYI.

Allan -- here's the note. Comments/enhancements welcome.
I think we should run this and the OPA deck by Garry to bring him back up to speed.
Would be good to get this to Jenn by day's end.

04/30/2010

C.

From: Rehob, James (MEI)
Sent: March 1, 2010 6:02 PM
To: Bishop, Ceiran (MEI)
Cc: Girling, James (MEI); Vidal-Ribas, Victoria (MEI); Johnson, Paul (MEI)
Subject: RE: FYI.

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

March 1, 2010

Good afternoon, Ceiran. I write in order to provide my views as to the OPA's assessment of the potential risks associated with terminating its contractual arrangements with TransCanada Pipelines ("TCPL"), which arose out of the OPA-lead procurement associated with the August 18th, 2008 direction from the then Minister of Energy to the OPA. That direction required the OPA to competitively procure a 900 MW gas-fired generation facility to be located in the Southwest GTA which was designed to support local reliability needs and requirements.

The OPA's presentation (deck) explores three main avenues of analysis, then provides a generalized risk-assessment of each. These are:

- Terminating the contract with TCPL
- Amending the contract with TCPL
- Re-characterizing the transaction so that TCPL acquires the assets (site, technology, goodwill/copywrite, etc.) of one of the unsuccessful suppliers (the "Mississauga site").

1. Terminating the contract with TCPL: The OPA deck does a good job of articulating the main characteristics and risks associated with terminating (or repudiating) the contract between itself and TCPL. It identifies the following transactional risks affecting this option:

- Delay associated with any structured termination designed to minimize costs to the OPA. While the deck does not detail the steps that could be taken to effect this kind of termination and the kinds of costs that might otherwise be minimized, the main points are present and well-made—that attempting to terminate the contract prematurely (prior to its normal expiry date) would leave the OPA open to suit for damages and would result in rate-payer exposure in the millions of dollars.
- OPA deck correctly points out that there is no provision explicitly empowering the OPA to terminate for "convenience".
- Per Article 11.1(g), the OPA deck correctly and accurately identifies the instances in which the OPA can exercise its contractual rights of termination, namely the arising of an "event of default" and events leading to "*force majeure*" –
 - The deck does a particularly good job at setting out the structure of relevant provisions within the *force majeure* Article (Article 11), including suppliers' unilateral right of termination after the commercial operation date is delayed for more than 365 days due to a failure to obtain necessary permits – the OPA would return the performance security while being liable for no further costs.
 - Either party can terminate where C.O.D. is delayed for 24 months and payout by OPA is on the same basis as above;
 - Either party can terminate where C.O.D. is delayed for 36 months in any five-year period, and payout by OPA is on the same basis as above plus any amounts due under contract;
- Any attempts by the OPA to unilaterally terminate the contract outside of a defensible or verifiable event of default by the supplier (TCPL) or in the absence of an event triggering *force majeure* would likely expose the OPA to significant risks under the contract, including litigation risks for damages.

2. Amending the contract with TCPL:

The OPA deck correctly identifies the option of bilateral amendment where both parties mutually agree to amend the existing contract in order to accommodate the new regulatory risks. The deck correctly notes that the terms of any amendment would be the subject of "negotiation" (hard bargaining) which would most likely involve significant costs.

- While the deck does raise the issue of costs, in a general way, and applies an order of magnitude of \$100 M to them, there is no attempt to break down the kinds of costs which could (or most likely) be the subject of negotiation in any detailed way. The decision not to do so may have as much to do with the

04/30/2010

presentation format rather than with any lack of analysis on this point. Costs and damages can be notoriously difficult to quantify with precision, depending upon the complexity of project and the economic analysis involved.

- o There may be other costs beyond the supplier's sunk costs (e.g. costs of gas turbines, etc.) that need to be reckoned with – including TCPL vying for a sliver of economic loss associated with either (i) profits due under the contract or (ii) the amount otherwise attainable by it where it was able to perform under the contract (contract damages) or invest its money elsewhere (in remunerative projects) (tort law damages, depending). Whether and under what circumstances such would be ultimately recoverable at law would involve detailed case-law analysis which is not open to us here given the current time-frame associated with this engagement. We would posit that contract versus tort theories of damages would have to be further investigated in light of their applicability in this scenario.

Nuanced Interpretative Options relating to amendment:

There are many ways to read and interpret legal agreements, even (depending upon the text of the agreement) managing interpretations which neither party contemplated or bargained for. Hence, what is offered up below relates to a possible and rather nuanced interpretation of certain clauses of the agreement which could, if such interpretation carries the day in court, result in other options which the OPA *could* consider – however, the risks are that the interpretation may not, in fact, carry the day in court or in arbitration/mediation:

- **Generalizing Clause 1.10(a) beyond Article 1:** Whether clause 1.10, and in particular the opening flush of 1.10 and para (a) read together, could allow the OPA, as “buyer”, to force good-face negotiations with TCPL designed to replace one or more relevant provisions of the contract with provisions which are more favourable to the OPA in light of what the OPA would have to be willing to characterize as the failure of TCPL to obtain or maintain, on an enduring basis, its requisite municipal approvals.

1.10 Invalidity, Unenforceability, or Inapplicability of Indices and Other Provisions

In the event that either the Buyer or the Supplier, acting reasonably, considers that any provision of this Agreement is invalid, inapplicable, or unenforceable, or in the event that any index or price quotation referred to in this Agreement, including the Gas Price Index (DA), ceases to be published, or if the basis therefor is changed materially, then:

(a) if a provision is considered to be invalid, inapplicable or unenforceable, then the Party considering such provision to be invalid, inapplicable or unenforceable may propose, by notice in writing to the other Party, a replacement provision and the Buyer and the Supplier and, at the Buyer’s discretion, those Other Suppliers who are required by the Buyer to participate, shall engage in good faith negotiations to replace such provision with a valid, enforceable, and applicable provision, the economic effect of which substantially reflects that of the invalid, unenforceable, or inapplicable provision which it replaces;

Successful utilization of this clause could force good-faith amendment negotiations and, depending upon the circumstances, where arbitration is selected or triggered (see Article 1.10(d)) and the OPA’s view wins the day, even allow the OPA to amend the contract unilaterally. Clause 1.10(e) provides for a structured approach to amendments and admits of the possibility where the OPA would prepare the amendments where the supplier determined not to participate in the arbitration of the matter as is its option pre clause 1.10(d).

Risks: Clause 1.10 is set out under provisions which deal with evolution of the IESO-administered markets and include clauses which deal with the contingency of the development of the fabled “Day Ahead Market”. Hence, from a contract-structural point of view, this line of argument is somewhat risky as the reviewer (Court/arbitrator) may be unwilling to see the general phraseology in paragraph 1.10 (a) as extending beyond Article 1. Note that where one party does not agree that a particular provision is invalid or unenforceable against it or the other party, it may trigger the binding arbitration clause found in 1.10(d) (see Exhibit K for more detail on arbitration process) to have the matter determined through binding arbitration. Clause 1.10(e) sets out the actual amending process associated with clause 1.10.

Secondly, whether TCPL’s regulatory position (having been changed by the OMB’s order upholding Oakeville’s Interim Control By-Law) could be viewed as an “event of default” based on the technical reading of clause 10.1(c) is one potential avenue (though I recommend that this avenue be explored very quietly): the essence of this argument is that, based only on the technical review of the language, TCPL no longer holds the necessary permits or authorizations at municipal law to

utilize its site in the manner contemplated at the time it made its proposal and negotiated /executed the contract with the OPA. This avenue may well have been explored by the OPA but, given that TCPL did all it could to act to protect its regulatory position by appearing before the OMB and exploring Appeals options before the Divisional court, that the OPA may have viewed this line of analysis as risky or inappropriate: other potential suppliers taking note of TCPL's untenable position may be warned off future dealings with the OPA should it attempt to characterize this as a Supplier event of default (**reputational / transactional risk**). The OPA deck does make reference to inherent reputational risks in its deck and this is most helpful.

3. Re-characterizing the transaction so that TCPL's proposal is combined (married) with that of another proponent: This option involves TCPL negotiating either with the OPA's assistance or alone (not specified) in respect of acquiring rights to utilize or the ownership of all major elements of one of the unsuccessful proponent's proposal, including site, relevant technology, relevant associated goodwill/copywrite, etc. The unsuccessful proponent had received all municipal and related approvals for their site located in Mississauga.

Note that the fact that the unsuccessful proponent has received all necessary municipal approvals may not preclude Mississauga from exercising its powers under the *Municipal Act, 2001* in order to craft new or amended zoning by-laws or even interim control by-laws or particulate matter by-laws which could have a deleterious effect on the construction of the plant at that location. While the OPA does not delve into this level of detail, the regulatory risk is highlighted as it notes that Mississauga has voiced loud and consistent opposition to the construction of gas-fired generation facilities within the Municipality. (I believe there is some media coverage which suggests that the Mayor of Mississauga has joined supporters in protesting construction of large gas-fired plants in neighbouring municipalities.

Aside from the costs and delay which the OPA deck does reference, such vehement/concerted opposition would not bode well for scenarios which are aimed at re-locating the constructing of the facility to Mississauga. The OPA deck does a good job of highlighting this transactional risk as well as the costs associated with any such approach.

Procurement Process Risks: One concern not specifically identified in the OPA's deck relates to amendment – one important concern is that, where the amendment option is pursued, it must be done in a manner which does not offend the competitive procurement process such that other participants (unsuccessful proponents) would be deprived of the opportunity to compete on a level playing field with TCPL had it (they) been presented with the contract on terms similar to that ultimately presented to TCPL, taking into account the amendments. This is a transactional risk which can only be analyzed appropriately in light of any proposed amendments to the contract having regard to the terms and conditions of the current contract. For now, it is merely raised as a general consideration. (**reputational / transactional risk**).

Other Issues

Re-powering the Lakeview Generation Station: A further bullet is offered in respect of "re-powering the Lakeview Generating Facility" owned by OPG, however the OPA's analysis in respect of that issue is limited to the observation that it would likely entail a fair degree of political risk. My own view is that much in the way of costs would have to be expended in order to re-power the Lakeview plant, subject to its current operational state. OPG would be in the best position to provide insight into the economics and regulatory hurdles (including any attendant delay) associated with this approach. This facet of the deck also seems to exist independently of the main transactional options involving TCPL either alone or interacting with other suppliers.

This is my analysis thus far.

Where more time is permitted more may be done. Do let me know whether this meets your requirements or whether you require anything further.

I am out of the office for much of the day tomorrow, but should be in the office the balance of the week.

Kindly,

James

From: Bishop, Ceiran (MEI)
Sent: March 1, 2010 3:08 PM
To: Rehob, James (MEI)
Subject: RE: FYI.

James – thanks for the voicemail.

Somehow I think we got our lines crossed- MO would very much like to see this assessment in written form – not merely your assessment of the completeness/rigour of OPA's work, but also of any further insights you may have into the contract.

04/30/2010

I spoke to Jenn Tuck and she let me know that the minister is very keen to see this as soon as feasible.
C.

From: Rehob, James (MEI)
Sent: March 1, 2010 12:31 PM
To: Bishop, Ceiran (MEI)
Subject: RE: FYI.

Left you a voice-mail which is not to be further forwarded.
Kindly,
James

From: Bishop, Ceiran (MEI)
Sent: February 26, 2010 1:50 PM
To: Rehob, James (MEI)
Subject: RE: FYI.

It's online
http://www.powerauthority.on.ca/GP/Storage/18/1294_Southwest_GTA_Contract_%28Final_March_18_2009%29.pdf

here are other procurement documents
http://www.powerauthority.on.ca/GP/Page.asp?PageID=861&SiteNodeID=215&BL_ExpandID=

From: Rehob, James (MEI)
Sent: February 26, 2010 10:20 AM
To: Bishop, Ceiran (MEI)
Subject: RE: FYI.

Hi, Ceiran – to do this any justice I'll need a copy of the contract itself (I should have mentioned while on the phone with you) – Can you obtain?

Kindly,
James

From: Bishop, Ceiran (MEI)
Sent: February 26, 2010 10:03 AM
To: Rehob, James (MEI)
Subject: FW: FYI.

From: Tuck, Jennifer (MEI)
Sent: February 25, 2010 5:45 PM
To: Bishop, Ceiran (MEI)
Subject: FW: FYI.

From: JoAnne Butler [mailto:joanne.butler@powerauthority.on.ca]
Sent: February 16, 2010 11:07 AM
To: Tuck, Jennifer (MEI)
Cc: Amir Shalaby; Michael Killeavy
Subject: FYI.

04/30/2010

As discussed...thanks...

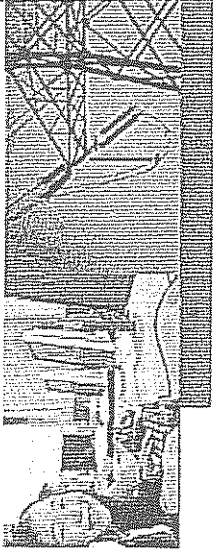
JCB

JoAnne C. Butler
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Ontario Power Authority

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ONTARIO POWER AUTHORITY



February 2010

Ministerial Briefing SWGTA Options

SWGTA Options - Summary

- Exiting the contract will take a long time if try to minimize our costs. Conversely, if we repudiate the contract to make a quick exit it will cost ratepayers millions in potential damages.
- A forced “marriage” of our Supplier and the unsuccessful Proponent with a permitted site will not only transfer the problem to Mississauga but will also increase ratepayer costs by entering into bilateral negotiations. This will highlight that the government’s directive and procurement processes have failed and put the government in a bad light.
- Re-powering Lakeview GS means reneging on a public commitment, and the Ministry’s directive, to not do so.
- Any move to a site in Mississauga will mobilize just as much opposition given the long history of other sites and the Clarkson Airshed Study.

Termination of the SWGTA Contract

- There is no provision in the contract for the OPA to terminate for convenience, i.e., the OPA cannot terminate the contract without having a reason to terminate.
- The OPA can terminate the contract if there is a Supplier Event of Default (s. 10.1). This has not happened. *loss of future to obstruct what about 10.1(c)? never feasible.*
- The inability to secure permits and approvals would likely be a Force Majeure under s. 11.3(h) of the contract.

- If there is an event of Force Majeure pertaining to the Supplier's inability to get a permit or approval that delays the Milestone Date for Commercial Operation for more than 365 days, the Supplier can terminate the Contract and the OPA will return the performance security (s. 11.1(g)). There is no payment to the Supplier for its costs by the OPA.

[OPA could want it out]

Termination of the SWGTA Contract

- If there is an event of Force Majeure that delays the Milestone Date for Commercial Operation for more than 24 months, either party can terminate the Contract and the OPA will return the performance security (s. 11.1(h)). There is no payment to the Supplier for its costs by the OPA. ~ Long Inc for OPA B and the ord.
- If a Force Majeure prevents the Supplier from performing its obligations under the contract for an aggregate of more than 36 months in any 60 month period, then either party can terminate the Contract and the OPA will return the performance security (s. 11.1(i)). There is no payment to the Supplier for its costs by the OPA, other than for amounts already owed to it under the contract.

Termination of the SWGTA Contract

- The parties can mutually agree to an amendment to the contract (s. 1.12). Conceivably, the parties could agree on an amendment to terminate the contract ("mutually agreeable termination"). This has been done on one RES I project because of the delay involved in obtaining permits. - Terms & cost to rate pay
- The terms of the amendment to terminate, including any payment of costs, would be subject to negotiation.
- Presumably, the OPA would have to pay the costs that the Supplier has reasonably incurred up to the point in time of the mutually agreeable termination. PLUS lost profit?
- The costs the Supplier has incurred to date might be as much as \$100 million dollars. The Supplier has already ordered and paid for gas turbines. These costs would be passed onto the ratepayer via the GAM.

Termination of the SWGTA Contract

- Outside of commercially agreed, a*
- Termination by any means not expressly provided for under the contract would likely be a breach of the contract by the OPA. ✓
 - The Supplier could sue the OPA for its damages caused by the breach of the contract. ✓ *See L.D.C.* ✓
 - The measure of damages that OPA would likely be liable for would be the Supplier's lost profits over the term of the contract, which would be quite a significant amount of money. With \$1 billion invested at a return of 8% or 9%, damages would be in the neighbourhood of \$80 to \$90 million plus costs for the already purchased gas turbines. These costs will be passed on to the ratepayer via the GAM.
 - In addition to liability for damages, there would be considerable reputational risk for the OPA to do this. ✓

[Future Transactional Cost] ✓

Brokering a "Marriage" With Other Proponents

- It has been suggested that the OPA broker a "marriage" *if called* between some unsuccessful Proponents to the RFP. *[on what legally]*
- Each Proponent had its own site with unique characteristics and technology suited for those conditions.
- One unsuccessful Proponent has a permitted site.
- The site is in Mississauga, which would likely just result in transferring the problem from Oakville to Mississauga. *where Hazel is working ... !*
- Mississauga has already voiced concerns about additional gas-fired generation. There has been considerable attention paid to the SWGTA procurement because of the Clarkson Airshed Study. Opposition to gas-fired generation in Mississauga is vehement and enjoys the political support of the Mayor and Council.

Brokering a “Marriage” With Other Proponents

- Furthermore, in order to take advantage of the permits for the site, our Supplier would have to replicate exactly the unsuccessful Proponent’s design.
- In order to use the site our Supplier would have to buy both the site and the design, and operate it in accordance with the issued permits. *More costs?*
- The cost of the site and intellectual property associated with the design would be prohibitive.
- Such a “marriage” is also a tacit admission that the procurement process failed.
- In summary, there is little benefit in doing this and a number of attendant risks.

Bilateral Negotiation with A Proponent

- The Pros and Cons of bilateral negotiation with one of the unsuccessful proponents

PROS	CONS
Projects have already reached certain stage of development	Price would be higher than the original bid, which will be passed on to the ratepayer.
Projects might already have received environmental approval and permitting	Significant negative impact on the OPA competitive procurement process
Proponents are qualified and are willing to enter into an agreement for the project	No guarantee that the negotiated contract could be successfully implemented
Delay would be manageable and would not have significant system impact if negotiation is going to start soon	Project would face similar opposition on permitting

Lakeview Site

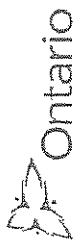
- The Pros and Cons of Lakeview site are

PROS	CONS
Transmission capacity is still available	Facility would be 500 metres to 800 metres from residential area
Transmission circuits and structures are still standing	We were directed not to re-power Lakeview. This was publicly announced.
No other or minimal transmission upgrading work needed	Require significant natural gas connection and reinforcement
Site is still available	Need to go through environmental and municipal permitting for both generating facility and gas connection
	Significant delay in commercial operation date; might have impact on system reliability
	Significant public push back because of the work done so far on the heritage project planned for the site.

Potential Impact on Mississauga

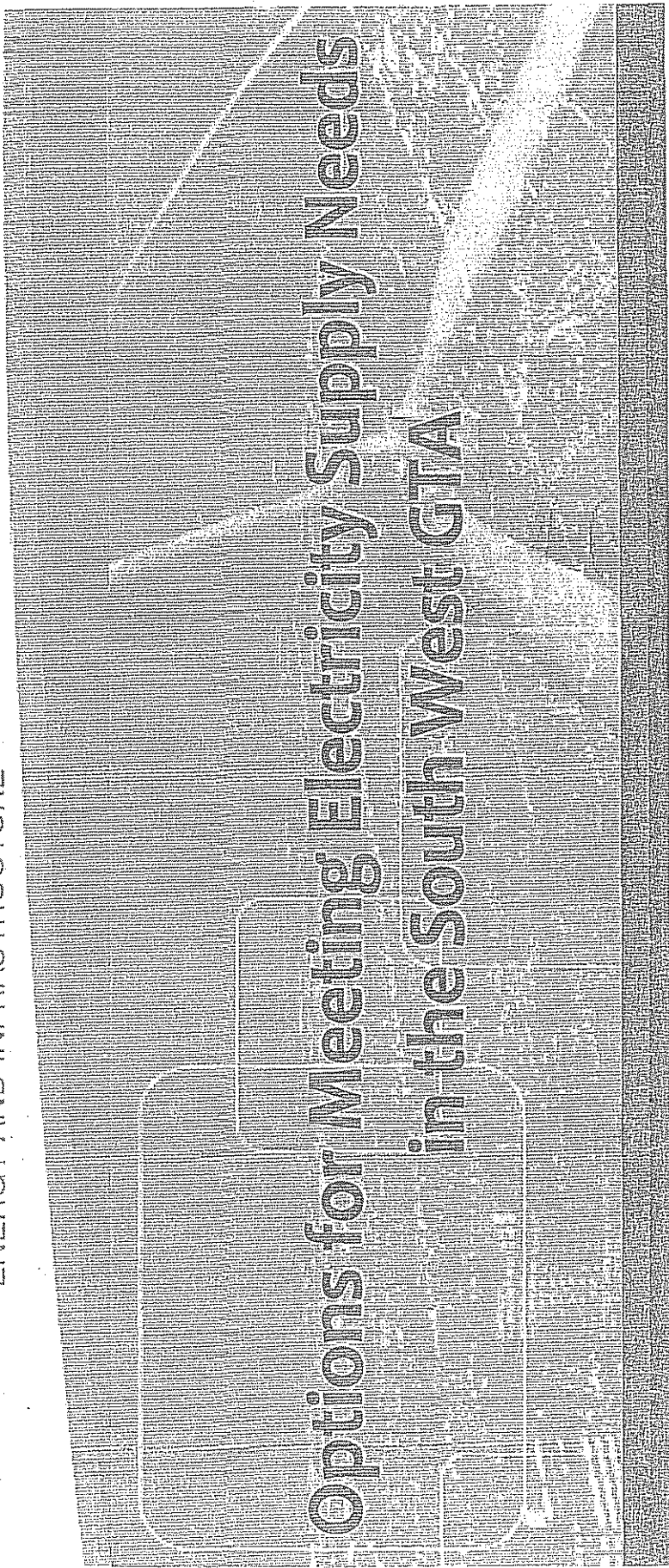
- All of three unsuccessful proposals are located in Mississauga;
- Mississauga would oppose the project similar to Oakville;
- Opposition in Mississauga will be vehement. It has a more than 10 year history with the unsuccessful Proponent's site in Mississauga. The proposed siting of this facility has engendered much public opposition in the past decade and announcing that the Supplier will now occupy a site in Mississauga and not Oakville will be incendiary.

May 3/10



Ontario

MINISTRY OF ENERGY AND INFRASTRUCTURE



Options for Meeting Electricity Supply Needs in the South West GTA

Oakville Generating Station and Alternative Supply Options

Background – Need for New Gas Generation Within the SWGTA

- In consultation with the IESO, Hydro One, the local distribution utilities and other experts and stakeholders, the OPA determined and listed in the Integrated Power System Plan (2007) a need for approximately 850 MW of new generation within the SWGTA by 2014 for supply and system reliability purposes..
- This need exists because of growing demand in the area and because of the loss of 1200 MW of generation capacity within serving the SWGTA, resulting from the closure of Lakeview GS. This need remains despite current economic conditions.
- New generation is also needed within the area to address reliability issues in the area, including supply adequacy, voltage support and system security, to support coal replacement by adding back-up to new intermittent renewable supply.
- Generation within the SWGTA adds greater reliability, has less environmental impact and is likely to be less costly than remote generation with transmission to the SWGTA.
- The IPSP took into account accelerated conservation and demand management and other generation plants already planned or under construction including Halton Hills, Goreway and Greenfield South. None of these reduced the need within SWGTA.
- Gas generation was identified as the cleanest, most reliable source available for the needed generation as renewable energy of that scale and reliability would not be available within the SWGTA.

Background – SWGTA Procurement Process

SWGTA Procurement Direction and Removal of the Lakeview Site

- On August 18, 2008, MEI Minister Smitherman directed the OPA to procure approximately 850 MW of gas fired generation in the SWGTA with an in-service date no later than December 31, 2013.
- On the same date it was announced by Minister Smitherman that the Lakeview site would be removed from consideration for electricity generation.

OPA Procurement Process

- The Ontario Power Authority (OPA) issued a Request for Qualifications (RFQ) on October 2, 2008.
 - The RFQ specified a geographic area and specific electrical connection site for bid projects. The area encompassed parts of Etobicoke, Mississauga, and Oakville and the winning project would feed the existing Manby Transformer Station located in Etobicoke.
 - Four companies were qualified with seven potential unidentified sites in all three municipalities. Site identification was not part of the RFQ; qualified companies would identify and bid in a single site during the RFP.
- On October 28, 2009, the Minister of Energy and Infrastructure held a town hall in Mississauga to engage the public on the plan for local generation. The OPA, IESO and the LDC also presented. On March 3rd, 2009, the OPA held a second town hall in Mississauga to discuss the SWGTA procurement.
- On March 13, 2009, the OPA released the RFP with a proposal due date of July 8, 2009

Background – SWGTA Procurement Process

- On April 1, 2009, the OPA released the locations that the four eligible firms were planning to bid. The potential sites were:

Registered Participant	Facility Name	Location of Site
Invenergy Canada Development Partnership	Avon Energy Centre	445 Hazelhurst Road, Mississauga
Northland Power Inc.	Royal Windsor Energy Centre	2400 + 2430 Royal Windsor Drive, Mississauga
Portlands Energy Centre L.P. (name changed to TCE in final proposal)	Oakville Generating Station	1500 Royal Windsor Drive, Oakville
Southdown Station Partnership (a partnership of Sithe Global Power Southdown ULC and Sithe Global Power Southdown II ULC)	Southdown Station or Southdown Station – Facility B	759 – 797 Winston Churchill Boulevard, Mississauga

- On July 8th, 2009, the OPA received bids from all four registered participants in response to the RFP.
- On September 30, 2009, the Ontario Power Authority announced that it would sign a contract with TransCanada Corporation to design, build and operate a 900 MW electricity generating station in Oakville.

Background – SWGTA Procurement Process (cont'd)

OPA Selection Process

- The evaluation was a multi-stage process which looks at proposal completeness; addressing of mandatory requirements, rated criteria evaluation, and economic evaluation.
- Rated criteria included environmental assessment, community outreach, engineering, procurement/construction agreements, fuel supply, etc.
- Bid price and financial strength of the proponent were also important factors determined in the subsequent economic evaluation phase.
- Beyond being within the specified boundaries of general location and ability to connect to the specified transformer station, the specific site was not directly evaluated and is not a prior concern for the OPA. The OPA requires that the proponent obtain all approvals and the extent that approvals have been obtained is one of the rated criteria. In the case of the Oakville site the land was zoned to allow industrial uses, including generation. The Town of Oakville created the Interim Control by-law late in the RFP process, at a time when the bid could not be changed.
- An independent evaluation team reviewed all submissions against the criteria. This team was comprised of representatives from the OPA, IESO and the OEB. The committee had an independent chair and its activities were overseen by an independent Fairness Advisor.
- The Fairness Advisor concluded that the RFP process was conducted "in a procedurally fair, open, and transparent manner".

Background – Oakville GS Selection

Oakville Generating Station

- Announced September 30, 2009 as winning proposal in OPA South West GTA competitive procurement.
- 900 MW combined cycle electricity generating station to be built and operated by TransCanada Energy Ltd. Contract specifies commercial operation by Q1 2014.
- Located on an existing 15-acre industrial site within the Ford property at 1500 Royal Windsor Drive in the Town of Oakville. The site was zoned for industrial purposes including electricity generation and is near natural gas pipelines and the high voltage electricity grid.
- The plant is undergoing an Environmental approval. On January 26, 2010 TransCanada published a draft Environmental Review Report (ERR).

Town of Oakville Opposition

- The Council of the Town of Oakville has taken three significant actions to date to slow or possibly stop the construction of the plant within Oakville:
 - Interim Control By-Law (ICBL) which temporarily prohibits any new power generating facility greater than 10 MW, while the Town studies the impact. The OMB upheld the ICBL and the Council extended it in March for an additional year.
 - An Official Plan Amendment which would have allowed permanent prohibition (denied by the Ontario Municipal Board)
 - A Health Protection By-Law to control the emissions of fine particulate matter within Oakville at levels far below MOE regulatory levels.
- The ICBL allows Oakville to withhold all permitting while in effect. It is expected that after the interim period a prohibitive zoning by-law would be put into effect to prevent construction of the plant.
- The emissions control bylaw would allow Oakville to stop operation of the plant, if built. Commercial gas generation technology that would meet the emission standards set by the municipal by-law is not available.
- The Mayor of Oakville frequently speaks against the plant and receives extensive local media coverage.

Other Opposition to Oakville GS

- Citizens For Clean Air (C4CA) is a well-funded public group formed to oppose the Oakville Generating Station in its proposed site on the basis of their perceived health and safety risks. The group has received extensive coverage both bought and earned.
- Other municipalities and opposition groups are using Oakville and C4CA as models for their action against power plants. King Township has passed an ICBL in an attempt to stop the York Energy Centre, and opponents of that plant are working with C4CA on a widespread opposition.
- On March 22, 2010 Oakville M.P.P. Kevin Flynn introduced a private member's bill to provide legislation that would restrict the construction and operation of new natural gas generating plants that are less than 1500 meters from specified structures and properties. Ontario would be the first jurisdiction to mandate such a setback, and the distance has not been justified by conventional risk and safety analysis. If this became law this would eliminate all of the proposed alternatives within the SWGTA, and may impact the Nanticoke alternatives.

TransCanada and OPA Response to Opposition

- TransCanada, together with Ford appealed the Oakville ICBL and the Official Plan Amendment to the Ontario Municipal Board. The OMB upheld the ICBL but ruled against the plan amendment. TransCanada is pursuing further appeals to the OMB.
- TransCanada has also applied to the Divisional court to appeal the OMB decision upholding the ICBL, on the basis that the ICBL challenges provincial authority.
- TransCanada has approached government requesting regulatory action to overcome the municipal barriers. Ongoing appeals to the OMB and Divisional Court are likely to add lengthy delays and risk unfavourable decisions. The ICBL could be overcome by exercising existing provisions in the Planning Act, but it is likely that new legislation would be required to overcome the emissions control by-law.
- TransCanada and the OPA have publicly responded to various concerns about emissions and safety that have been raised by the municipality and public opposing the plant. TransCanada continues to work proactively within the community with meetings and open houses.

SWGTA Supply Alternatives

TransCanada was asked to propose alternative sites for new generation to serve the SWGTA TransCanada has suggested the following alternatives :

- Oakville GS (baseline)
- Southdown Station (Site unsuccessful in the SWGTA procurement)
- Oakville North (Site on Provincial lands not formerly considered)
- Lakeview site (alternative not being considered).

In addition MEI has considered two additional generation alternatives:

- A gas generation plant located at Nanticoke, such as the proposed Competitive Power Ventures plant (the IPSP did not identify a need for a plant located at Nanticoke)
- Conversion of OPG's Nanticoke plant to gas generation

Summary of Alternatives: Oakville Generating Station

Description

- 900 MW Capacity, 1500 Royal Windsor Drive
- Estimated Cost \$1.20 Billion (\$1,355/kW)
- Setback, 400 meters from residence, 320 meters from school

Pros

- OPA contract already in place as result of competitive procurement, EA underway
- Lowest cost
- Technical advantages – location maximizes local and system reliability, efficient cooling, nearby electrical connection and gas supply

Cons

- Public opposition, e.g. C4CA, threat of legal action against EA, civil suits; Municipal opposition, ICBL, emissions by-law, permitting refusal
- Several appeals to OMB and court action underway

Provincial Actions Required to Achieve Operation

- Regulatory action to overcome ICBL, legislative action to overcome emissions bylaw

Summary of Alternatives: Sithe Southdown Site

Description

- 820 MW capacity, 797 Winston Churchill Drive (near Oakville GS site)
- Estimated cost \$1.2 Billion (\$1450/kW)
- Setback 700 meters to closest residence

Pros

- Advanced state of permitting --most zoning and environmental approvals in place.
- Technical advantages - electrical and gas interconnection similar to Oakville, no cooling water issue

Cons

- Doesn't have OPA contract - change would open up procurement issues and require making TransCanada and possibly other bidders whole
- Less efficient, higher construction cost (per MW) plus transaction costs
- Municipality and public have already shown that they will oppose the project – Mississauga likely to implement an emissions by-law against a plant (ICBL previously implemented by Mississauga and addressed by Sithe with concessions on emissions controls and landscaping)

Provincial Actions Required to Achieve Operation

- Direction to the OPA to renegotiate with TransCanada and Sithe, and possibly make other parties to the procurement whole
- Possible legislative action if Mississauga raises emissions or other by-laws

Summary of Alternatives: Oakville North Site

Description

- The Oakville GS design would be relocated within the municipality to a greenfield site on Provincial land, 880 MW capacity due to reduced cooling efficiency
- Estimated cost \$ 1.4 billion (\$ 1507/kW) (extra connection and cooling costs)
- Setback from nearest subdivision 1000 meters – individual residences that are closer would have to be bought out if they were concerned

Pros

- Land zoned for use, no ICBL in place (but Oakville could implement), Provincial land may provide some zoning/permitting advantages
- Setbacks from residents and rail lines may reduce public and municipal opposition
- Provides opportunity for both sides to act responsibly

Cons

- No existing contract; not within the original procurement area, other procurement participants may seek compensation.
- Oakville emissions by-law would still apply.
- Additional transmission, water and other infrastructure would add At least one year to construction.

Provincial Actions Required to Achieve Operation

- Direction to the OPA to renegotiate with TransCanada, and possibly make other parties to the procurement whole
- Possible negotiation with municipality and other parties to accept relocation
- Possible legislative action if Oakville continues emissions by-law.



Summary of Alternatives: Nanticoke CPV Site

Description

- Competitive Power Ventures has proposed to build the Nanticoke Energy Center (NEC); a 1,200 MW combined cycle gas plant north of Nanticoke GS. (Cost and setbacks not determined.)
- CPV has indicated that they are willing to partner with TransCanada. TransCanada has not yet expressed interest in participating in this project

Pros

- Generating plant appears to have local public and municipal support
- CPV has consulted with the community and has produced an EA report (not approved by MOE)
- Removes emissions and safety concerns from the GTA region

Cons

- The plant is remote from the SWGTA and a Nanticoke location was not identified as needing new gas generation by the OPA/IPSP.
- Reinforced and new transmission infrastructure would be required assure reliable delivery of the power to the SWGTA.. EAs, including public consultation for the transmission upgrades have not been started. Upgrades in Etobicoke and Richmond Hill to bring in power from Nanticoke to send into the SWGTA would likely draw public opposition in these areas.
- Expected to be much more costly with transmission costs and new natural gas pipeline costs added to the plant costs
- Less efficient and higher environmental impact than generation within SWGTA

Provincial Actions Required to Achieve Operation

- Direction to the OPA to renegotiate with CPV, and either include TransCanada or make them whole if contract terminated. Other developers may call for a competition rather than sole source.
- Direction to the OPA and Hydro One to begin transmission upgrades to deliver power from Nanticoke to the SWGTA



Summary of Alternatives: OPG Conversion to Gas Generation

Description

- OPG would build gas generation within its Nanticoke coal generating site either by conversion of coal units or building new gas turbine generation. Plant size and cost to be determined.

Pros

- Setback unlikely to be an issue as generation already is permitted and a cleaner fuel is replacing coal
- Local public and municipal acceptance likely as continuing generation at the site would retain jobs
- Removes emissions and safety concerns from the GTA region

Cons

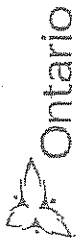
- Likely to be the highest cost and least efficient alternative. Gas generation using converted coal units is very inefficient compared with new gas turbine generation.
- Would likely take the longest to plan and build since design and permitting processes have not been started
- Would present the same transmission requirements and possible local GTA public opposition as the CPV plant

Provincial Actions Required to Achieve Operation

- Direction to OPG to design and cost appropriate gas generation at the Nanticoke site, to serve the SWGTA as well as other markets.
- Direction to the OPA to negotiate a contract termination with TransCanada and negotiate a new contract with OPG, and TransCanada if they are interested in partnership with OPG. (They are partners in Portlands Energy Centre)
- Direction to the OPA and Hydro One to begin transmission upgrades to deliver power from Nanticoke to the SWGTA

OPA Role in Terminating Oakville GS Contract

- TransCanada's contract with the OPA can be terminated for a number of reasons:
 - o OPA can terminate if there is a supplier event of default
 - o Inability to secure permits and approvals would likely be a force majeure. If this delayed the milestone date for commercial operation for more than 365 days, TransCanada could terminate the contract and the OPA will return the security. There is no payment to the supplier for its costs by the OPA.
 - o Parties can mutually agree to an amendment to the contract, including an amendment to terminate, with terms of the amendment to be negotiated.



Ontario

MINISTRY OF ENERGY AND INFRASTRUCTURE

OPA Role Terminating Oakville GS Contract (cont'd)

- Termination by any means not expressly provided for under the contract would likely be a breach of the contract by the OPA
- TransCanada would likely sue the OPA for damages.
- Estimates of such damages provided by the OPA (Feb 2010) are
 - Up to \$100 million already paid for gas turbines
 - Present value of profits over the life of the contract estimated at \$500 million.
- In addition to damages, there would be considerable reputational risk for the OPA with respect to the integrity of its procurement processes.

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: June 20, 2011 3:57 PM
To: Lung, Ken (JUS)
Cc: Calwell, Carolyn (ENERGY)
Subject: FW: OPA et al (part two)
Attachments: Oakville - Email from James Rehob dated April 13, 2010.pdf

Second email -

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
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From: Miceli, Martina (ENERGY)
Sent: June 20, 2011 11:45 AM
To: Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY)
Subject: OPA et al (part two)

Hi Halyna and Carolyn,

Please find the last attachment, as apparently it was missed due to the Printer rejecting it. Thank you for understanding and hope you are enjoying the beautiful weather.

Kindest Regards,

Martina Miceli
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Ministry of the Attorney General
Ministry of Energy/Ministry of Infrastructure
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Please consider the environment before printing this e-mail message

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Montano, Teresita (MEI)

From: Rehob, James (MEI)
Sent: April 13, 2010 12:54 PM
To: Montano, Teresita (MEI)
Subject: FW: Oakville
Importance: High
Attachments: Attachment 1 BRIEFING NOTE 2 on Oakville and King energy plants March 22.10.doc; Attachment 2 B20 - Southwest GTA Supply - March 31 2010 (2).doc; Attachment 3 MN - TransCanada Oakville 19-04-10r2 (2).doc; CO Comp note on Oakville April 13 10.doc

Hi, T! Please print two copies -- one for me and one for file.
Thanks!
James

From: Vidal-Ribas, Victoria (MEI)
Sent: April 13, 2010 12:53 PM
To: Wismer, Jennifer (MEI)
Cc: Rehob, James (MEI); Girling, James (MEI); Linington, Brenda (MEI); Jennings, Rick (MEI); McKeever, Garry (MEI); Bishop, Ceiran (MEI)
Subject: Oakville
Importance: High

Jenn, attached is the summary note that I promised yesterday. Attached are some additional materials that may be of assistance to CO. The options note that Brenda prepared was the discussion document that arose from the luncheon meeting that we attended a while back. You'll see that the legal note doesn't recommend a course of action but simply reflects various options and their elements. Hope this is helpful. Please let me know if you or CO need anything else.

Thanks to the team (with Brenda holding the pen) for pulling this together.

04/13/2010

BRIEFING NOTE

ISSUE: Options for facilitating development of Gas Fired peaking plants in the Town of Oakville and King Township

CURRENT STATUS:

- Ontario Power Authority directed to procure peaking plants in area to south west of Toronto including Oakville (900 MW in service date of no later than December 31, 2013) and one in York Region (350MW in service no later than December 31, 2011).
- Contracts for the two plants awarded and power companies undertook obtaining all necessary approvals.
- Proponents of both plants have approached province for assistance given local resistance.
- MPP Kevin Flynn introduced Bill to establish minimum separation distances between gas fired power plants and sensitive uses such as residential and day care facilities.

York Energy Centre Project:

- Has received all necessary approvals except site plan approval, development permit from the Lake Simcoe Region Conservation Authority for access, and building permit. Permit to take water also raised but it will not be addressed as it is not required prior to financial close.
- King Township has passed interim control by-law preventing locating of plant for at least one year while issue studied. Outcome of study could be rezoning of lands preventing use for plant. Proponent has made application to the Court asking that the interim control by-law be quashed.

Oakville Project:

- Town of Oakville has passed Interim Control By-law prohibiting for one year any new power generating facility greater than 10 MW, while the Town studies the impact and a by-law to control the emissions of fine particulate matter. Ontario Municipal Board upheld Interim Control By-law and proponent has now requested leave to appeal to Divisional Court.
- Town of Oakville has also passed a by-law regulating fine particulate matter. The plant as designed would not meet the emission standards set by the municipal by-law.
- TransCanada is in the process of completing its Environmental Screening Process to complete requirements of regulation under the Environmental Assessment Act.

Options for Addressing Municipal Actions to Prevent Development of Plants:

Proposed Action	Accomplishes - Pros	Does not Accomplish - Cons
Planning Act:		
Ministers Zoning Order under s. 47 of the Planning Act	<ul style="list-style-type: none"> -would zone land to permit peaking plant - would take precedence over interim control by-law so any further appeals/court actions regarding the interim control by-laws could be abandoned 	<ul style="list-style-type: none"> - site plan approval would still be required and would be required prior to building permit being issued - does not address application of a municipal emission control by-law to prevent operation once plant is constructed. Additional response to this type of by-law would still be required if plant unable to meet standards - does not address requirement for Development Permit from Conservation Authority required in York - any person could apply to amend MZO and this application can be appealed to Ontario Municipal Board
LGIC Regulation pursuant to s. 62.0.1 of the Planning Act setting out that peaking plants are not subject to the Planning Act once they have received approval under the Environmental Assessment Act.	<ul style="list-style-type: none"> -consistent with policy that government energy projects are not subject to Planning Act if approved under Environmental Assessment Act - would allow development of plants subject only to other approvals that may be required such as building permits - applications for site plan approval would not require approval but developer could still plan 	<ul style="list-style-type: none"> - would need to obtain consent of Minister of Municipal Affairs and Housing to request Regulation - does not address application of a municipal emission control by-law to prevent operation once plant is constructed. Additional response to this type of by-law would still be required if plant unable to meet standards - does not address requirement for Development Permit from

	to meet municipal requirements - appeals/court actions regarding the interim control by-laws could be abandoned	Conservation Authority required in York
Conservation Authorities Act:		
If CA does not approve development permit based on information provided - An Order in Council or Regulation pursuant to the Conservation Authorities Act providing that the Lake Simcoe Region Conservation Authority does not have jurisdiction over the entry road to the site. Other option is to return appeal decision making authority to the Minister of Natural Resources so that decision could be obtained more quickly.	- if access road not within regulated area then CA would not have jurisdiction and could not issue development permit - if development permit application remains outstanding then providing MNR with approval authority could remove possible political considerations from decision	- unclear what implications would be on Conservation Authority to remove a small portion of regulated area - could be seen as contrary to public safety - changing appeal decision making authority may not necessarily secure approval.
Municipal Act:		
- Possible fine particulate matter by-law - in place in Oakville but not in King Township. Possible legal avenues to prevent application of fine particulate matter by-law to peaking plant: - Province could attempt to use regulation making authority to set a standard for emissions that must be followed. - The Lieutenant Governor in Council may where desirable in the provincial interest make a	- may put in place provincial limits that would take precedence over municipal by-laws	- it is unclear if there is regulation making authority available to implement this option. Municipal by-law would be of no effect if it was in clear conflict with provincial requirements and this would only occur if it was impossible to implement both. Would be difficult to establish provincial requirement that conflicted with municipal by-law. - ability to restrict municipal powers for 18

regulation pursuant to the Municipal Act, 2001 restricting municipal powers for 18 months.		months limited given authority used to pass municipal by-law.
Comprehensive:		
Legislation to provide that the Planning Act requirements, Conservation Authority Development Permits and any municipal by-laws pursuant to the Municipal Act do not apply to peaking plants. Would be possible to do legislation in combination with other options – for instance a Planning Act regulation providing that its processes do not apply to peaking plants followed up with legislation that addresses municipal by-laws regulating air emissions.	<ul style="list-style-type: none"> - single comprehensive action that would clearly provide authority to locate plants subject to the Environmental Assessment Act approval process - alternatively could be used in combination with regulation under Planning Act so that construction could commence and then air emissions standards could be addressed by legislation 	<ul style="list-style-type: none"> - time required to approve proposed legislation. If used in combination with Planning Act regulation could allow construction to commence but risk that if proposed legislation not introduced that plants may not be able to be used as designed.

Prepared by: Brenda Linington, Senior Counsel, LSB MEI 416 325-1785
Date: March 22, 2010

March 31, 2010 – B(20)

Southwestern GTA Supply

ISSUE:

Oakville council voted on March 29, 2010 to extend the interim control bylaw by an additional year citing need for further study of environmental and safety issues.

TransCanada announced on March 30, 2010 that it will take legal action against the bylaw.

For matters relating to York Region Supply please see B(04); for other gas-fired generation not in the Southwest GTA please see B(15).

SUGGESTED RESPONSE:

- The Ontario government remains committed to both improving power supply and reducing harmful emission in the southwest GTA – a region which requires local generation to assure long-term reliability and where urban expansion has resulted in above-average growth in peak demand.
- The new 900 MW gas-fired generation facility in Oakville is essential to meeting the need for new, clean, reliable power in southwest GTA, an area of rapid growth.
- We recognize the community's concerns and have launched a clear air plan that will help improve air quality in the region. As part of this comprehensive plan:
 - The Ministry of Environment has launched a new task force, led by Dr. David Balsillie, that will be required to develop and report back on a detailed action plan to improve air quality by the end of June 2010. The report will include air quality improvement targets, strategies and timelines.
 - The Ontario Power Authority (OPA) will invest \$30 million over five years in a new industrial energy efficiency program to reduce both electricity and gas consumption.
 - Establish a Working Group on Cleaner Energy and Industrial Efficiency with Holcim Canada Inc., a local cement company, to explore energy efficiency and cleaner industrial emissions. MEI and the OPA will also participate in the group.
 - The OPA will work closely with local distribution companies to identify opportunities for renewable energy generation under the new Feed In Tariff program
 - The OPA will work to achieve 500 megawatts (MW) of conservation in west GTA by 2014.

IF ASKED ABOUT MPP FLYNN'S PRIVATE MEMBER'S BILL/SETBACKS:

- We recognize that MPP Flynn's private members' bill aims to address his constituents concerns and we look forward to debate in the Legislature on this bill.
- All gas-fired generation projects must meet or exceed Ontario's safety requirements.
- Natural gas projects must also complete the Environmental Screening Process which requires proponents to identify potential and mitigate environment effects as well as consult with members of the public.
- Plants are sited according to existing zoning laws, which determine where industrial projects can be located.
- Municipalities (like Oakville), through their Official Plans, have the ability to work with proponents to establish zoning standards like setbacks.
- There are dozens of gas-fired generation facilities in Canada and hundreds in the U.S. There are over 15 gas plants operating within the core area of New York City alone within similar distance or even closer to residences and other buildings.

IF ASKED ABOUT DETAILS OF THE GAS PLANT:

- TransCanada Corporation will build and operate a 900 MW combined-cycle, natural gas-fired power plant in Oakville by December 31, 2013
- The \$1.2 billion plant will create approximately 600 jobs during the construction period and 25 permanent jobs.
- In addition to the construction jobs, economic benefits for the community are expected to include 25 permanent opportunities at the plant, over \$1 million annually in municipal tax revenue, along with Ontario-purchased equipment and supplies.
- This facility will provide homes and businesses with an increased security of supply and contribute to the government's goal of eliminating coal-fired generation in the Province.
- Local gas-fired generation facilities such as this one are necessary to ensure the reliability of the electricity system during periods of higher demand.

IF ASKED ABOUT THE ONTARIO MUNICIPAL BOARD DECISION TO UPHOLD THE OAKVILLE INTERIM BYLAW:

- The OMB determined that the City of Oakville had reason and precedence to take a reasonable amount of time to study the benefits and impacts of the project in order to make a better informed decision on land use requirements.

- In issuing their decision the OMB emphasized that the generating plant would serve the public interest and urged Oakville to give due consideration to this and to make timely decisions in recognition of the time constraints that TransCanada is facing.
- In this same ruling the OMB found that there was no demonstration of public benefit or authority for Oakville to make the proposed Official Plan Amendment which would have restricted the size of generating plants, and so did not allow the Amendment.

IF ASKED ABOUT PM 2.5 EMISSIONS FROM THE OGS:

- Almost all local pm 2.5 emissions in the Southwestern GTA come from vehicles, homes and small to mid-sized industrial activity.
- A gas plant would contribute less than 1 per cent of the total pm 2.5 emissions in the Southwestern GTA.
- The Oakville Generating Station would actually incrementally improve the level of pm 2.5 emissions in the Southwestern GTA compared with the old Lakeview coal-fired generating station.
- Oakville and the Southwestern GTA need a local, cleaner energy supply.
- Future generations deserve the same access to reliable electricity that Oakville and Ontario have enjoyed -- and the Oakville Generation Station is a cleaner source of power than the coal plants we've been relying on.
- Oakville has an opportunity to take advantage of Ontario's clean air strategy for the Southwestern GTA, which includes 30 million dollars over the next 5 years to help industries improve energy efficiency and a task force to address the causes of pollution including pm 2.5.

IF ASKED ABOUT THE CLARKSON AIRSHED STUDY AND OTHER ENVIRONMENTAL CONCERNS:

- Government, the OPA and all of the proponents are fully aware of the study findings and are working to be able to mitigate emissions impacts from any plant located in the SWGTA.
- That's why the Ministry of the Environment has launched a new task force, led by Dr. David Balsillie that is required to develop and report back by the end of June 2010 on a detailed action plan to improve air quality in the region.
- This task force will work with a community advisory committee to establish targets, timelines and strategies to improve air quality in the southwest GTA.

- Communities and individuals also have the opportunity for input into the environmental review process. The proponent will be required to address the potential cumulative impacts of its project at the approvals stage of the process
- The proposed plant will be equipped so that emissions will be lower than the Ministry of Environment's limits by at least 70%.
- The emission standards in this RFP mean that the plant's technology will be amongst the best lowest emitting technologies available.

IF ASKED ABOUT THE INTEGRITY OF THE RFP PROCESS:

- Each proposal was evaluated against a number of factors, including community outreach, engineering, procurement/construction agreements, fuel supply, etc.
- An independent evaluation team reviewed all submissions against the criteria.
- This team is comprised of representatives from the OPA, IESO and the OEB. The committee had an independent chair and its activities were overseen by the Fairness Advisor.

IF ASKED ABOUT LOCATING A GAS PLANT IN NANTICOKE INSTEAD OF THE SWGTA:

- Nanticoke was identified as a possible location for a new gas-plant in the OPA's 2006 IPSP
- The OPA determined it was not the most cost-effective option to meet the SWGTA's needs.
 - New transmission to and into the SWGTA would be required at an estimated cost of about \$200 million.
 - Converting Nanticoke to a gas plant would be a complex and expensive process that would result in a less efficient, more polluting and more costly gas plant.
 - SW GTA needs local generation to reliably and safely meet the needs of its growing population
 - The proposed new plant saves transmission, is more cost and operationally efficient and will better meet local needs.

IF ASKED ABOUT THE FORMER LAKEVIEW GENERATING STATION SITE:

- We were able to respect the community's wishes and rule out Lakeview because there are other suitable sites that are available for generation in southwest GTA.

IF ASKED ABOUT TRANSCANADA'S NOV 24TH PRIVATE MEETING WITH RESIDENTS' ASSOCIATIONS

- This meeting has been initiated by TransCanada as part of their outreach. They are best able to answer questions about it.
- We do understand that TransCanada has already held two public information sessions, and is planning on hosting several more in the coming weeks and months. These will be open to all members of the public.

Background

Clean Energy Supply Procurement :

Future In-Service Dates are **CONFIDENTIAL**

Project	Size (MW)	Status	In-Service Date
GTAA Cogen	90	On-line	February 2006
Loblaws DSM	10	On-line	June 2006
Greenfield Energy Centre	1005	On-line	October 2008
St. Clair Power	577	On-line	March 2009
Greenfield South	280	Approvals complete. Construction not yet started	2012-2013
TOTAL ONLINE	1682		
TOTAL	1962		

Status of Other New Contracted or Procured Gas-Fired Generation Facilities in the GTA:

Future In-Service Dates are **CONFIDENTIAL**

Project	Size (MW)	Status	In-Service Date
Portlands Energy Centre in SCGT Operation	340	On-line	June 2008
Portlands Energy Centre in CCGT Operation (Incremental)	210	On-line	April 2009
(Sithe) Goreway Station	839	On-line	June 2009
TransCanada Halton Hills Generating Station	632	Under construction	Summer 2010
TransCanada Oakville Generating Station	900	Contract announced	2013
TOTAL ONLINE	1389		
TOTAL	2921		

Southwest GTA Direction

- On August 18, 2008, Minister Smitherman directed the OPA to launch a competitive procurement process for a combined-cycle natural gas generating plant of about 850 MW in the Southwest GTA. The new facility is to have an in-service date of no later than December 31, 2013.
- The new project will be required to undergo all local, municipal and environmental approvals to ensure it meets or exceeds regulated standards, including those for air quality, noise, odour and vibration.
- The Direction also asks the OPA to arrange a public forum to provide information to local officials and residents regarding the need for a new gas-fired generation facility in the Southwest GTA, which Minister Smitherman will participate in.

CONFIDENTIAL – FOR MINISTER’S USE ONLY

- The SWGTA RFP requires bidders to exceed Ministry of Environment's standards for emissions by 70%.

Public Meetings

- On October 28, 2008, the Minister of Energy and Infrastructure held a town hall in Mississauga on the plan for local-generation. The town hall was attended by over 200 people.
- On March 3rd, 2009, the OPA held a town hall in Mississauga to discuss the SWGTA procurement. At that meeting, the OPA presented findings of a Jacques Whitford report that was released on January 31, 2009. The report looked at the effect of displacing coal plants (Lakeview, Lambton, and Nanticoke) with gas-fired generation on local air quality.
- Mississauga's "The News" reported that at that meeting there was staunch opposition to the proposed gas-fired generation facility in the region.
- The basic findings of the Jacques Whitford study are: the SWGTA region will see a reduction in some contaminants (SO₂ and ozone); for other contaminants (NO₂, CO, and fine particulate matter), there will be little change.
- Across Ontario, displacing coal with gas-fired generation reduces emissions of heavy metals, arsenic and mercury.
- The June 24, 2009 Mississauga news reported that a rally and petition signing against the proposed plant was held in southern Mississauga. The article reported that "hundreds" of local residents attended and that Mayor Hazel McCallion received hundreds of names on a petition. The report quotes the Mayor as stating that she would fight the plant and win.
- The article also reported that Marie Trainer, the Mayor of Haldimand County, offered to host the plant in Nanticoke instead, proposing conversion of the coal plant to gas.
- Councilor Pat Mullin and M.P.P Charles Sousa were also scheduled to speak at the rally but they were not quoted in the article.

Clarkson Airshed Study:

- The Clarkson Airshed Study is being conducted by MOE to look at how emissions from local industries, vehicles, residences and sources outside the study area contribute to air quality in the Clarkson area.
- MOE recently held a public meeting in the area to report their current findings from the ongoing study. This was used as a forum for local residents and politicians to oppose the gas plant. They pointed to the study findings as a rationale to not locate the proposed plant in the SWGTA.
- Rigorous emissions limits for the proposed gas plant are being addressed in the RFP, for oxides of nitrogen (NO_x) and carbon monoxide by requiring levels to be 70% below the provincial standard. These can be achieved by using best available technology and operating

practices.

- At this time there is not a suitable technological solution for lowering small particulate matter, PM_{2.5} Particulate matter. PM_{2.5} is a contaminant of most concern to residents in relation to the proposed gas plant
- The study has found that exceedances of the standard for PM_{2.5} were similar to other urban regions such as Brampton and less than Toronto, Hamilton, St. Catharines and other urban areas of Southern Ontario.
- The three major emissions sources of PM_{2.5} in the Clarkson airshed are industry, vehicle traffic and residential furnaces. An 850 MW gas plant has been estimated to add 1% to the PM_{2.5} emissions in the Clarkson airshed, which would leave the airshed relatively unchanged and still less taxed than many other urban areas of Ontario.
- Ongoing vehicle efficiency improvements and economic redevelopment of the area away from heavy industry promises a lowering of PM_{2.5} much greater than the incremental amount a gas plant would add.
- A comparison study by environmental consultants Jacques Whitford for the OPA found that that there will be a net reduction in particulate matter from electrical generation entering the Clarkson airshed when the coal plants are closed and replaced with generation within the SWGTA / Clarkson airshed.

Southwest GTA Procurement

- On July 16, 2008, Minister Smitherman announced that he will direct the OPA to launch a competitive bidding process for a combined-cycle natural gas plant of about 850 MW in the southwest GTA.
- The new plant will provide local supply to the growing areas of Mississauga, Etobicoke and Oakville.
- With other possible sites available for a natural gas plant in the region, Minister Smitherman also announced that the former Lakeview Generating Station site in Mississauga will no longer be used for electricity generation.
- The Lakeview site being ruled out as a future location for gas-fired generation was well-covered by the media (The Toronto Star, National Post, CBC, CTV, Global, City TV).
- Mississauga Mayor Hazel McCallion praised the province for its decision on Lakeview in many news articles, but said she is readying for another battle (with respect to the plans for a new gas plant in southwest GTA).
- Sithe Global Power LLC has approvals in place to build an 800 MW natural gas-fired plant in the Southdown area between Clarkson and Oakville, and therefore would be a strong contender in the planned southwest GTA procurement.

- Mayor McCallion is quoted by the Toronto Star as saying to Minister Smitherman "if Sithe is the winner... the province is going to have to answer to the Clarkson airshed study. I'm just warning you up front."
- The Ontario Power Authority (OPA) released the Southwest GTA Request for Qualifications (RFQ) on October 2, 2008. A list of 7 qualified applicants was released on January 16th 2009.
 - The RFQ determined projects that qualify for a future Request for Proposals (RFP).
 - The RFQ called for a combined cycle gas turbine (CCGT) plant of 750MW to approximately 850MW in Etobicoke, Mississauga, or Oakville.
 - Site identification was not part of the RFQ; sites will be identified early on in the RFP process.
- The qualified applicants from the SWGTA RFQ were:

Qualified Applicant Name	Proposed Project Name
Invenergy Canada Development Partnership	GTA Southwest Energy Centre (Submission #1)
Invenergy Canada Development Partnership	GTA Southwest Energy Centre (Submission #2)
Invenergy Canada Development Partnership	GTA Southwest Energy Centre (Submission #3)
Northland Power Inc.	Clarkson Energy Centre
Portlands Energy Center L.P.	Manby Power Project
Portlands Energy Center L.P.	Mississauga Power Project
Sithe Global Power Southdown ULC	Southdown Station

- On February 6, 2009, the Ontario Power Authority (OPA) issued the draft Request for Proposals for comment.
- On March 13, 2009, the OPA released the Request for Proposals. The registered firms had until July 8, 2009 to submit a proposal. It was expected that the winning bidder would be named in August.

- On April 1, 2009, the OPA released the locations of the remaining four eligible firms. The sites are:

Registered Participant	Facility Name	Location of Site
Inverenergy Canada Development Partnership	Avon Energy Centre	445 Hazelhurst Road, Mississauga
Northland Power Inc.	Royal Windsor Energy Centre	2400 + 2430 Royal Windsor Drive, Mississauga
Portlands Energy Centre L.P.	Oakville Generating Station	1500 Royal Windsor Drive, Oakville
Southdown Station Partnership (a partnership of Sihe Global Power Southdown ULC and Sihe Global Power Southdown II ULC)	Southdown Station or Southdown Station – Facility B	759 – 797 Winston Churchill Boulevard, Mississauga



- All four of these sites are within the Clarkson airshed.
- The OPA issued two addenda to the RFP and Contract; the first on May 12 and the second on June 19, 2009. These addenda add clarity to the emissions requirements and strengthen the measurement and reporting requirements. Additional changes were made to better align the OPA process with the MOE environmental assessment process.

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- On July 8th, 2009, the OPA received bids from all four registered participants in response to the RFP. The OPA expects to announce the successful project in early Fall.
- On August 28th, 2009, the Ontario Power Authority announced that it was extending the deadline for the selection of a proponent for a new gas-fired generation electricity plant in the Southwestern GTA. The decision is now expected by the end of September.
- On September 30, 2009, the Ontario Power Authority announced that it will sign a contract with TransCanada Corporation to design, build and operate a 900 MW electricity generating station in Oakville. TransCanada has estimated the cost of the plan at \$1.2 billion.

TransCanada Oakville Generating Station

- The Oakville Generating Station will be located on an existing industrial site at 1500 Royal Windsor Drive, in the Town of Oakville.
- The 15-acre site is located near natural gas pipelines and the high voltage electricity grid.
- The generating station will meet or exceed all regulatory environmental requirements, including those related to air, noise, and water.
- It will be a 900 MW combined cycle natural gas-fuelled electricity generating station which includes the following major equipment:
 - Two High Efficiency Natural Gas-Fired Combustion Turbine Generators (258 MW each)
 - Two Heat Recovery System Generators with Duct Firing
 - One Steam Turbine Generator (437 MW)
 - One Mechanical Draft Cooling Tower
- The plant is undergoing an Environmental approval and has not received any municipal approvals.

Need for New Generation in the Southwest GTA

- A natural gas generation plan is essential meet the electricity needs of a region whose peak load has grown more than twice as quickly as the provincial average and to support the elimination of coal-fired generation by 2014.
- The IPSP identifies a need for 850 MW of new combined cycle gas-fired generation in the south-west GTA by 2013. Further, 550 MW of simple cycle generation is needed in the GTA area, by 2014.
- New generation is needed to address reliability issues in the area, including supply adequacy, voltage support and system security, and to support coal replacement.

- The OPA identified this need in consultation with the IESO and taking into account the plants already existing and under contract. The IPSP capacity figures assume Eastern Power/Greenfield South (280 MW) will reach completion and are in addition to this project.
- The closing of the Lakeview coal plant in 2005 removed 1,150 megawatts of supply from the grid at a time where demand in the region continued to grow.
- The lack of local generation in the SWGTA increases strain on the aging transmission system. Transformer stations in the region are forecast to exceed their capacity by 2015.

Conservation in West GTA:

- The Ontario Power Authority is working to achieve 500 MW of conservation in the region by 2014.
- Since 2006, the OPA and local distribution companies have reduced peak demand by about 150 MW.
- That's equivalent to the power used by 1.5 million 100-watt bulbs.

Greenfield South – Approvals Issues

- The proposed 280 MW Greenfield South Power Corporation (GSPC) facility was a successful project under the Province's 2,500 MW Request for Proposals for New Clean Energy completed in 2004.
- The proposed location for the project is in an industrial area west of Etobicoke Creek between Dundas Street East, Queensway East, and Loreland Avenue, immediately north of the Canadian Pacific Railway in the City of Mississauga.
- The primary fuel source for this combined cycle plant will be natural gas. Distillate fuel will be used as an alternative fuel source when there are interruptions to the natural gas supply which are estimated to occur approximately four per cent of the time.
- Officials from the City of Mississauga are opposed to the project, and the City has taken steps to delay or prevent project construction. Mayor Hazel McCallion stated, "It's in the wrong location and we've said that from day one...we have no alternative but to ask the Minister to get involved" (Toronto Star, 02/02/06, pB5).
- On March 8, 2006, City of Mississauga Council adopted a zoning by-law amendment which would eliminate power generating facilities as a permitted use on GSPC's lands.
- GSPC appealed the zoning by-law amendment to the Ontario Municipal Board (OMB). An OMB hearing on the Appeal concluded on July 18, 2007.

- On October 4, 2007 the Ontario Municipal Board ruled in favour of GSPC, stating that the City of Mississauga did not demonstrate that there were sufficient public benefits to justify taking away the zoning permission.
- The Board also found that the location of the site is within an industrial area and that power generation is an appropriate use.
- The Board, in its decision, requires the company to meet several conditions, including reducing by 50 per cent the amount of fuel oil that can be kept on site.
- After conferring with legal staff Mississauga City Council decided not to appeal the Board's decision.
- In February 2006, the City of Mississauga appealed to the Minister of the Environment, the Director of the Environmental Assessment and Approvals Branch's decision to deny requests that the project be made subject to a full Environmental Assessment. The Minister of Environment also received appeals from the Coalition of Homeowners for Intelligent Power (a local ratepayers group) and a private citizen.
- On July 16, 2008, the Minister of Environment decided not to subject the project to a full environmental site assessment.

Greenfield South – Status

- Greenfield South has completed approvals, but has to finalize financing before starting construction.
- GSPC has informed the OPA that approvals delays have harmed the economic viability of the project. The contract between GSPC and the OPA was renegotiated. As part of the renegotiation, GSPC dropped its plan for outside fuel storage.

Mississauga Mayor McCallion Requests Decision on Generation

- In response to a local citizen's group proposing residential redevelopment of the 80 hectare Lakeview lands, Mississauga Mayor Hazel McCallion sent Minister Phillips a letter on February 22, 2008 urging the Province to make a decision on the capacity and site for new generation in Mississauga.
- The letter indicated that the City is undertaking a review of the Lakeview site and that a motion which opposes using Lakeview for electricity development would be considered.
- The Lakeview site was viewed as one of the preferred sites in the area for new generation because of its access to transmission, and because it has been a generation site since the early 1960s.
- On February 27, 2008 the Minister sent a letter to Mayor McCallion advising her that there was a need for 850 MW of gas fired generation in Southwest GTA, that Lakeview was still

under consideration as a site and that a direction would be issued to the OPA by June 2008, to establish and clarify the procurement process.

Ontario Municipal Board Hearing

- Ford of Canada and TransCanada Corp. called for an Ontario Municipal Board hearing to challenge a Town of Oakville interim control bylaw and Official Plan amendment, which ban the construction or expansion of power plants with a capacity larger than 10-megawatts. The two companies are advocating that the OMB overturn the two planning measures so TransCanada can build and operate the 900-megawatt Oakville Generating Station. The natural gas-fired plant would be built on the Ford-owned lands of 1500 Royal Windsor Drive.
- According to media reports, the Town of Oakville has argued that its planning measures are necessary to give it enough time to conduct an environmental study to determine what areas of the town can best accommodate the proposed plant. Ford and TransCanada held that the Town instituted the two planning measures as a last ditch effort to withhold development rights.
- Ford lawyer Gerald Swinkin told the OMB that the measures are at odds with the Provincial Policy Statement, which calls for the promotion of opportunities for energy generation. He noted that the Ministry of the Environment already formed a panel of experts who conducted a study. According to the panel's findings, the air in the Clarkson airshed was not unusual for an urban area, and may actually be slightly better than most.
- Town legal counsel John Doherty argued that Oakville's actions were not unusual. He held that municipalities typically wait to alter their official plans to prepare for large power plants until it appears that the project in question is actually approved. TransCanada lawyer Neil Smiley said allowing the bylaw to stand would be crippling to the project, which has a contract with the Ontario Power Authority requiring them to supply 900-megawatts of power by 2013.
- Lawyers representing all three parties completed their closing statements on Tuesday, October 20, 2009.
- A decision by OMB Chair Aristotle Christou was issued on December 4, 2009. The OMB found that Oakville had the authority and that there was precedence to support the Interim Control Bylaw to allow Oakville to become better informed in making its planning and approval decisions.
- The Official Plan Amendment, that would permanently restrict generating plants within Oakville to 10 MW or less, was struck down.
- The ruling also urged, Oakville to recognize the public good being served by the plant and the time constraints that TransCanada was facing.
- On January 26, 2010, TransCanada informed MEI Legal Services Branch that they intended to file a Leave to Appeal the OMB decision on ICBL to the Ontario Divisional Court on the primary basis that the ICBL was in conflict with the Electricity Act and the MEI Ministerial

directive.

Oakville Council Extension of the Interim Control Bylaw

- Oakville council voted on March 29, 2010 to extend the interim control bylaw by one year citing the need for further study of environmental and safety concerns that were not in the terms of reference of their initial study. The bylaw would have expired on March 30, 2010.
- TransCanada announced on March 30, 2010 that they would appeal the bylaw to the Ontario Superior Court of Justice suggesting June 24th as a date for this hearing

TransCanada's Offer to Fund Independent Environmental Study

- TransCanada Corp. has offered to fund an independent environmental review its Environmental Review Report (ERR). This came in response to the Town of Oakville's interest in hiring a third party study to confirm TransCanada's plans to better the emissions limitations set by the Ontario Power Authority.
- TransCanada indicated that it fully supports a review of its ERR, and is willing to cover the cost of hiring a qualified environmental consultant to conduct a review. TransCanada also volunteered to extend the review period from 30 days to 75 days. In doing so, it is more than doubling the normal amount of time that the ministry would require to review our impact.
- In a letter to Oakville Mayor Rob Burton dated October 13, 2009, Oakville Generating Station Project Manager, Terri Steeves, wrote that the funding offer is part of the TransCanada's commitment to community consultation and informed dialogue. Further, the letter indicated that TransCanada strives to implement the best and most advanced technology for its facilities. For example, the industrial gas turbines selected for the generating station represent the most efficient and highest output units currently commercially available.
- The Oakville Beaver reported that Mayor Burton was not impressed with TransCanada's funding offer, saying that the town could pay its own way.

Private Member's Bill on Separation Distances for Natural Gas Plants

- Oakville M.P.P. Kevin Flynn is proposing to introduce through a private member's bill, legislation that would restrict the construction and operation of new natural gas generating plants that are less than 1100 meters from specified structures and properties.
- A draft of the legislation, titled Separation Distances for Natural Gas Power Plants Act, 2010, specifies a distance of 1100 meters from the property boundary of the following:
 - A building or structure used for residential purposes,
 - A building or structure used for a public purpose, including an educational facility, a day nursery, a health care facility, a community centre or a place of worship,
 - A property used for recreational purposes,
 - A property used as a campsite or campground at which overnight accommodation is provided by or on behalf of a public agency or as part of a commercial operation,

- A property used for commercial activity, including a shopping centre and an office building but not including an industrial facility.
- As written the proposed Act would only exempt plants that are already operating or that have all required permits to build and operate. Oakville (and York Energy Centre) would be subject to the act and would not be able to proceed.
- Oakville GS could not fit in an 1100 or even 550 meter setback. TransCanada would seek substantial compensation for lost revenues if such retroactive legislation were applied. The growing demand of SWGTA would have to be met from some other location. This would mean transmission lines to bring the power to SWGTA, likely crossing multiple jurisdictions and, according to the OPA, costing more. The OPA has repeatedly stressed that while there are alternatives to building a plant in the SWGTA, all are less efficient (i.e. more expensive with greater environmental impact) than the Oakville plant.
- No analysis has been shown to justify the distance of 1100 meters, which appears to be a doubling of the setback distance required of wind turbines subject to the GEGERA REA and FIT. The wind distance is based on noise made by wind turbines, not safety.
- With respect to using noise to set back a gas generating plant, gas generating equipment can be enclosed and noise mitigated such that plants can be located less than 200 meters from a receptor site such as a residence or school and still operate well below the MOE noise requirements, whereas a wind turbine cannot be enclosed or the noise otherwise mitigated except by distance.
- From the standpoint of using safety as a metric for determining separation distance for a natural gas generating plant MEI could find no other jurisdiction that does so, or any mechanism that determines the safety of a natural gas generating plant relative to any other use of piped natural gas such as a home or commercial heating.
- Natural gas as it is used by Ontario generating stations is not a stored fuel so that there is not a high amount of energy stored at any time at the plant as there would be at a coal or oil fired plant or at a propane storage facility. The natural gas is used as it is delivered.
- The safety mechanisms that apply are based on integrity of the pipelines, connections, and equipment that burns the gas, and in response to Technical Standards and Safety Authority and industry standards, these systems are operated, inspected and maintained at gas generating plant at levels exceeding the standards required for commercial and residential properties.
- TransCanada has provided information on plants it operates elsewhere, without incident and within zoning/ siting rules that are closer than 200 meters to occupied buildings - in England and in Phoenix AZ, and within 300 meters in downtown NYC. There are over 15 gas generating plants operating within the core area of NYC with similar or closer separation from residences and other buildings.
- The OPA has provided information on setbacks of contracted natural gas generating plants that are already in operation or are under construction with all permits.

Setbacks - OPA Contracted Facilities

Project	Technology	In-Service Date	Average Contract Capacity (MW)	Location	Proximity to Residential Area
Portlands Energy Centre	Combined Cycle (CC)	22-Apr-09	550.0	Toronto	■ 1 km from Leslieville community
					■ 1 km from Beach community
					■ 450 metres from marina
Goreway Station	CC	04-Jun-09	839.0	Brampton	■ 2.8 km from nearest school and church
					■ 3 km from nearest residential area
					■ 6.7 km from nearest hospital
Brighton Beach Power Station	CC	01-Jan-06	550.0	Windsor	■ 1.3 km from nearest residential area
					■ 2.3 km from nearest school
					■ 8 km from nearest hospital
Greenfield Energy Centre	CC	16-Oct-08	1005.0	Courtright	■ 1.5 km from nearest homes
					■ 12.5 km from nearest school
St. Clair Energy Centre	CC	30-Mar-09	577.0	Sarnia	■ 2.7 km from nearest homes
					■ 2.7 km from nearest school
East Windsor Cogenerating Centre	Combined Heat & Power (CHP)	06-Nov-09	84.0	Windsor	■ 300 metres from nearest residential area
					■ 380 metres from nearest church
					■ 1 km from nearest school
Great Northern Tri-Gen Facility	CHP	31-Oct-08	11.3	Kingsville	■ 2.6 km from nearest residential area
					■ 5.4 km from nearest hospital
					■ 5.2 km from nearest school and church
Sarnia Regional Cogeneration Plant	CHP	01-Jan-06	505.0	Sarnia	■ 1.7 km from nearest church
					■ 6 km from nearest hospital
					■ 4 km from nearest residential area
Sudbury District Energy, Hospital Cogeneration	CHP	01-Jan-06	6.7	Sudbury	■ 1 km from nearest church
					■ 500 metres from nearest residential area
					■ 1.6 km from nearest shopping centre
GTAA Cogeneration Plant	CHP	01-Feb-06	90.0	Mississauga	■ 3.2 km from nearest residential area
					■ 4.5 km from nearest hospital
					■ 3.2 km from nearest school
Trent Valley Cogeneration Plant	CHP	01-Jan-06	8.3	Trenton	■ 300 m from nearest residential area
					■ 500 m from nearest school
					■ 1 km from nearest hospital
Durham College District Energy Project	CHP/District Energy (CHP/DE)	11-Mar-08	2.3	Oshawa	■ Located on Durham College campus
					■ CHP site adjacent to the existing Durham College high voltage substation
					■ 100 metres from nearest homes
London Cogeneration Facility	CHP/DE	31-Dec-08	12.0	London	■ 100 m from nearest residential area
					■ 400 m from nearest school
Warden Energy	CHP/DE	04-Jun-08	5.0	Markham	■ 1.3 km from nearest residential area

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Centre					■ 1.3 km from nearest school
					■ 5.5 km from nearest hospital
Sudbury District Energy Cogeneration Plant	CHP/DE	01-Jan-06	5.0	Sudbury	■ 1 km from nearest hospital
					■ 200 metres from nearest church

OPA Facilities Under Development

Project	Technology	Average Contract Capacity (MW)	Location	Proximity to Residential Area
Oakville Generating Station	CC	900	Oakville	■ 300 metres from nearest school (academy) ■ 400 metres from nearest residential area ■ 1 km from nearest high school ■ 3 km from nearest hospital
Halton Hills	CC	631.5	Halton Hills	■ 3 km from nearest residential area ■ 200 metres from nearest home ■ 450 metres from nearest church ■ 4.7 km from nearest school ■ 2.5 km from nearest hospital
Greenfield South Power Plant	CC	280.0	Mississauga	■ 400 m from nearest residential area ■ 1.5 km from nearest school ■ 1.0 km from nearest hospital
Thorold Cogenerating Project	CHP	236.4	Thorold	■ 100 metres from nearest residential area ■ 250 metres from nearest church ■ 1.5 km from nearest school
York Energy Centre	Simple Cycle (SC)	393.0	King	■ 200 metres from nearest residence ■ 400 metres from church ■ 400 metres from Holland Marsh School ■ 4 km from child care centre ■ 500 metres from public library ■ 2 km from Cawthra Mulock Nature Reserve

OEFC NUG Facilities > 50MW

Project	Technology	In-Service Date	Average Contract Capacity (MW)	Location	Proximity to Residential Area
Ottawa Cogeneration Plant	CHP	1992	68	Downtown Ottawa	■ 800 metres from nearest school ■ 700 metres from nearest church ■ 100 metres from nearest residential area ■ 100 metres from nearest hospital
Cardinal	CHP	Nov-94	156	Cardinal	■ 350 metres from nearest residential area

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Power					<ul style="list-style-type: none"> ■ 125 metres from nearest school ■ 300 metres from nearest church ■ 300 metres from nearest residence
Whitby Cogen	CHP	1996	50	Whitby	<ul style="list-style-type: none"> ■ 3 km from nearest residential area ■ 2 km from nearest school ■ 3.5 km from nearest hospital ■ 3 km from nearest church
Lake Superior Power	CHP	1993	110	Sault Ste. Marie	<ul style="list-style-type: none"> ■ 400 metres from nearest church ■ 3 km from nearest hospital ■ 1.5 km from nearest residential area
Windsor Cogeneration Plant	CHP	1996	74	Windsor	<ul style="list-style-type: none"> ■ 1 km from nearest church ■ 700 metres from nearest school ■ 700 metres from nearest residential area ■ 2 km from nearest hospital
West Windsor Power	CHP	31-May-96	116	Windsor	<ul style="list-style-type: none"> ■ 1.3 km from nearest church ■ 2.16 km from nearest school ■ 2 km from nearest residential area
Mississauga Cogeneration Plant	CHP	1992	110	Mississauga	<ul style="list-style-type: none"> ■ 1.5 km from nearest school ■ 1 km from nearest church ■ 500 metres from nearest residential area

Setbacks: SWGTA Proponents

Project	Proximity
Selected Project: Oakville Generating Station (TransCanada)	<ul style="list-style-type: none"> • 300 m from nearest school (academy) • 1 km from nearest high school • 400 m from nearest residential area • 3 km from nearest hospital
Southdown Station (Sithe)	<ul style="list-style-type: none"> • Located on Winston Churchill Boulevard, approximately 700 m from Royal Windsor Drive • 1.5 km from nearest school • 700 m from nearest residential area • 5.2 km from nearest hospital
Royal Windsor Energy Centre (Northland)	<ul style="list-style-type: none"> • Electrical switch yard will be located towards the front of the property, set back about 100 m from Royal Windsor Drive, approximately 1 km from Winston Churchill Boulevard • 700 m from nearest school • 500 m from nearest residential area • 6.2 km from nearest hospital
Avon Energy Centre (Invenergy)	<ul style="list-style-type: none"> • About 0.6 km from Winston Churchill Boulevard, 1.5 km from Royal Windsor Drive • 1.1 km from nearest school (academy) • 2.1 km from nearest high school

	<ul style="list-style-type: none"> • 1 km from nearest residential area • 5.7 km from nearest hospital
Average of three non-winning proposals	<ul style="list-style-type: none"> • 1.4 km from nearest school • 700 m from nearest residential area • 5.7 km from nearest hospital

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Updated: March 31, 2010

MEETING NOTE

NAME OF ORGANIZATION: TransCanada Energy
DATE/TIME OF MEETING: April 19, 2010, 2:30 pm to 3:15 pm
LOCATION OF MEETING: 900 Bay Street, Hearst Block, 4th Floor, Executive Boardroom

PURPOSE: To discuss issues and possible solutions relating to TransCanada Energy's proposed Oakville Generating station

DESIRED OUTCOME: To understand issues affecting procedure with the generating station and discuss possible approaches to mitigation

ATTENDEES: Ministry of Energy and Infrastructure
Brad Duguid, Minister

TransCanada
Alex Pourbaix, President, Energy
Chris Breen, Senior Consultant, Government Relations

AGENDA:

- Presentation of Oakville GS issues
- Discussion of potential solutions

BACKGROUND:

Oakville Generating Station

- On September 30, 2009, the Ontario Power Authority announced that TransCanada Corporation had been chosen to design, build and operate a 900 MW combined cycle electricity generating station in Oakville. This was a result of the SWGTA procurement directive issued to the OPA by the Minister of Energy and Infrastructure on July 16, 2008.
- The Oakville GS site is part of an existing industrial site within the Ford property at 1500 Royal Windsor Drive, in the Town of Oakville.
- The 15-acre site is located near natural gas pipelines and the high voltage electricity grid.

Environmental Review

- The plant is undergoing an Environmental approval. On January 26, 2010 TransCanada published a draft Environmental Review Report (ERR) for public review.
- TransCanada has offered to fund an independent environmental review of the ERR. This was in response to the Town of Oakville's interest in hiring a third party to confirm TransCanada's plans to better the emissions limitations set by the Ontario Power Authority. Oakville declined the offer and is proceeding with its own funding.
- TransCanada also volunteered to extend the review period from 30 days to 75 days. In doing so, it is more than doubling the normal amount of time that the ministry would require to review the impact. The current plan is to issue the Draft for a 30 day review and to follow with a 60 day review period for the final version.

Public Opposition

- Significant public opposition has been expressed by the Mayor of Oakville and the residents of Oakville and nearby communities, particularly about the amount of setback from residences and schools, allowable noise limits and air emissions.
- TransCanada and the OPA have responded to these concerns and provided explanation and further information without noticeable result.
- A well funded community organization, Citizens For Clean Air (C4CA) has mounted a public relations campaign in opposition to the plant, focusing on the emissions of Particulate Matter (PM).

Town of Oakville Actions

- The Council of the Town of Oakville has taken three significant actions to date to slow or possibly stop the construction of the plant within Oakville:
 1. Interim Control By-law (ICBL) which would temporarily, but for at least one year prohibit any new power generating facility greater than 10 MW, while the Town studied the impact
 2. An Official Plan Amendment which would have allowed permanent prohibition
 3. A by-law to control the emissions of fine particulate matter within Oakville
- TransCanada and Ford appealed the first two actions to the Ontario Municipal Board (OMB) in October. The OMB decision upheld the Interim Control By-law, but struck down the Official Plan Amendment. In rendering its decision the OMB noted that they expected the OPA and the provincial government to appear at the hearing or write to explain the public need for the plant, which would appear to be a signal that they would prefer policy direction.

- On March 29 2010, Oakville council voted to extend the Interim Control By Law by the allowed period of one year.
- Oakville introduced its particulate matter by-law in late December 2009 so TransCanada has had limited opportunity to react. It is the view of TransCanada's lawyers that this by-law is not appealable to the OMB as the powers are given to the Town under the Municipal Act.

TransCanada's Expectations for Procedure Under Current Legislative Conditions

- TransCanada expects that Oakville will exploit its by-law powers to slow and if possible stop the construction of the plant.
- TransCanada and Ford have applied to the Ontario Superior Court of Justice, to appeal the Ontario Municipal Board decision on the Interim Control By-Law, seeking a June 24 2010 hearing date but have not yet received a response. TransCanada's lawyers are not confident that the appeal will be successful.
- The particulate matter by-law has set emissions limits that are so low that the plant would not be able to operate.
- It would be very difficult to challenge this by-law under current legislation. The City of Toronto pesticides by-law provides precedence that has been upheld by Ontario courts. The Municipal Act does give municipalities the authority to issue environmental bylaws if there is no conflicting provincial or federal policy.
- Ministry of Environment staff who worked on the City of Toronto by-law have given MEI an initial opinion that it would be difficult to prove Environment regulatory conflict with the Oakville by-law. Environment is examining their policies around GHG and particulates as points of conflict
- It is TransCanada's opinion that any challenge route would be lengthy and could still result in Oakville's actions being upheld.
- TransCanada also pointed out that other generating plant host communities are following Oakville; for example King Township has passed a similar Interim Control Bylaw and is likely to follow with a particulate matter by-law.

TransCanada's Proposal for Legislative Action

- TransCanada's lawyers have proposed some potential legislative responses to exempt Oakville GS from Oakville's planning and by-law authority. These changes would be applicable to other gas plants in other municipalities.
- These proposals have also been given by MEI staff to our lawyers for review and comment, together with comment on whether the GEA regulations could also be used as a model for gas plants.

- As a response to the Interim Control By-law, TransCanada has proposed their preferred approach would be for the province to use the regulation- making provisions in sections 62.01 and 70 (h) of the *Planning Act* to exempt the plant from municipal planning authority. An issue with this approach is interpretation of whether the language allows procedure on the exemption before Environment has issued the Environmental Approval. TransCanada's lawyers have interpreted that the exemption regulation could be issued before, with the exemption subject to the environmental approval being received.
- Other less-preferred approaches have been proposed such as exempting electricity projects from the *Planning Act* through the *Electricity Act*, and modifying the Halton Official Plan to require provisions for electricity projects. Less preferred means that TransCanada's lawyers see these as more complicated and/or time consuming.
- As a response to the particulates by-law, TransCanada has proposed regulation under the *Electricity Act* that exempts from municipal by-laws discharges from electricity generation that are already subject to the *Environmental Assessment Act*. This would place the Oakville particulate by-law in conflict with the provincial regulation, which is not permitted under the *Municipal Act*.
- As less-preferred alternatives, TransCanada's lawyers have proposed making regulation under the *Environmental Protection Act*, or a regulation under the *Municipal Act* which would allow an 18 month suspension of the by-law, which would allow time for statutory amendment.
- MEI legal, in consultation with MAH and MOE legal examined the options and has briefed Minister's Office staff (see attached briefing note prepared by Legal Services Branch).
- Ministry policy and legal staff are in agreement that legislation is the most effective option in ensuring that the various regulatory barriers put in place by municipalities do not prevent completion of the Oakville and North York Region plants.

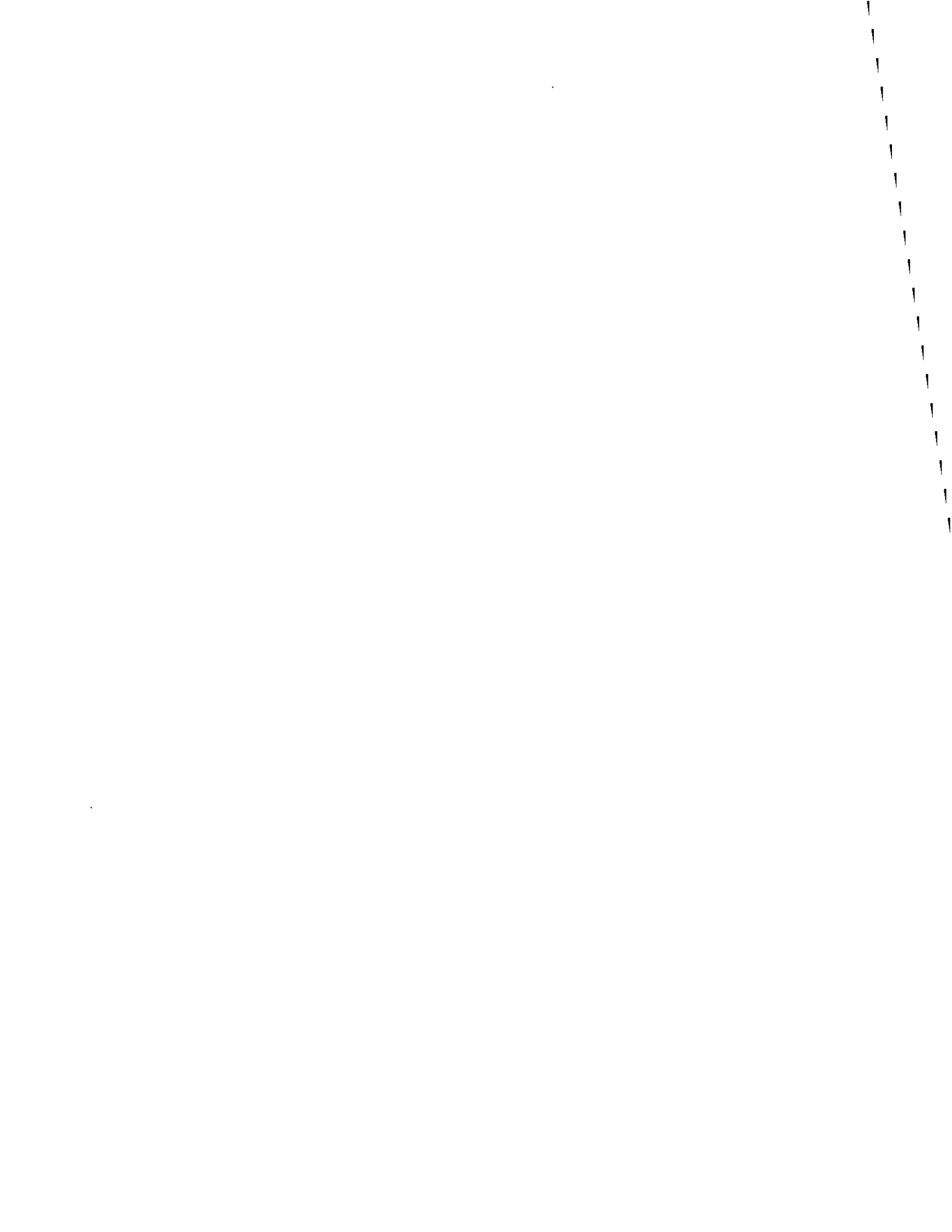
SUGGESTED RESPONSE:

- Thank you for briefing me on these issues. I share your concern about the impacts of Oakville's actions, and the potential for this to be used as a model for other municipalities.
- I appreciate that you have presented some response options. We have reviewed them in consultation with the other ministries that would be involved.
- This is an urgent issue; we are giving this a priority attention.

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April 12, 2010

Approved by: Garry McKeever
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April 12, 2010

Approved by: Rick Jennings
Assistant Deputy Minister
Energy Supply, Transmission and Distribution Policy
April 12, 2010



BRIEFING NOTE

ISSUE: Description of legal issues relating to the development of the gas fired electricity plant in the Town of Oakville

ATTACHMENTS:

1. Note prepared by Legal Services Branch at MEI regarding legal options available to facilitate development of Oakville and York gas fired power plants dated March 22, 2010.
2. Note prepared by Energy Supply at Ministry of Energy and Infrastructure (MEI) setting out process related to the procurement of a gas fired energy plant for the southwestern GTA supply dated March 31, 2010.
3. Note prepared Energy Supply at MEI for scheduled April 19, 2010 meeting of representatives of TransCanada Energy (TransCanada) with the Minister of Energy and Infrastructure dated April 12, 2010.

SUMMARY:

- In August of 2008 the Minister of Energy and Infrastructure directed Ontario Power Authority (OPA) to procure a gas fired energy plant of approximately 850 MW capacity in southwestern GTA. In September of 2009 OPA announced that TransCanada had been chosen to develop a 900 MW plant (in service date of no later than December 31, 2013) within the Ford property at 1500 Royal Windsor Drive in the Town of Oakville.
- Residents in the area actively oppose the use of this site based mostly on air quality and proximity to nearest school (300m) and residences (400m).
- Oakville Council are taking all steps to stop use of lands for the plant including approving interim control by-law that prevents use of the site for the plant for next year and may result in by-law amendment that would not permit the use. Oakville Council has also approved a by-law regulating emissions of fine particulate matter. As designed the plant would not meet the standards set by the emission control by-law.
- TransCanada is taking all available steps both locally, at Ontario Municipal Board and in the Courts to attempt to obtain necessary approvals to allow the plant at this location. Likely that the approvals will not be obtained to allow in service date of December 31, 2013. For TransCanada to be successful it would have to successfully challenge interim control by-law and obtain zoning to permit use and successfully challenge application of emission control by-law.
- TransCanada has advised OPA that it believes that the force majeure provisions of its contract with OPA have been triggered as TransCanada is now being prevented from performing its obligations under the contract due to the actions of Oakville. The force majeure provisions set out that once triggered TransCanada would not be subject to certain payments required by the contract until the force majeure event is remedied.

- A consideration in any option chosen is the effect of Ontario's actions on any contracts undertaken or the procurement/ tender process.
- TransCanada Energy has approached the province for legislated and other assistance given local resistance.
- MPP Kevin Flynn introduced Bill to establish minimum separation distances between gas fired power plants and sensitive uses such as residential and day care facilities. Ford site would not meet the suggested separation distances.
- To date the province has taken no public steps to assist TransCanada in development of the plant at the Ford site.

Prepared by: Legal Services Branch, Ministry of Energy and Infrastructure
Date: April 13, 2010

Perun, Halyna N. (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: June 20, 2011 11:52 AM
To: Khatri, Anupa (ENERGY)
Subject: FW: Re: OPA et al
Attachments: Email from James Rehob last received April 30, 2010.pdf; OPA - Ministerial Briefing SWGTA Options.pdf; Options for Meeting Electricity Supply Needs in the South West GTA - Oakville Generating Station and Alternative Supply Options.pdf

Please print attached thanks

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
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From: Miceli, Martina (ENERGY)
Sent: June 20, 2011 11:28 AM
To: Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Re: OPA et al

Good morning Halyna and Carolyn,

As per your request.

Kindly,

Martina Miceli
Legal Secretary
Ministry of the Attorney General
Ministry of Energy/Ministry of Infrastructure
Legal Services Branch
777 Bay Street, 4th. Floor Suite 425
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T: 416-326-9857
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Montano, Teresita (MEI)

From: Rehob, James (MEI)
Sent: April 30, 2010 2:24 PM
To: Montano, Teresita (MEI)
Subject: FW: FYI.

Hi, please print! Kindly, James

From: Bishop, Ceiran (MEI)
Sent: March 2, 2010 1:30 PM
To: Rehob, James (MEI)
Cc: Jenkins, Allan (MEI)
Subject: FW: FYI.

James – see Allan's comments.

1. Would you be ok with stating explicitly that "mutually agreed termination" would be one of the outcomes from amendments to accommodate new regulatory risks?
2. I think the answer on the section numbering question is that 1.12 is the explicit clause about amendment while 1.10 is the area where you've identified potential alternate avenues through which to pursue an amendment (nuanced options). Can you confirm?

C/

From: Jenkins, Allan (MEI)
Sent: March 2, 2010 1:08 PM
To: Bishop, Ceiran (MEI)
Cc: McKeever, Garry (MEI)
Subject: RE: FYI.

James' note is OK with me, with a couple of comments: it isn't made clear by James that point 2 is discussing mutually agreed termination (he uses the phrase "to accommodate the new regulatory risks") where the OPA deck refers to 'agree on an amendment to terminate the contract'.

Wrt the same point 2 (James' note) the OPA deck refers to 1.12, while James analysis dwells only on 1.10. Is there a mis-numbering by the OPA or James in referring to the relevant section, or is there a difference of opinion as to which section is relevant?

Still awaiting feedback from OPA on damages.

From: Bishop, Ceiran (MEI)
Sent: March 2, 2010 12:22 PM
To: Jenkins, Allan (MEI)
Cc: McKeever, Garry (MEI)
Subject: FW: FYI.

Allan – here's the note. Comments/enhancements welcome.
I think we should run this and the OPA deck by Garry to bring him back up to speed.
Would be good to get this to Jenn by clay's end.

04/30/2010

C.

From: Rehob, James (MEI)
Sent: March 1, 2010 6:02 PM
To: Bishop, Ceiran (MEI)
Cc: Girling, James (MEI); Vidal-Ribas, Victoria (MEI); Johnson, Paul (MEI)
Subject: RE: FYI.

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

March 1, 2010

Good afternoon, Ceiran. I write in order to provide my views as to the OPA's assessment of the potential risks associated with terminating its contractual arrangements with TransCanada Pipelines ("TCPL"), which arose out of the OPA-lead procurement associated with the August 18th, 2008 direction from the then Minister of Energy to the OPA. That direction required the OPA to competitively procure a 900 MW gas-fired generation facility to be located in the Southwest GTA which was designed to support local reliability needs and requirements.

The OPA's presentation (deck) explores three main avenues of analysis, then provides a generalized risk-assessment of each. These are:

- Terminating the contract with TCPL
- Amending the contract with TCPL
- Re-characterizing the transaction so that TCPL acquires the assets (site, technology, goodwill/copywrite, etc.) of one of the unsuccessful suppliers (the "Mississauga site").

1. Terminating the contract with TCPL: The OPA deck does a good job of articulating the main characteristics and risks associated with terminating (or repudiating) the contract between itself and TCPL. It identifies the following transactional risks affecting this option:

- Delay associated with any structured termination designed to minimize costs to the OPA. While the deck does not detail the steps that could be taken to effect this kind of termination and the kinds of costs that might otherwise be minimized, the main points are present and well-made—that attempting to terminate the contract prematurely (prior to its normal expiry date) would leave the OPA open to suit for damages and would result in rate-payer exposure in the millions of dollars.
- OPA deck correctly points out that there is no provision explicitly empowering the OPA to terminate for "convenience".
- Per Article 11.1(g), the OPA deck correctly and accurately identifies the instances in which the OPA can exercise its contractual rights of termination, namely the arising of an "event of default" and events leading to "*force majeure*" –
 - o The deck does a particularly good job at setting out the structure of relevant provisions within the *force majeure* Article (Article 11), including suppliers' unilateral right of termination after the commercial operation date is delayed for more than 365 days due to a failure to obtain necessary permits – the OPA would return the performance security while being liable for no further costs.
 - o Either party can terminate where C.O.D. is delayed for 24 months and payout by OPA is on the same basis as above;
 - o Either party can terminate where C.O.D. is delayed for 36 months in any five-year period, and payout by OPA is on the same basis as above plus any amounts due under contract;
- Any attempts by the OPA to unilaterally terminate the contract outside of a defensible or verifiable event of default by the supplier (TCPL) or in the absence of an event triggering *force majeure* would likely expose the OPA to significant risks under the contract, including litigation risks for damages.

2. Amending the contract with TCPL:

The OPA deck correctly identifies the option of bilateral amendment where both parties mutually agree to amend the existing contract in order to accommodate the new regulatory risks. The deck correctly notes that the terms of any amendment would be the subject of "negotiation" (hard bargaining) which would most likely involve significant costs.

- o While the deck does raise the issue of costs, in a general way, and applies an order of magnitude of \$100 M to them, there is no attempt to break down the kinds of costs which could (or most likely) be the subject of negotiation in any detailed way. The decision not to do so may have as much to do with the

04/30/2010

presentation format rather than with any lack of analysis on this point. Costs and damages can be notoriously difficult to quantify with precision, depending upon the complexity of project and the economic analysis involved.

- o There may be other costs beyond the supplier's sunk costs (e.g. costs of gas turbines, etc.) that need to be reckoned with – including TCPL vying for a sliver of economic loss associated with either (i) profits due under the contract or (ii) the amount otherwise attainable by it where it was able to perform under the contract (contract damages) or invest its money elsewhere (in remunerative projects) (tort law damages, depending). Whether and under what circumstances such would be ultimately recoverable at law would involve detailed case-law analysis which is not open to us here given the current time-frame associated with this engagement. We would posit that contract versus tort theories of damages would have to be further investigated in light of their applicability in this scenario.

Nuanced Interpretative Options relating to amendment:

There are many ways to read and interpret legal agreements, even (depending upon the text of the agreement) managing interpretations which neither party contemplated or bargained for. Hence, what is offered up below relates to a possible and rather nuanced interpretation of certain clauses of the agreement which could, if such interpretation carries the day in court, result in other options which the OPA *could* consider – however, the risks are that the interpretation may not, in fact, carry the day in court or in arbitration/mediation:

- **Generalizing Clause 1.10(a) beyond Article 1:** Whether clause 1.10, and in particular the opening flush of 1.10 and para (a) read together, could allow the OPA, as “buyer”, to force good-face negotiations with TCPL designed to replace one or more relevant provisions of the contract with provisions which are more favourable to the OPA in light of what the OPA would have to be willing to characterize as the failure of TCPL to obtain or maintain, on an enduring basis, its requisite municipal approvals.

1.10 Invalidity, Unenforceability, or Inapplicability of Indices and Other Provisions

In the event that either the Buyer or the Supplier, acting reasonably, considers that any provision of this Agreement is invalid, inapplicable, or unenforceable, or in the event that any index or price quotation referred to in this Agreement, including the Gas Price Index (DA), ceases to be published, or if the basis therefor is changed materially, then:

(a) if a provision is considered to be invalid, inapplicable or unenforceable, then the Party considering such provision to be invalid, inapplicable or unenforceable may propose, by notice in writing to the other Party, a replacement provision and the Buyer and the Supplier and, at the Buyer's discretion, those Other Suppliers who are required by the Buyer to participate, shall engage in good faith negotiations to replace such provision with a valid, enforceable, and applicable provision, the economic effect of which substantially reflects that of the invalid, unenforceable, or inapplicable provision which it replaces;

Successful utilization of this clause could force good-faith amendment negotiations and, depending upon the circumstances, where arbitration is selected or triggered (see Article 1.10(d)) and the OPA's view wins the day, even allow the OPA to amend the contract unilaterally. Clause 1.10(e) provides for a structured approach to amendments and admits of the possibility where the OPA would prepare the amendments where the supplier determined not to participate in the arbitration of the matter as is its option pre clause 1.10(d).

Risks: Clause 1.10 is set out under provisions which deal with evolution of the IESO-administered markets and include clauses which deal with the contingency of the development of the fabled “Day Ahead Market”. Hence, from a contract-structural point of view, this line of argument is somewhat risky as the reviewer (Court/arbitrator) may be unwilling to see the general phraseology in paragraph 1.10 (a) as extending beyond Article 1. Note that where one party does not agree that a particular provision is invalid or unenforceable against it or the other party, it may trigger the binding arbitration clause found in 1.10(d) (see Exhibit K for more detail on arbitration process) to have the matter determined through binding arbitration. Clause 1.10(e) sets out the actual amending process associated with clause 1.10.

Secondly, whether TCPL's regulatory position (having been changed by the OMB's order upholding Oakeville's Interim Control By-Law) could be viewed as an “event of default” based on the technical reading of clause 10.1(c) is one potential avenue (though I recommend that this avenue be explored very quietly); the essence of this argument is that, based only on the technical review of the language, TCPL no longer holds the necessary permits or authorizations at municipal law to

utilize its site in the manner contemplated at the time it made its proposal and negotiated /executed the contract with the OPA. This avenue may well have been explored by the OPA but, given that TCPL did all it could to act to protect its regulatory position by appearing before the OMB and exploring Appeals options before the Divisional court, that the OPA may have viewed this line of analysis as risky or inappropriate: other potential suppliers taking note of TCPL's untenable position may be warned off future dealings with the OPA should it attempt to characterize this as a Supplier event of default (**reputational / transactional risk**). The OPA deck does make reference to inherent reputational risks in its deck and this is most helpful.

3. Re-characterizing the transaction so that TCPL's proposal is combined (married) with that of another proponent: This option involves TCPL negotiating either with the OPA's assistance or alone (not specified) in respect of acquiring rights to utilize or the ownership of all major elements of one of the unsuccessful proponent's proposal, including site, relevant technology, relevant associated goodwill/copywrite, etc. The unsuccessful proponent had received all municipal and related approvals for their site located in Mississauga.

Note that the fact that the unsuccessful proponent has received all necessary municipal approvals may not preclude Mississauga from exercising its powers under the *Municipal Act, 2001* in order to craft new or amended zoning by-laws or even interim control by-laws or particulate matter by-laws which could have a deleterious effect on the construction of the plant at that location. While the OPA does not delve into this level of detail, the regulatory risk is highlighted as it notes that Mississauga has voiced loud and consistent opposition to the construction of gas-fired generation facilities within the Municipality. (I believe there is some media coverage which suggests that the Mayor of Mississauga has joined supporters in protesting construction of large gas-fired plants in neighbouring municipalities.

Aside from the costs and delay which the OPA deck does reference, such vehement/concerted opposition would not bode well for scenarios which are aimed at re-locating the constructing of the facility to Mississauga. The OPA deck does a good job of highlighting this transactional risk as well as the costs associated with any such approach.

Procurement Process Risks: One concern not specifically identified in the OPA's deck relates to amendment – one important concern is that, where the amendment option is pursued, it must be done in a manner which does not offend the competitive procurement process such that other participants (unsuccessful proponents) would be deprived of the opportunity to compete on a level playing field with TCPL had it (they) been presented with the contract on terms similar to that ultimately presented to TCPL, taking into account the amendments. This is a transactional risk which can only be analyzed appropriately in light of any proposed amendments to the contract having regard to the terms and conditions of the current contract. For now, it is merely raised as a general consideration. (**reputational / transactional risk**).

Other Issues

Re-powering the Lakeview Generation Station: A further bullet is offered in respect of "re-powering the Lakeview Generating Facility" owned by OPG, however the OPA's analysis in respect of that issue is limited to the observation that it would likely entail a fair degree of political risk. My own view is that much in the way of costs would have to be expended in order to re-power the Lakeview plant, subject to its current operational state. OPG would be in the best position to provide insight into the economics and regulatory hurdles (including any attendant delay) associated with this approach. This facet of the deck also seems to exist independently of the main transactional options involving TCPL either alone or interacting with other suppliers.

This is my analysis thus far.

Where more time is permitted more may be done. Do let me know whether this meets your requirements or whether you require anything further.

I am out of the office for much of the day tomorrow, but should be in the office the balance of the week.

Kindly,

James

From: Bishop, Ceiran (MEI)
Sent: March 1, 2010 3:08 PM
To: Rehob, James (MEI)
Subject: RE: FYI.

James – thanks for the voicemail.

Somehow I think we got our lines crossed- MO would very much like to see this assessment in written form – not merely your assessment of the completeness/rigour of OPA's work, but also of any further insights you may have into the contract.

04/30/2010

I spoke to Jenn Tuck and she let me know that the minister is very keen to see this as soon as feasible.
C.

From: Rehob, James (MEI)
Sent: March 1, 2010 12:31 PM
To: Bishop, Ceiran (MEI)
Subject: RE: FYI.

Left you a voice-mail which is not to be further forwarded.
Kindly,
James

From: Bishop, Ceiran (MEI)
Sent: February 26, 2010 1:50 PM
To: Rehob, James (MEI)
Subject: RE: FYI.

It's online
http://www.powerauthority.on.ca/GP/Storage/18/1294_Southwest_GTA_Contract_%28Final_March_18_2009%29.pdf

here are other procurement documents
http://www.powerauthority.on.ca/GP/Page.asp?PageID=861&SiteNodeID=215&BL_ExpandID=

From: Rehob, James (MEI)
Sent: February 26, 2010 10:20 AM
To: Bishop, Ceiran (MEI)
Subject: RE: FYI.

Hi, Ceiran – to do this any justice I'll need a copy of the contract itself (I should have mentioned while on the phone with you)-- Can you obtain?

Kindly,
James

From: Bishop, Ceiran (MEI)
Sent: February 26, 2010 10:03 AM
To: Rehob, James (MEI)
Subject: FW: FYI.

From: Tuck, Jennifer (MEI)
Sent: February 25, 2010 5:45 PM
To: Bishop, Ceiran (MEI)
Subject: FW: FYI.

From: JoAnne Butler [mailto:joanne.butler@powerauthority.on.ca]
Sent: February 16, 2010 11:07 AM
To: Tuck, Jennifer (MEI)
Cc: Amir Shalaby; Michael Killeavy
Subject: FYI.

04/30/2010

As discussed...thanks...

JCB

JoAnne C. Butler
Vice President, Electricity Resources
Ontario Power Authority

120 Adelaide Street West, Suite 1600
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ONTARIO POWER AUTHORITY



February 2010

Ministerial Briefing SWGTA Options

SWGTA Options - Summary

- Exiting the contract will take a long time if try to minimize our costs. Conversely, if we repudiate the contract to make a quick exit it will cost ratepayers millions in potential damages.
- A forced “marriage” of our Supplier and the unsuccessful Proponent with a permitted site will not only transfer the problem to Mississauga but will also increase ratepayer costs by entering into bilateral negotiations. This will highlight that the government’s directive and procurement processes have failed and put the government in a bad light.
- Re-powering Lakeview GS means reneging on a public commitment, and the Ministry’s directive, to not do so.
- Any move to a site in Mississauga will mobilize just as much opposition given the long history of other sites and the Clarkson Airshed Study.

Termination of the SWGTA Contract

- There is no provision in the contract for the OPA to terminate for convenience, i.e., the OPA cannot terminate the contract without having a reason to terminate.
- The OPA can terminate the contract if there is a Supplier Event of Default (s. 10.1). This has not happened. *loss of [Ability to deliver] - what about 10.1(c)? never feasible.*
- The inability to secure permits and approvals would likely be a Force Majeure under s. 11.3(h) of the contract.

- If there is an event of Force Majeure pertaining to the Supplier's inability to get a permit or approval that delays the Milestone Date for Commercial Operation for more than 365 days, the Supplier can terminate the Contract and the OPA will return the performance security (s. 11.1(g)). There is no payment to the Supplier for its costs by the OPA.

[OPA could wind up]

Termination of the SWGTA Contract

- If there is an event of Force Majeure that delays the Milestone Date for Commercial Operation for more than 24 months, either party can terminate the Contract and the OPA will return the performance security (s. 11.1(h)). There is no payment to the Supplier for its costs by the OPA. ~ Long time for OPA to ~~and the ord.~~
- If a Force Majeure prevents the Supplier from performing its obligations under the contract for an aggregate of more than 36 months in any 60 month period, then either party can terminate the Contract and the OPA will return the performance security (s. 11.1(i)). There is no payment to the Supplier for its costs by the OPA, other than for amounts already owed to it under the contract.

Termination of the SWGTA Contract

- The parties can mutually agree to an amendment to the contract (s. 1.12). Conceivably, the parties could agree on an amendment to terminate the contract ("mutually agreeable termination"). This has been done on one RES I project because of the delay involved in obtaining permits. - Terms & cost to rate pay
- The terms of the amendment to terminate, including any payment of costs, would be subject to negotiation.
- Presumably, the OPA would have to pay the costs that the Supplier has reasonably incurred up to the point in time of the mutually agreeable termination. PLUS lost profit?
- The costs the Supplier has incurred to date might be as much as \$100 million dollars. The Supplier has already ordered and paid for gas turbines. These costs would be passed onto the ratepayer via the GAM.

Termination of the SWGTA Contract

- Outside of commercially agreement, a*
- Termination by any means not expressly provided for under the contract would likely be a breach of the contract by the OPA. ✓
 - The Supplier could sue the OPA for its damages caused by the breach of the contract. ✓ *see L.d.c.* ✓
 - The measure of damages that OPA would likely be liable for would be the Supplier's lost profits over the term of the contract, which would be quite a significant amount of money. With \$1 billion invested at a return of 8% or 9%, damages would be in the neighbourhood of \$80 to \$90 million plus costs for the already purchased gas turbines. These costs will be passed on to the ratepayer via the GAM.
 - In addition to liability for damages, there would be considerable reputational risk for the OPA to do this. ✓

[A Future Transactional Cost]

Brokering a "Marriage" With Other Proponents

- It has been suggested that the OPA broker a "marriage" between some unsuccessful Proponents to the RFP. *if could on what legally.*
- Each Proponent had its own site with unique characteristics and technology suited for those conditions.
- One unsuccessful Proponent has a permitted site.
- The site is in Mississauga, which would likely just result in transferring the problem from Oakville to Mississauga. *where Hazel is coexisting...*
- Mississauga has already voiced concerns about additional gas-fired generation. There has been considerable attention paid to the SWGTA procurement because of the Clarkson Airshed Study. Opposition to gas-fired generation in Mississauga is vehement and enjoys the political support of the Mayor and Council.

Brokering a “Marriage” With Other Proponents

- Furthermore, in order to take advantage of the permits for the site, our Supplier would have to replicate exactly the unsuccessful Proponent’s design.
- In order to use the site our Supplier would have to buy both the site and the design, and operate it in accordance with the issued permits. *More costs!*
- The cost of the site and intellectual property associated with the design would be prohibitive.
- Such a “marriage” is also a tacit admission that the procurement process failed.
- In summary, there is little benefit in doing this and a number of attendant risks.

Bilateral Negotiation with A Proponent

- The Pros and Cons of bilateral negotiation with one of the unsuccessful proponents

PROS	CONS
Projects have already reached certain stage of development	Price would be higher than the original bid, which will be passed on to the ratepayer.
Projects might already have received environmental approval and permitting	Significant negative impact on the OPA competitive procurement process
Proponents are qualified and are willing to enter into an agreement for the project	No guarantee that the negotiated contract could be successfully implemented
Delay would be manageable and would not have significant system impact if negotiation is going to start soon	Project would face similar opposition on permitting

Lakeview Site

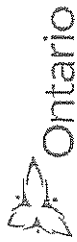
- The Pros and Cons of Lakeview site are

PROS	CONS
Transmission capacity is still available	Facility would be 500 metres to 800 metres from residential area
Transmission circuits and structures are still standing	We were directed not to re-power Lakeview. This was publicly announced.
No other or minimal transmission upgrading work needed	Require significant natural gas connection and reinforcement
Site is still available	Need to go through environmental and municipal permitting for both generating facility and gas connection
	Significant delay in commercial operation date; might have impact on system reliability
	Significant public push back because of the work done so far on the heritage project planned for the site.

Potential Impact on Mississauga

- All of three unsuccessful proposals are located in Mississauga;
- Mississauga would oppose the project similar to Oakville;
- Opposition in Mississauga will be vehement. It has a more than 10 year history with the unsuccessful Proponent's site in Mississauga. The proposed siting of this facility has engendered much public opposition in the past decade and announcing that the Supplier will now occupy a site in Mississauga and not Oakville will be incendiary.





Ontario

MINISTRY OF ENERGY AND INFRASTRUCTURE

Options for Meeting Electricity Supply Needs in the South West GTA

Oakville Generating Station and Alternative Supply Options

Background – Need for New Gas Generation Within the SWGTA

- In consultation with the IESO, Hydro One, the local distribution utilities and other experts and stakeholders, the OPA determined and listed in the Integrated Power System Plan (2007) a need for approximately 850 MW of new generation within the SWGTA by 2014 for supply and system reliability purposes..
- This need exists because of growing demand in the area and because of the loss of 1200 MW of generation capacity within serving the SWGTA, resulting from the closure of Lakeview GS. This need remains despite current economic conditions.
- New generation is also needed within the area to address reliability issues in the area, including supply adequacy, voltage support and system security, to support coal replacement by adding back-up to new intermittent renewable supply.
- Generation within the SWGTA adds greater reliability, has less environmental impact and is likely to be less costly than remote generation with transmission to the SWGTA.
- The IPSP took into account accelerated conservation and demand management and other generation plants already planned or under construction including Halton Hills, Goreway and Greenfield South. None of these reduced the need within SWGTA.
- Gas generation was identified as the cleanest, most reliable source available for the needed generation as renewable energy of that scale and reliability would not be available within the SWGTA.

Background – SWGTA Procurement Process

SWGTA Procurement Direction and Removal of the Lakeview Site

- On August 18, 2008, MEI Minister Smitherman directed the OPA to procure approximately 850 MW of gas fired generation in the SWGTA with an in-service date no later than December 31, 2013.
- On the same date it was announced by Minister Smitherman that the Lakeview site would be removed from consideration for electricity generation.

OPA Procurement Process

- The Ontario Power Authority (OPA) issued a Request for Qualifications (RFQ) on October 2, 2008.
 - The RFQ specified a geographic area and specific electrical connection site for bid projects. The area encompassed parts of Etobicoke, Mississauga, and Oakville and the winning project would feed the existing Manby Transformer Station located in Etobicoke.
 - Four companies were qualified with seven potential unidentified sites in all three municipalities. Site identification was not part of the RFQ; qualified companies would identify and bid in a single site during the RFP.
- On October 28, 2009, the Minister of Energy and Infrastructure held a town hall in Mississauga to engage the public on the plan for local generation. The OPA, IESO and the LDC also presented. On March 3rd, 2009, the OPA held a second town hall in Mississauga to discuss the SWGTA procurement.
- On March 13, 2009, the OPA released the RFP with a proposal due date of July 8, 2009

Background – SWGTA Procurement Process

- On April 1, 2009, the OPA released the locations that the four eligible firms were planning to bid. The potential sites were:

Registered Participant	Facility Name	Location of Site
Invenenergy Canada Development Partnership	Avon Energy Centre	445 Hazelhurst Road, Mississauga
Northland Power Inc.	Royal Windsor Energy Centre	2400 + 2430 Royal Windsor Drive, Mississauga
Portlands Energy Centre L.P. (name changed to TCE in final proposal)	Oakville Generating Station	1500 Royal Windsor Drive, Oakville
Southdown Station Partnership (a partnership of Sithe Global Power Southdown ULC and Sithe Global Power Southdown II ULC)	Southdown Station or Southdown Station – Facility B	759 – 797 Winston Churchill Boulevard, Mississauga

- On July 8th, 2009, the OPA received bids from all four registered participants in response to the RFP.
- On September 30, 2009, the Ontario Power Authority announced that it would sign a contract with TransCanada Corporation to design, build and operate a 900 MW electricity generating station in Oakville.

Background – SWGTA Procurement Process (cont'd)

OPA Selection Process

- The evaluation was a multi-stage process which looks at proposal completeness; addressing of mandatory requirements, rated criteria evaluation, and economic evaluation.
- Rated criteria included environmental assessment, community outreach, engineering, procurement/construction agreements, fuel supply, etc.
- Bid price and financial strength of the proponent were also important factors determined in the subsequent economic evaluation phase.
- Beyond being within the specified boundaries of general location and ability to connect to the specified transformer station, the specific site was not directly evaluated and is not a prior concern for the OPA. The OPA requires that the proponent obtain all approvals and the extent that approvals have been obtained is one of the rated criteria. In the case of the Oakville site the land was zoned to allow industrial uses, including generation. The Town of Oakville created the Interim Control by-law late in the RFP process, at a time when the bid could not be changed.
- An independent evaluation team reviewed all submissions against the criteria. This team was comprised of representatives from the OPA, IESO and the OEB. The committee had an independent chair and its activities were overseen by an independent Fairness Advisor.
- The Fairness Advisor concluded that the RFP process was conducted "in a procedurally fair, open, and transparent manner".

Background – Oakville GS Selection

Oakville Generating Station

- Announced September 30, 2009 as winning proposal in OPA South West GTA competitive procurement.
- 900 MW combined cycle electricity generating station to be built and operated by TransCanada Energy Ltd. Contract specifies commercial operation by Q1 2014.
- Located on an existing 15-acre industrial site within the Ford property at 1500 Royal Windsor Drive in the Town of Oakville. The site was zoned for industrial purposes including electricity generation and is near natural gas pipelines and the high voltage electricity grid.
- The plant is undergoing an Environmental approval. On January 26, 2010 TransCanada published a draft Environmental Review Report (ERR).