

Aleksandar Kojic

From: Smith, Elliot [ESmith@osler.com]
Sent: March 28, 2011 4:41 PM
To: Smith, Elliot; Safouh Soufi; Deborah Langelaan; Michael Killeavy
Cc: Sebastiano, Rocco
Subject: RE: TransCanada Potential Project Negotiations - Capital Cost Estimate Rev 5 February 17, 2011
Attachments: #20297127v8_LEGAL_1_ - Draft Response to A. Pourbaix Letter with Project Proposal.doc; Blackline.pdf

All,

Please find attached a further revised draft of the letter, to reflect this afternoon's discussion.

Elliot

From: Smith, Elliot
Sent: Monday, March 28, 2011 1:46 PM
To: 'Safouh Soufi'; 'Deborah.Langelaan@powerauthority.on.ca'; 'Michael.Killeavy@powerauthority.on.ca'
Cc: Sebastiano, Rocco
Subject: RE: TransCanada Potential Project Negotiations - Capital Cost Estimate Rev 5 February 17, 2011

Please find attached a revised draft of the response letter to A. Pourbaix, along with a blackline to Friday afternoon's draft.

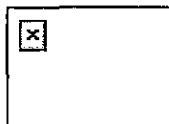
Elliot

From: Smith, Elliot
Sent: Friday, March 25, 2011 6:00 PM
To: 'Safouh Soufi'; Deborah.Langelaan@powerauthority.on.ca; Michael.Killeavy@powerauthority.on.ca
Cc: Sebastiano, Rocco
Subject: RE: TransCanada Potential Project Negotiations - Capital Cost Estimate Rev 5 February 17, 2011

All,

Further to today's discussion, please find attached a revised draft letter to TCE along with a blackline. Please note that this draft presumes that the quarterly ramp rates set out below correspond to the Seasons used in the CES contract. If this is not the case, further revision may be required.

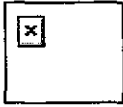
Elliot



Elliot Smith
Associate

416.862.6435 DIRECT
416.862.6666 FACSIMILE
esmith@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



From: Safouh Soufi [mailto:safouh@smsenergy-engineering.com]
Sent: Friday, March 25, 2011 5:19 PM
To: Smith, Elliot; Deborah.Langelaan@powerauthority.on.ca;
Michael.Killeavy@powerauthority.on.ca
Subject: RE: TransCanada Potential Project Negotiations - Capital Cost Estimate Rev 5 February 17, 2011

Hello Elliot:

The figures are per minute and the comma should be replaced with period ".". Sorry about that.

Here are the figures as they should appear in the Contract

Q1: 37.8 MW/minute
Q2: 35.8 MW/minute
Q3: 33.0 MW/minute
Q4: 35.2 MW/minute

Thanks,
Safouh

From: Smith, Elliot [mailto:ESmith@osler.com]
Sent: March 25, 2011 3:30 PM
To: 'safouh@smsenergy-engineering.com'; 'Deborah.Langelaan@powerauthority.on.ca';
'Michael.Killeavy@powerauthority.on.ca'
Subject: Re: TransCanada Potential Project Negotiations - Capital Cost Estimate Rev 5 February 17, 2011

Thanks Safouh. Can you clarify the units of measurement for me?

Elliot

From: Safouh Soufi [mailto:safouh@smsenergy-engineering.com]
Sent: Friday, March 25, 2011 03:18 PM
To: 'Deborah Langelaan' <Deborah.Langelaan@powerauthority.on.ca>; Smith, Elliot; 'Michael Killeavy' <Michael.Killeavy@powerauthority.on.ca>
Subject: RE: TransCanada Potential Project Negotiations - Capital Cost Estimate Rev 5 February 17, 2011

Hello Elliot:

The ramp rate figures for the Facility (two units) will be as follows:

Q1: 37,800 MW
Q2: 35,800 MW
Q3: 33,000 MW
Q4: 35,200 MW

These rates do not required adjustment for ambient conditions and are subject to negotiation with TCE, of course. TCE may see one of these rates in particular as being little aggressive but that is OK for now.

Let me know if you have any questions.

Thanks,
Safouh

From: Deborah Langelaan [mailto:Deborah.Langelaan@powerauthority.on.ca]
Sent: March 25, 2011 11:04 AM
To: esmith@osler.com; rsebastiano@osler.com; Michael Killeavy; Safouh Soufi; gene.meehan@nera.com
Cc: Susan Kennedy
Subject: FW: TransCanada Potential Project Negotiations - Capital Cost Estimate Rev 5 February 17, 2011

Privileged and Confidential

Please find attached TCE's revised capital cost estimate for a peaking plant in Cambridge. Although TCE has reduced its CAPEX by ~\$118 MM we're still miles apart with our estimates.

TCE decreased the following costs:

1. Reduced Fuel gas connection charges to \$0 (decrease of ~\$62 MM)
2. Reduced Electrical connection charges by ~\$34 MM
3. Reduced Insurance & Misc. by ~\$1 MM
4. Reduced Project Uncertainties by ~\$20 MM

Deb

Deborah Langelaan | Manager, Natural Gas Projects| OPA |
Suite 1600 - 120 Adelaide St. W. | Toronto, ON M5H 1T1 |
T: 416.969.6052 | F: 416.967.1947 | deborah.langelaan@powerauthority.on.ca |

From: John Mikkelsen [mailto:john_mikkelsen@transcanada.com]
Sent: March 24, 2011 5:00 PM
To: Deborah Langelaan
Cc: Geoff Murray; Terry Bennett; John Cashin
Subject: TransCanada Potential Project Negotiations - Capital Cost Estimate Rev 5 February 17, 2011

Dear Deborah,

Further to the receipt of your designation letter of March 21, 2011 received today, please find attached capital cost estimate TransCanada Capital Cost Estimate titled "Capital Cost Estimate Boxwood Generation Station...#157;, Rev.5 dated "Feb 17, 2011...#157;.

Best Regards,

John Mikkelsen, P.Eng.

Director, Eastern Canada, Power Development

TransCanada

Royal Bank Plaza
200 Bay Street
24th Floor, South Tower
Toronto, Ontario M5J 2J1

Tel: 416.869.2102

Fax: 416.869.2056

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PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

We are writing to you in response to your letter to Colin Andersen, dated March 10, 2011. As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner, or if they are not issued in a timely manner, that so long as the Replacement Project has been approved under Part II or Part II.1 of the *Environmental Assessment Act* or is the subject of (i) an order under section 3.1 or a declaration under section 3.2 of that Act, or (ii) an exempting regulation made under that Act, such *Planning Act* approvals do not impede the development of the Replacement Project.

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR). In addition, the

OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination amount equal to (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000 plus (ii) fifty percent of the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Replacement Project. TCE would be solely responsible for all other permits and approvals required for the Replacement Project, subject to the standard Force Majeure provisions set out in the NYR Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by 0.000 012 681 3 multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that

the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of 250 MW at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times;
- (b) be able to provide a minimum of 500 MW at 35 °C under N-2 System Conditions;
- (c) have a Season 3 Contract Capacity of not less than 480 MW; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NO_x) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NO_x and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NO_x and CO.
- (c) The Replacement Contract will require that the emission limits for NO_x and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NO_x and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NO_x and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 12,500 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	500 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule 'A', TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$375,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule “B”, plus the OPA Share multiplied by 0.000 012 681 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule “B”.

2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, “Interconnection Costs”, as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with “Good Engineering and Operating Practices” (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.

3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the

determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

We are writing to you in response to your letter to Colin Andersen, dated March 10, 2011. As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner, or if they are not issued in a timely manner, that so long as the Replacement Project has been approved under Part II or Part II.1 of the *Environmental Assessment Act* or is the subject of (i) an order under section 3.1 or a declaration under section 3.2 of that Act, or (ii) an exempting regulation made under that Act, such *Planning Act* approvals do not impede the development of the Replacement Project.

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR). In addition, the OPA

would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination amount equal to ~~\$50,000,000 plus~~ (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000. ~~37,000,000 plus~~ (ii) fifty percent of the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Replacement Project. TCE would be solely responsible for all other permits and approvals required for the Replacement Project, subject to the standard Force Majeure provisions set out in the NYR Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by ~~{0.000 019 314 2}~~ {0.012 681 3} multiplied by the amount by which such costs are less than \$37,000,000.
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4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
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Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

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Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of 250 MW at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times;
- (b) be able to provide a minimum of 500 MW at 35 °C under N-2 System Conditions;
- (c) have a Season 3 Contract Capacity of not less than 480 MW; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

Draft & Privileged

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

Draft & Privileged

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 12,887 <u>12,500</u> / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	500 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A" TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE "C" – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule "B" is based on a target capital cost for the design and construction of the Replacement Project of \$375,000,000 (the "Target Capex"). So long as the actual cost to design and build the Replacement Project (the "Actual Capex") is within ~~3%~~\$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. ~~*If the Actual Capex is more than *3% higher or lower than the Target Capex, the NRR shall be adjusted on the following basis. For greater certainty, none of the other parameters set out in Schedule "B" is B" other than the NRR shall be subject to adjustment pursuant to this Schedule "C".~~

- (a) ~~(i) The~~*If the Actual Capex is more than *\$25,000,000 greater than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

~~*OPA Share = (Actual Capex – Target Capex*) × 0.50, provided that the OPA Share shall not exceed \$*37,500,000~~

OPA Share = (Actual Capex – Target Capex – \$25,000,000*) × 0.50, provided that the OPA Share shall not exceed \$*25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) ~~(ii) The adjusted NRR shall be equal to the NRR set out in Schedule "B", plus the OPA Share multiplied by 1.000 012 681 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule "B". [NTD: The adjustment value may need to correspond to the adjustment value being used for Oakville Sunk Costs.]~~

2. ~~(b) The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, "Interconnection Costs", as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with "Good Engineering and Operating Practices" (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.~~
3. ~~(c) The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:~~

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	US <u>USD</u> \$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	US <u>USD</u> \$[36,295,00

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	US USD\$[144,900,000]
	01
<u>Hedge Costs of Hedging USD to CAD</u>	<u>CAD\$[●13,500,000]</u>

4. (d) The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.
5. (e) All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

Aleksandar Kojic

From: Deborah Langelaan
Sent: March 28, 2011 5:06 PM
To: 'John Mikkelsen'
Cc: JoAnne Butler; Michael Killeavy; Susan Kennedy; 'Rocco Sebastiano (rsebastiano@osler.com)'; 'Elliot Smith (esmith@osler.com)'
Subject: OPA Draft Response to A. Pourbaix Letter dated March 10, 2011
Attachments: #20297127v8_LEGAL_1_ - Draft Response to A. Pourbaix Letter with Project Proposal.doc
Importance: High

Privileged, Confidential and Without Prejudice

John;

Please find enclosed the OPA's draft response to Alex Pourbaix's letter to Colin Andersen dated March 10, 2011. We look forward to discussing it with you during tomorrow's meeting.

Kind Regards,
Deb

Deborah Langelaan | Manager, Natural Gas Projects| OPA |
Suite 1600 - 120 Adelaide St. W. | Toronto, ON M5H 1T1 |
T: 416.969.6052 | F: 416.967.1947 | deborah.langelaan@powerauthority.on.ca |

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

We are writing to you in response to your letter to Colin Andersen, dated March 10, 2011. As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner, or if they are not issued in a timely manner, that so long as the Replacement Project has been approved under Part II or Part II.1 of the *Environmental Assessment Act* or is the subject of (i) an order under section 3.1 or a declaration under section 3.2 of that Act, or (ii) an exempting regulation made under that Act, such *Planning Act* approvals do not impede the development of the Replacement Project.

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR). In addition, the

OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination amount equal to (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000 plus (ii) fifty percent of the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Replacement Project. TCE would be solely responsible for all other permits and approvals required for the Replacement Project, subject to the standard Force Majeure provisions set out in the NYR Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by 0.000 012 681 3 multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that

the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of 250 MW at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times;
- (b) be able to provide a minimum of 500 MW at 35 °C under N-2 System Conditions;
- (c) have a Season 3 Contract Capacity of not less than 480 MW; and
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The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

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If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

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The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

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- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
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- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
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The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

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SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 12,500 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	500 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A", TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE "C" – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule "B" is based on a target capital cost for the design and construction of the Replacement Project of \$375,000,000 (the "Target Capex"). So long as the actual cost to design and build the Replacement Project (the "Actual Capex") is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B" other than the NRR shall be subject to adjustment pursuant to this Schedule "C".

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule "B", plus the OPA Share multiplied by 0.000 012 681 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule "B".

2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, "Interconnection Costs", as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with "Good Engineering and Operating Practices" (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.

3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an "open book" process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the

determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

Aleksandar Kojic

From: Deborah Langelaan
Sent: March 31, 2011 12:09 PM
To: Michael Killeavy
Subject: FW: TCE audit
Attachments: TOR - Special Audit TCE - Final draft.doc

Michael;

Do you have any comments?

Deb

Deborah Langelaan | Manager, Natural Gas Projects| OPA |
Suite 1600 - 120 Adelaide St. W. | Toronto, ON M5H 1T1 |
T: 416.969.6052 | F: 416.967.1947 | deborah.langelaan@powerauthority.on.ca |

From: Bonny Wong
Sent: March 31, 2011 11:55 AM
To: Deborah Langelaan
Subject: TCE audit

Hi Deborah,

I attach the final draft of TOR for your review. The Ministry of Finance have already updated our comments provided, including the timing of completion date in section E. I have rephrased some languages in terms of the delay receipts of information from TCE.

Please let me know if I can finalize the TOR today.

In the meantime, I would appreciate if you could follow up with TCE.

Thanks and regards,


Bonny Wong, CA | Manager, Accounting| Business Strategies and Solutions
ONTARIO POWER AUTHORITY

Direct Phone: (416) 969-6403 | Main Phone: (416) 967-7474 | Fax: (416) 967-1947

Email: bonny.wong@powerauthority.on.ca

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

Website: www.powerauthority.on.ca

 Please consider your environmental responsibility before printing this email.



**PRIVILEGED & CONFIDENTIAL
HIGH SENSITIVITY**

Ontario Power Authority

Terms of Reference

**Special Audit of
Sunk Costs Payable
to TransCanada Energy Ltd.**

March, 2011

Ontario Internal Audit Division

Ministry of Finance

**Serving:
Ontario Power Authority**

<XXX – YY/

Privileged and Confidential
Prepared in Contemplation of Litigation

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[A] Background:

In October 2009, the OPA signed a contract with TransCanada Energy Ltd. (TCE) to design, build and operate a 900 megawatt gas-fired generating station in Oakville over a 20-year term.

The contract was cancelled at the direction of the Ministry of Energy of Ontario during October 2010 and the OPA has agreed to reimburse TCE for its sunk costs associated with the development of the Oakville Generating Station.

As of February 28, 2011, TCE has provided the OPA with 2 binders that include supporting documentation for the development and implementation costs incurred as part of the project. The total amount being claimed by TCE as sunk costs is approximately \$37M as of February 28, 2011. These costs include interest costs, which will continue to accrue overtime.

These amounts have not been audited to date and have not been validated as true “sunk costs” by the OPA. A verification audit has been requested to be completed by the Finance Revenue Audit Service Team (FRAST) of the Ministry of Finance.

[B] Engagement Objectives, Criteria and Scope**Engagement Objective**

The audit objectives are to provide OPA management with assurance that:

- The costs submitted by TCE to be paid by the OPA meet the definition of “sunk costs” (as established for the terms of this review) and are eligible for recovery by TCE.
- The amounts claimed by TCE were incurred in relation to the contracted Oakville Generating Station.
- The eligible sunk costs submitted for recovery by TCE include adequate supporting documentation to verify the accuracy and existence of amounts claimed.

Definition of “sunk cost” A cost that is incurred but not recoverable (in whole or in part). Not Recoverable, for the purpose of this review, refers to the inability of TCE to recover any or all of the costs incurred in any present or future undertaking.

Criteria

The submitted costs:

1. Meet the definition of "sunk cost";
2. Were incurred in relation to the planned Oakville Generating Station;
3. Were reasonable in amount; and
4. Were paid by TCE.

Scope

The scope of this review includes:

- Review of the binders and supporting documentation supplied by TCE for recovery of sunk costs.
- Review of any applicable documentation (e.g. negotiation terms, correspondence, agreements, evidence of payment, etc.) surrounding the terms of the costs being claimed by TCE for background.
- Scope of sample testing (including sample size) to be discussed and confirmed with management prior to sample testing.

- **Limitations of a review based on documentation alone:**

We are reliant on the integrity and accuracy of the information provided. It is assumed that documented costs were actually incurred and related documentation is accurate. For example, in reviewing the labour costs, we assume:

- That the listed employees actually exist;
- That those employees have the stated job titles;
- That those employees worked on the project for stated number of hours and for the implied rate; and
- That TCE paid the stated amount for the work.

- **Limitations in the data**

The data provided may in turn limit some planned audit procedures. For example, TCE's employment charge rates are based on the midpoint salary for the position, rather than the specific compensation of the individual assigned to the project. This is done to preserve the confidentiality of individual salaries. Consequently, the amount quoted as a cost incurred is not necessarily the amount that was actually paid and cannot be traced to the actual payment amount.

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[C] Engagement Approach, Methodology & Engagement Reporting

Our engagement approach will include the following:

- Obtain summary and detailed spreadsheets (in suitable Excel format) from TCE via the OPA contact. These spreadsheets will include updated costs as at approximately end of March 2011. Subsequent changes by TCE to these spreadsheets will be tracked and reconciled by OPA.
- Aggregate the spreadsheet data into categories (such as labour costs, invoices, employee expenses).
- For each category, select a sample for review and request the corresponding documents (i.e., invoices, receipts, evidence of payment) from TCE via the OPA contact. Risk and sensitivity will be considered in selecting the samples. For example, while employee expenses constitute a very small portion of the total amount that TCE is claiming, these expenses are of a very sensitive nature and the sampling will be adjusted accordingly.
- Some audit procedures may require assistance from OPA Management.
- Review the sample data and note any findings for discussion with and follow-up by OPA Management.

[D] Key Stakeholders & Client Contacts

- Michael Killeavy, Director, Contract Management, Electricity Resources
- Deborah Langelaan, Manager, Natural Gas Projects, Electricity Resources
- Bonny Wong, Manager, Accounting

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1. Audit Objectives
2. Audit Approach
3. Audit results based on the audit's Objectives and Approach.

The draft and final reports will be issued to Susan Kennedy, Director Corporate/Commercial Law Group.

[F] Engagement Team

- Richard King – Senior Audit Manager
- Ted Speevak – Consultant

Aleksandar Kojic

From: Bonny Wong
Sent: March 31, 2011 5:11 PM
To: Michael Killeavy; Deborah Langelaan; Susan Kennedy
Cc: Terry Gabriele
Subject: Fw: Final TOR
Attachments: FINAL Terms of Reference_2011_OPA Special Audit of Sunk Costs Payable to TransCanada Energy Ltd Mar 31.doc

Hi Michael, Deborah, Susan,

I attach the terms of reference for the special audit of sunk costs payable to TCE for your information. Please let me know if you have any questions on this subject matter.

Regards,
Bonny Wong

From: King, Richard (FIN) [<mailto:Richard.King@ontario.ca>]
Sent: Thursday, March 31, 2011 04:46 PM
To: Bonny Wong
Cc: Speevak, Ted (FIN) <Ted.Speevak@ontario.ca>
Subject: Final TOR

Bonny Attached is the final TOR for the Special Audit of Sunk Costs Payable to TransCanada Energy Ltd. Could you please circulate to all the required individuals.

Let me know if you need me to send a hardcopy.

Thanks
Richard
Richard King, CGA
Manager, Risk & Assurance Services (A)
Finance & Revenue Audit Service Team
Ontario Internal Audit Division
Ministry of Finance
Tel: 416-325-8488
Fax: 416-325-5096
richard.king@ontario.ca

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Thank You



**PRIVILEGED & CONFIDENTIAL
HIGH SENSITIVITY**

Ontario Power Authority

Terms of Reference

Special Audit of Sunk Costs Payable to TransCanada Energy Ltd.

March, 2011

Ontario Internal Audit Division

Ministry of Finance

**Serving:
Ontario Power Authority**

<XXX-YY/

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Prepared in Contemplation of Litigation

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[A] Background:

In October 2009, the OPA signed a contract with TransCanada Energy Ltd. (TCE) to design, build and operate a 900 megawatt gas-fired generating station in Oakville over a 20-year term.

The contract was cancelled at the direction of the Ministry of Energy of Ontario during October 2010 and the OPA has agreed to reimburse TCE for its sunk costs associated with the development of the Oakville Generating Station.

As of February 28, 2011, TCE has provided the OPA with 2 binders that include supporting documentation for the development and implementation costs incurred as part of the project. The total amount being claimed by TCE as sunk costs is approximately \$37M as of February 28, 2011. These costs include interest costs, which will continue to accrue overtime.

These amounts have not been audited to date and have not been validated as true “sunk costs” by the OPA. A verification audit has been requested to be completed by the Finance Revenue Audit Service Team (FRAST) of the Ministry of Finance.

[B] Engagement Objectives, Criteria and Scope

Engagement Objective

The audit objectives are to provide OPA management with assurance that:

- The costs submitted by TCE to be paid by the OPA meet the definition of “sunk costs” (as established for the terms of this review) and are eligible for recovery by TCE.
- The amounts claimed by TCE were incurred in relation to the contracted Oakville Generating Station.
- The eligible sunk costs submitted for recovery by TCE include adequate supporting documentation to verify the accuracy and existence of amounts claimed.

Definition of “sunk cost”: A cost that is incurred but not recoverable (in whole or in part). Not Recoverable, for the purpose of this review, refers to the inability of TCE to recover any or all of the costs incurred in any present or future undertaking.

Criteria

The submitted costs:

1. Meet the definition of “sunk cost”;
2. Were incurred in relation to the planned Oakville Generating Station;
3. Were reasonable in amount; and
4. Were paid by TCE.

Scope

The scope of this review includes:

- Review of the binders and supporting documentation supplied by TCE for recovery of sunk costs.
- Review of any applicable documentation (e.g. negotiation terms, correspondence, agreements, evidence of payment, etc.) surrounding the terms of the costs being claimed by TCE for background.
- Scope of sample testing (including sample size) to be discussed and confirmed with management prior to sample testing.
- **Limitations of a review based on documentation alone:**
We are reliant on the integrity and accuracy of the information provided. It is assumed that documented costs were actually incurred and related documentation is accurate. For example, in reviewing the labour costs, we assume:
 - That the listed employees actually exist;
 - That those employees have the stated job titles;
 - That those employees worked on the project for stated number of hours and for the implied rate; and
 - That TCE paid the stated amount for the work.
- **Limitations in the data**
The data provided may in turn limit some planned audit procedures. For example, TCE’s employment charge rates are based on the midpoint salary for the position, rather than the specific compensation of the individual assigned to the project. This is done to preserve the confidentiality of individual salaries. Consequently, the amount quoted as a cost incurred is not necessarily the amount that was actually paid and cannot be traced to the actual payment amount.

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[F] Engagement Team

- Richard King – Senior Audit Manager
- Ted Speevak – Consultant

Aleksandar Kojic

From: Michael Killeavy
Sent: April 2, 2011 12:50 PM
To: griffithsl@bennettjones.com
Cc: Susan Kennedy; Deborah Langelaan
Subject: TCE Matter - BOD Presentation for 6 April 2011 ...
Attachments: OGS_BOD_CM_20110406 v2.ppt

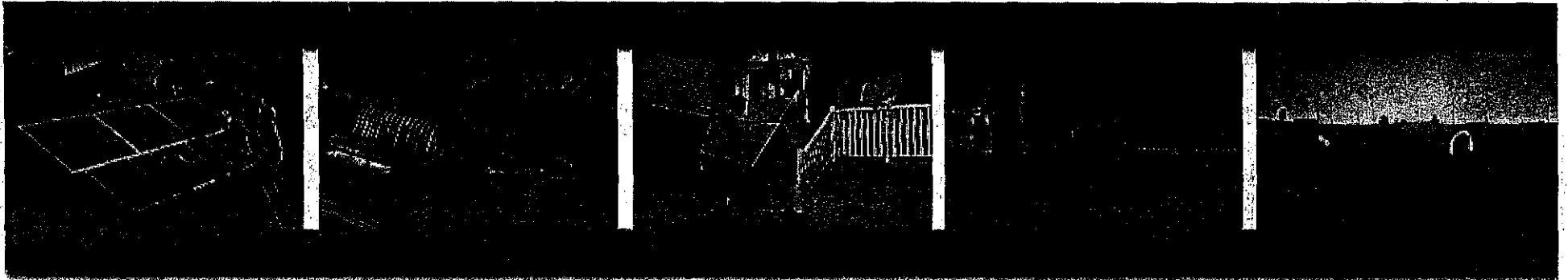
*** PRIVILEGED AND CONFIDENTIAL - PREPARED IN CONTEMPLATION OF LITIGATION ***

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416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca



Winding Up of the Oakville Generating Station (OGS) Contract

Board of Directors – For Information

April 6, 2011

Privileged and Confidential – Prepared in Contemplation of Litigation

Summary

- OPA has made a counter-proposal to the TCE proposal of 10 March 2011.
- The salient features are:
 1. Net Revenue Requirement (NRR) of \$12,500/MW-month;
 2. 25-year contract term;
 3. 500 MW Contract Capacity;
 4. Payment for \$37M in OGS Sunk Costs over the term;
 5. Separate payment for gas/electrical interconnections;
 6. Assistance on mitigating *Planning Act* approvals risk;

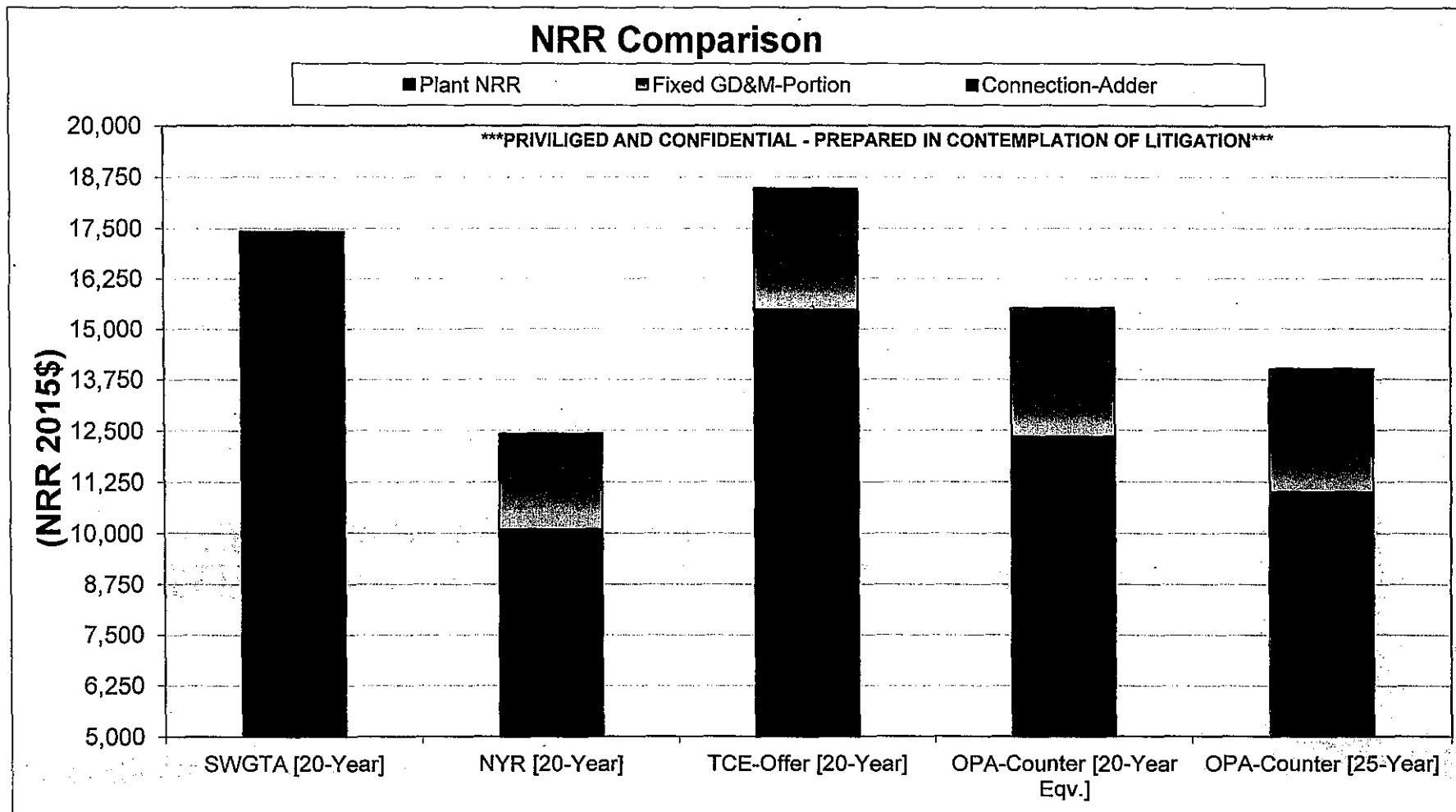
Net Revenue Requirement

- The OPA proposed NRR is based on a targeted capital cost expenditure (CAPEX) of \$400 million and reasonable projected operating expenditures (OPEX). This CAPEX is based on an independent review by our technical expert as well as published information on other similar generation facilities.
- TCE has a much higher proposed CAPEX of \$540 million. TCE could not satisfactorily explain why its CAPEX was so high.
- TCE's \$540 million CAPEX estimate translated into an NRR of \$16,900/MW-month. This is slightly below the OGS NRR of \$17,277/MW-month, which was roughly a \$1 billion projected CAPEX.
- The OPA believes that the TCE NRR is far too high for a plant that is much smaller in size, even when factoring in the anticipated financial value of the OGS

Net Revenue Requirement – Target Costing

- In order to mitigate the CAPEX risk we proposed to TCE that we target cost the CAPEX, where the OPA and TCE would share equally on any CAPEX increases above or decreases below the target CAPEX (gain share/pain share). The final NRR would then be adjusted upwards or downwards depending on final shares based on the actual CAPEX.
- A target cost mechanism with gain share/pain share provides both TCE and the OPA with an incentive to bring the project in below the target CAPEX.
- The target costing approach is commonly used in the energy and infrastructure industries to provide an incentive to both sides to minimize CAPEX. We understand that TCE has used target costing itself and is consequently familiar with the concept.

Net Revenue Requirement



Annual Payments Based on NRR

[INTD: Insert slide showing annual \$ payments based on NRR and state assumptions]

Contract Term

- OPA contracts typically have 20-year terms.
- A longer term allows for CAPEX to be recovered over a longer period of time, which reduces the NRR.
- TCE had asked for a 30 year term. This would set a precedent for gas-fired generation contracts for the OPA.

Contract Term

- The OPA proposed a 25-year term.
- In analyzing the TCE numbers it looked to us as if TCE were actually using a 20-year time horizon for recovering its costs.
- Portlands Energy Centre has an option for an additional five years on the 20-year term to make the contract have a 25-year term.

Contract Capacity

- The Long-term Energy Plan (“LTEP”) indicates the need for a peaking generation facility in the Kitchener-Waterloo-Cambridge area.
- PSP has indicated that at least 450 MW of summer peaking capacity is required.
- The OPA proposed an average 500 MW of Contract Capacity to provide additional system flexibility in the summer months and to reduce the NRR on per MW basis.

Contract Capacity

- The 500 MW we proposed is an average annual Contract Capacity.
- The nameplate capacity the GT units TCE proposes to use is 540 MW.
- We have given TCE the flexibility to nominate seasonal Contract Capacities for the purposes of imputing revenue and performing capacity check tests.

OGS Sunk Costs

- TCE has claimed \$37 million in OGS Sunk Costs.
- The OPA has the Ministry of Finance auditing these costs.
- We proposed to include the amount of OGS Sunk Costs in the NRR provided the costs were reasonable and substantiated.

Interconnection Costs

- The OPA proposed to pay for the gas and electrical interconnection costs on a cost-recovery basis.
- This is done on some other OPA contracts.
- Paying on a cost-recovery basis, i.e., a pass-through cost to the OPA is cheapest for the ratepayer since there is no opportunity to charge an additional risk premium on top of the actual cost.
- The interconnection costs are estimated at about \$100 million

Approvals and Permitting Risk Mitigation

- TCE had proposed to the OPA that it be protected from all permitting and approvals risk.
- This basically puts the OPA in the developer role, a role in which we are not comfortable.
- As a compromise, we proposed to approach the government to have it provide a *Planning Act* approvals exemption, similar to what had been done for the York Energy centre project.

Approvals and Permitting Risk Mitigation

Risk Description	Owner	Mitigation Strategies
Planning Act Approvals , e.g., Interim Control By-Law, Official Plan Amendment, Zoning By-Law Amendment, etc.	Ministry of Municipal Affairs and Housing	Exempting regulation similar to that which was done for YEC using s. 62.01(1) of the Act.
Development Charges Act charges levied	Ministry of Municipal Affairs and Housing	There is no power to exempt a developer, but regulation can be passed to influence the factors used. [NTD: How else to mitigate?]
Building Code Act Permits	Ministry of Municipal Affairs and Housing	Exempting regulation can be enacted under s. 34(19) of the Act.
Environmental Assessment Act Environmental Screening Process	Ministry of the Environment	Exempting regulation under Part IV of the Act.
Environmental Protection Act Certificates of Approval	Ministry of the Environment	Exempting regulation under s. 175.1(a) of the Act and/or a regulation to issue a C of A under s. 175.1(f) of the Act

Approvals and Permitting Risk Mitigation

Risk Description	Owner	Mitigation Strategies
<i>Ontario Water Resources Act</i> Approvals	Ministry of the Environment	Exempting regulation.
<i>Ontario Energy Board Act</i> Approvals, e.g., leave to construct for a gas line or an electricity transmission line	Ontario Energy Board	Exempting regulation under s. 127(1)(f) of the Act can exempt a party from any provisions of the Act.
Property Rights		There is no express statutory authority to expropriate land for a generation facility. Section 8(4) of the Ministry of Government Services Act provides for expropriation for a government-related agency. A regulation under s. 20(d) of that same Act would be required to make the OPA a government-related agency
<i>Municipal Act</i> Municipal By-Laws e.g., PM2.5 enacted pursuant to s. 10 and s. 11 of the Act.	Ministry of Municipal Affairs and Housing/Ministry of the Environment	Section 451.1(1) allows for a regulation to impose limits on municipal powers, however, the regulation is deemed to be revoked after 18 months. Legislation might be required to permanently override a municipal by-law.

TCE Response to OPA Counter-Proposal

- TCE has indicated that it does not accept the OPA counter-proposal.
- TCE believes that the financial offering by the OPA is too low and that there isn't sufficient compensation for it to recover its CAPEX and the anticipated financial value of the OGS contract.

Next Steps

- TBD

Aleksandar Kojic

From: Leonard Griffiths [GriffithsL@bennettjones.com]
Sent: April 3, 2011 8:13 PM
To: Michael Killeavy
Subject: Re: TCE Matter - BOD Presentation for 6 April 2011 ...

Sorry, just back in range- will open tomorrow and contact you. Len

This message is sent from my blackberry, and thus may contain inadvertent typos. Len Griffiths

From: Michael Killeavy [mailto:Michael.Killeavy@powerauthority.on.ca]
Sent: Saturday, April 02, 2011 10:50 AM
To: Leonard Griffiths
Cc: Susan Kennedy <Susan.Kennedy@powerauthority.on.ca>; Deborah Langelaan <Deborah.Langelaan@powerauthority.on.ca>
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Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
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120 Adelaide St. West, Suite 1600
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From: Michael Killeavy
Sent: April 3, 2011 8:21 PM
To: 'GriffithsL@bennettjones.com'
Subject: Re: TCE Matter - BOD Presentation for 6 April 2011 ...

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From: Leonard Griffiths [GriffithsL@bennettjones.com]
Sent: April 5, 2011 4:06 PM
To: Michael Killeavy
Cc: Leonard Griffiths
Subject: RE: TCE Matter - BOD Presentation for 6 April 2011 - privileged and confidential
Attachments: OPA Permitting Risks and Mitigation.DOCX

As discussed, we have considered the 3 slides related to potential approvals risk and mitigation strategies. Our questions/suggestions/advice is included in track changes, attached.

We have not involved "pure" municipal counsel for this, which would be needed to dig deeper into the municipal issues.

We have not addressed First Nations issues, which would arise under any environmental assessment, as well as pursuant to the governments' consultation obligations that may arise.

Our strong advice is to work as much as possible, as early and often as possible, with key stakeholders to get ahead of any issues. It is essential to be proactive, and ensure that we can provide politicians and regulators with the support and evidence they need to prevent any successful challenge to the approvals process, whether at the EA stage or for the technical approvals (air, waste, water). Pre consultation and consultation will be critical, with municipal officials, Ontario agencies, First Nations, and local communities. It is inevitable that there will be some opposition regardless of which site or sites are being considered.

Need to discuss strategy with respect to the EA process- whether to use environmental review, and whether to include more than one potential site. Or whether to voluntarily conduct an individual EA. Much depends on timing, costs and level of support/opposition.

Happy to discuss these matters, at your convenience. I have not copied this to others at the OPA, such as Mike Lyle, Ziyaad Mia, Susan Kennedy and Deborah Langelaan, which I leave for you. thx. len.

Len Griffiths



T 416 777 7473 / F 416 863 1716 / E griffithsl@bennettjones.com
Suite 3400, 1 First Canadian Place / P.O. Box 130 / Toronto, Ontario M5X 1A4

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- This Approvals are typically obtained by the developer, and as such are typically part of the business risk that a developer assumes
- If the OPA were to take on this risk, it would basically puts the OPA in the developer role, a role in which we are not comfortable which has ramifications, including:
 - The OPA would assume all risks related to obtaining acceptable approvals, and as such would need to be heavily involved in the approvals process to manage the risks
 - in addition to increasing the OPA's costs, this would expose the OPA to all risks should the project not receive all necessary approvals in an acceptable form [NOTE- on the business side, this may be necessary and acceptable in order to address the OGS situation, and to alleviate concerns that TCE may have; however, if the OPA were to take on this risk, this should result in a decreased project cost, including because there would be decreased costs and risks for TCE, which would have needed to expend considerably more to obtain approvals for the OGS, without any guarantee of success]
- The OPA ordinarily would not conduct an environmental assessment of a project, including because it is not designated as a "public body" under the EA legislation, and a project would be undertaken by a developer, not the OPA or the Province; in this case, the OPA would likely need to conduct the EA, including to manage the risk, which would require the OPA to take a very public developer role in the process
- The OPA would need to "enter the arena" in a manner that is typically undertaken by developers, which would likely result in the OPA losing its ability (or at least be perceived to lose its ability) to be an objective overseer of the process and the project; this could erode public trust, and increase the likelihood that the Minister of the Environment could elevate an EA for the project from a screening to an individual EA [NOTE- it may be appropriate to conduct an individual EA, anyway, as discussed in the mitigation strategies below]
- As a compromise, we proposed to approach the government to have it provide a *Planning Act* approvals exemption, similar to what had been done for the York Energy centre project. This has political ramifications, and the risks increase with each required regulatory intervention.

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Risk Description	Owner	Mitigation Strategies <u>[NTD- legislative only?]</u>
<p><i>Planning Act Approvals</i>, e.g., Interim Control By-Law, Official Plan Amendment, Zoning By-Law Amendment, etc.</p> <p>Municipality passes an official plan amendment or by-law, or refuses to amend same, which means the property could not be used for the project based on the official plan and zoning designation.</p>	<p>Ministry of Municipal Affairs and Housing</p> <p><u>Ministry of the Environment</u></p>	<p>Exempting regulation similar to that which was done for YEC using s. 62.01(1) of the Planning Act.</p> <p><u>[NTD- this may be too deep into the weeds- may prefer to indicate that "In addition, may result in requirement to complete an individual EA or to get an exempting regulation under the EA Act]</u></p> <p><u>[The exempting regulation would likely require meeting one of the conditions in clause 62.01(1) (a) of the Planning Act: (i) obtaining approval under Part II (Individual EA) or II.1 (Class EA- not applicable) of the EA Act; in short, the Screening Process exempts a project from Part II, which arguably means that it is not approved under Part II; (ii) a harmonization order under s. 3.1 (not applicable) or a declaration under s. 3.2 (Cabinet approval required to declare the legislation does not apply to a matter); or (iii) an exempting regulation under the EA Act.</u></p> <p><u>[Minister's Zoning Order?]</u></p>

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<p><i>Development Charges Act</i> charges levied</p> <p>[Cambridge by-law 90-09]</p> <p><u>Unreasonable/excessive charges are levied.</u></p>	<p>Ministry of Municipal Affairs and Housing</p>	<p>There is no power to exempt a developer, but regulation can be passed to influence the factors used. [NTD: How else to mitigate? <u>Without seeking regulation to qualify the charges that can be levied- provide reasonable reserve to satisfy development charge</u>]</p>
<p><i>Building Code Act</i> Permits to Demolish or Construct</p> <p>(s. 8 of the Building Code Act)</p> <p><u>Municipality (Chief Building Official) refuses to issue a demolition or building permit.</u></p>	<p>Ministry of Municipal Affairs and Housing</p> <p><u>Municipal Chief Building Official</u></p>	<p>Exempting regulation can be enacted under s. 34(19) 19. of the <u>Building Code Act</u>.</p> <p>[<u>Without seeking exemption: Meet all requirements, and as such, the Act expressly provides that a permit must be issued unless there will be contravention of law, provided the application is complete and properly completed by qualified individuals. If the municipality refuses to issue a permit, application can be made for mandamus, to have the court order the municipality to issue the permit.</u>]</p>
<p><i>Environmental Assessment Act</i> <u>Ontario</u></p> <p>Environmental Screening Process</p> <p><u>Screening EA (or Environmental Review) is conducted, and is successfully challenged, which results in elevation to an Individual EA. Individual EA is not approved by the Minister of Environment.</u></p>	<p>Ministry of the Environment</p>	<p>Exempting regulation under Part IV-VI of the EA Act (<u>exempt person or undertaking from the EA Act or the regulations, and impose conditions</u>).</p> <p><u>Without seeking exemption:</u></p> <p><u>Conduct Environmental Review, and ensure the relevant provincial agencies are involved and "on side" to prevent a challenge.</u></p>

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<p><u>Federal</u></p> <p><u>If require any federal approval, such as permit under the Fisheries Act (in short, to interfere with fish or fish habitat), Environmental Assessment, Comprehensive Study would be needed</u></p>	<p><u>Federal</u> <u>Department of Fisheries and Oceans</u></p> <p><u>Environment Canada</u></p>	<p><u>Consider conducting a "focused" Individual EA, on a voluntary basis. Key issue will be approval of terms of reference, which would need to exclude the need to consider alternative sites (beyond that being proposed) and alternative methods.</u></p> <p><u>Very limited ability to make an exempting regulation.</u></p> <p><u>Without seeking an exemption, consider harmonizing provincial and federal EA processes.</u></p>
<p><i>Environmental Protection Act</i></p> <p><u>Certificates of Approval – emissions to atmosphere (air) (s. 9); potentially waste management (Part V)</u></p>	<p>Ministry of the Environment</p>	<p>Exempting regulation under s. 175.1(a) of the Act and/or a regulation to issue a C of A under s. 175.1(f) of the Act</p> <p><u>Without seeking an exemption, complete EA and work with MOE to ensure no issues for "technical" approvals.</u></p>

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<p><i>Ontario Water Resources Act</i></p> <p><u>Approvals-sewage works (s. 53), potentially water taking (s. 34)</u></p>	<p>Ministry of the Environment</p>	<p><u>Sewage works- exceptions for draining into municipal sanitary works or system that is subject to the Building Code Act.</u></p> <p><u>Potential for Exempting regulation.</u></p>
<p><i>Ontario Energy Board Act</i></p> <p><u>Approvals, e.g., leave to construct for a gas line or an electricity transmission line</u></p>	<p>Ontario Energy Board</p>	<p>Exempting regulation under s. 127(1)(f) of the Act can exempt a party from any provisions of the Act.</p>

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Property Rights		There is no express statutory authority to expropriate land for a generation facility. Section 8(4) of the Ministry of Government Services Act provides for expropriation for a government-related agency. A regulation under s. 20(d) of that same Act would be required to make the OPA a government-related agency
<p>Municipal Act Municipal By-Laws e.g., PM2.5/PM 10, or other similar by-law that is <u>considered necessary or desirable for the public, including a by-law that addresses the economic, social and environmental well-being of the municipality or the health, safety and well-being of persons, enacted pursuant to s. 10 and s. 11 of the Act.</u></p> <p><u>Municipality passes a by-law that imposes restrictions or conditions that would delay or prevent the project from proceeding.</u></p>	<p>Ministry of Municipal Affairs and Housing</p> <p>Ministry of the Environment</p> <p>Ministry of Health</p>	<p>Section 451.1(1) allows for a regulation, <u>where it is necessary or desirable in the provincial interest, to impose limits on municipal powers;</u> however, the regulation is deemed to be revoked after 18 months, <u>and it cannot be extended or renewed, or replaced with a regulation of similar effect.</u> Legislation A <u>statutory amendment</u> might be required to permanently override a municipal by-law.</p> <p><u>Without seeking legislative changes, work with municipality to get comfort that such a by-law would not be imposed. If it were proposed or passed, would need to challenge any by-law that is intended to delay or stop the project.</u></p>

Aleksandar Kojic

From: Catherine Forster
Sent: April 11, 2011 12:40 PM
To: Michael Killeavy; Deborah Langelaan
Cc: JoAnne Butler
Subject: RE: Email Response from Alex Pourbaix
Attachments: PEC, Halton Hills and BP v2.xlsx

Sensitivity: Confidential

Hi Michael,

Please find attached the numbers you requested. This spreadsheet contains the settlement information in addition to the revenues as reported in their financial statements. Maggie is in the office this afternoon if you have any questions about the settlement payments.

Thanks,

Catherine

From: Michael Killeavy
Sent: Wednesday, April 06, 2011 6:51 PM
To: Catherine Forster; Deborah Langelaan
Cc: JoAnne Butler
Subject: Fw: Email Response from Alex Pourbaix
Sensitivity: Confidential

Cath and Deb,

Cath, can you please do a summary of our payments to TransCanada Energy for: PEC (1/2 is TCE); Halton Hills; and Bruce Power (1/2 is TCE)? Can you please do it for the last three years?

Deb, can you get Ronak to go through the TC financials to segregate out and summarize energy business revenue, too?

I'll check the lobbyist registry tonight.

I'm lecturing at Osgoode Hall Law School tomorrow, but I'll be in BlackBerry contact all day.

Sorry to dump this on you.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
16-969-6288 (office)

416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca

From: Brett Baker
Sent: Wednesday, April 06, 2011 06:43 PM
To: JoAnne Butler; Kristin Jenkins; Irene Mauricette; Michael Lyle; Michael Killeavy; Deborah Langelaan; Susan Kennedy
Subject: RE: Email Response from Alex Pourbaix

Hi all,

After speaking with Colin, a couple of small follow up items ... might we check the Lobbyist Registry and see who is on for TC (MacNaughton, Silver, Bird, other ...) and get a better sense from their financials as to the amount of revenue they make from their energy investments in Ontario v. the project/legal amounts for OGS?

Merci, brett.

From: JoAnne Butler
Sent: April 6, 2011 12:08 PM
To: Brett Baker; Kristin Jenkins; Irene Mauricette; Michael Lyle; Michael Killeavy; Deborah Langelaan; Susan Kennedy
Subject: Re: Email Response from Alex Pourbaix
Sensitivity: Confidential

Yes, we will handle...

JCB

From: Brett Baker
Sent: Wednesday, April 06, 2011 12:04 PM
To: Kristin Jenkins; JoAnne Butler; Irene Mauricette; Michael Lyle; Michael Killeavy; Deborah Langelaan; Susan Kennedy
Subject: RE: Email Response from Alex Pourbaix

Further to my discussion with Michael, the Board will need a "note" updating them, giving them a sense of the options going forward, inclusive of the litigation process .. and a draft response for Colin or Jim to send to Alex for day's end ... Make sense?

From: Kristin Jenkins
Sent: April 6, 2011 11:51 AM
To: JoAnne Butler; Irene Mauricette; Michael Lyle; Michael Killeavy; Deborah Langelaan; Susan Kennedy
Cc: Brett Baker
Subject: Re: Email Response from Alex Pourbaix
Sensitivity: Confidential

Are you drafting a response?

From: JoAnne Butler
Sent: Wednesday, April 06, 2011 11:27 AM
To: Irene Mauricette; Michael Lyle; Michael Killeavy; Kristin Jenkins; Deborah Langelaan; Susan Kennedy
Cc: Brett Baker

Subject: Re: Email Response from Alex Pourbaix

We will discuss this internally this aft and be prepared to talk to the Board about this at five. It is very timely. That will still give us time to respond to Alex by their end of day.

I certainly know what my initial reaction is...

JCB

From: Irene Mauricette
Sent: Wednesday, April 06, 2011 11:20 AM
To: JoAnne Butler; Michael Lyle; Michael Killeavy; Kristin Jenkins
Cc: Brett Baker
Subject: FW: Email Response from Alex Pourbaix

FYI....deadline for response end of day today.....

From: Linda Lee [mailto:linda_lee@transcanada.com] **On Behalf Of** Alex Pourbaix
Sent: April 6, 2011 10:31 AM
To: Colin Andersen
Subject: Email Response from Alex Pourbaix

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Colin,

Thank you for your email. I appreciate your invitation to continue discussions between our respective teams. However, I think we have to acknowledge that after six months of discussions, the size of the gap between us is too large for the teams to bridge.

TransCanada tabled a proposal with the OPA that is technically achievable (including the seasonally adjusted capacities), offers the OPA a lower NRR payment than the one they were obligated to pay under the SW-GTA contract, and contained a \$125 million concession on TransCanada's anticipated value under that contract. Finally, our proposal offered the OPA the full benefit of any capital cost reductions identified during the development of the project. Simply put, we want to build the less expensive, smaller, more responsive power plant required in your Long Term Energy Plan instead of taking legal action to recover our costs and damages from the SW-GTA project cancelled by the Minister.

Your team's counter-proposal is not technically achievable, provides for a negative value for TransCanada, strips TransCanada of our ability to recover reasonable damages including the anticipated value of the SW-GTA contract in the event that permitting is not achievable and seeks to have TransCanada provide a 4% loan for 25 years to the OPA for TransCanada's sunk costs on the Oakville project.

TransCanada stands behind its proposal sent to the OPA several weeks ago. We are prepared to work with the OPA or the government directly to finalize that agreement. Our proposal represents a reasonable and achievable compromise for the unilateral cancellation of our SW-GTA project that avoids a much more costly litigation.

Please let me know by the end of the day today whether the OPA accepts our proposal or whether we will have to pursue other means to recover our costs and damages referenced in your letter confirming cancellation of the SW-GTA project.

Regards,

Alex Pourbaix
President, Energy & Oil Pipelines

Linda Lee
Executive Assistant
TransCanada
450 - 1 Street, SW
Calgary, AB T2P 5H1
Ph: (403) 920-2106
Fx: (403) 920-2410

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Portlands

Year	Settlement Payments		Total TCE (1/2 Other Payment)	Total TCE (1/2 Total CSP and Other Payments)
	Contingent Support Payment (CSP)	TCE (\$)		
2008	\$0.00	\$0	\$25,858,028.61	\$25,858,028.61
2009	\$77,534,302.09	\$3	(\$1,689,849.96)	\$37,077,301.09
2010	\$106,155,285.95	\$0	\$90,709.67	\$53,168,352.65
2011 (Jan and Feb)	\$19,160,372.08	\$0	\$49,201.66	\$9,629,387.70

Halton Hills

Year	Settlement Payments		Total TCE (100% Other Payment)	Total TCE (100% Total CSP and Other Payments)
	Contingent Support Payment (CSP)	TCE (10)		
2010	\$28,633,978.66	\$0	\$3,821,441.40	\$32,455,420.06
2011 (Jan and Feb)	\$14,697,315.25	\$0	\$738,307.64	\$15,435,622.89

Bruce Power

Bruce A

Year	Settlement Payments	
	Contingent Support Payment (CSP)	TCE (\$)
2008	\$138,547,080.08	\$
2009	\$344,831,952.62	\$1
2010	\$287,075,771.48	\$1

Bruce B

Year	Settlement Payments	
	Contingent Support Payment (CSP) *	TCE (\$)
2008	\$0.00	
2009	\$513,726,349.55	\$2
2010	\$338,696,147.61	\$1

* Bruce B includes Recapture Payments

Revenue of TransCanada

Eastern Power	Generation Capacity (MW)	Fuel Type	% of Total
Halton Hills (ON)	683	NG	35%
Becancour (PQ)	550	NG	28%
Cartier Wind (PQ)	365	Wind	19%
Portlands Energy (ON)	275	NG	14%
Grandview (NB)	90	NG	5%
Total	1963		100%

Year ended Dec 31 [\$M]	2010	2009	2008
Revenues			
Eastern Power	\$ 330	\$ 281	\$ 175
Bruce Power	\$ 862	\$ 883	\$ 785
Total	\$ 1,192	\$ 1,164	\$ 960

Year ended Dec 31 [\$M]	2010	2009	2008
TCE Ontario Revenues			
Halton Hills	\$ 115	\$ -	\$ -
Portland Energy	\$ 46	\$ 39	\$ -
Bruce	\$ 862	\$ 883	\$ 785
Total	\$ 1,023	\$ 922	\$ 785

Aleksandar Kojic

From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: April 14, 2011 10:53 AM
To: Michael Killeavy
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy; Sebastiano, Rocco
Subject: RE: TCE Matter - Arbitration and Mediation [Privileged and Confidential]
Attachments: Letter to counsel for TCE 20447708_1.doc

Michael,

Attached for your review is a draft letter to counsel for TCE regarding mediation.

Regards,
Paul

Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

osler.com

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

From: Michael Killeavy [<mailto:Michael.Killeavy@powerauthority.on.ca>]
Sent: Wednesday, April 13, 2011 4:50 PM
To: Ivanoff, Paul; Sebastiano, Rocco
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy
Subject: TCE Matter - Arbitration

Paul/Rocco,

We are being asked to:

1. Prepare a formal letter to TCE requesting mediation in a formal way, which sets out the reasons for mediation and where we think it might assist us. This will be a counsel to counsel letter; and,
2. Prepare a Notice of Arbitration to TCE.

Can you please start work on this. We want to send the mediation letter tomorrow.

We would like to be in a position to serve the Notice of Arbitration on Monday.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.

Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
416-969-6288 (office)
416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca

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Toronto

April 14, 2011

Montréal

Paul Ivanoff
Direct Dial: 416.862.4223
PIvanoff@osler.com
Our Matter Number: 1126205

Ottawa

SENT BY FACSIMILE AND EMAIL

Calgary

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

New York

Mr. David Lever
McCarthy Tétrault
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Dear Sir:

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

As you know, we are the solicitors for the OPA.

We have been provided with a copy of an email from Alex Pourbaix to Colin Andersen of the OPA sent on April 13, 2011. Mr. Pourbaix's email was in response to Mr. Andersen's email sent on April 12, 2011, in which Mr. Andersen indicated his belief that TCE and the OPA would benefit from entering into a mediation process in connection with the differences between the parties respecting the Contract and the potential development of a simple cycle natural gas-fired power generation project in the Cambridge area.

Mr. Andersen's request to Mr. Pourbaix 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. As you know, the parties entered into an MOU dated December 21, 2010, in which the parties identified that they were working together co-operatively to identify other generation projects that meet Ontario's electricity system needs. The MOU contains obligations requiring both TCE and the OPA to engage in good faith negotiations. In that regard, the MOU expressly states that "[T]he OPA and TCE agree to work together in good faith to negotiate the definitive form of an agreement (the "Definitive Agreement") in respect of the Potential Project, or an alternative project agreed to by the OPA and TCE."

Mr. Andersen's request that the parties continue their negotiations in a mediated process is consistent with the parties' express obligations under the MOU respecting good faith negotiations. A mediated process would allow the parties to advance negotiations on

Draft

certain key issues including those respecting CAPEX estimates and TCE's alleged damages. Rejecting, outright, the OPA's proposal to continue negotiations in a mediated process forecloses the parties from receiving the benefits of third party facilitation and is inconsistent with TCE's obligations under the MOU. We note that these obligations continue through to June 30, 2011, as stated in the MOU.

Our client expects that your client will meet its obligations under the MOU. The OPA is hopeful that TCE, on reflection, will recognize the benefits of participating in negotiations with the assistance of a mediator, and that TCE will take all steps necessary to comply with its obligations relating to good faith negotiations as set forth in the MOU. On behalf of the OPA, we would ask that your client reconsider its position respecting mediation. The OPA is hopeful that your client's reconsideration will result in an agreement to promptly proceed with mediation to further the negotiations in this regard.

May we please hear from you at your earliest opportunity.

Yours very truly,

Paul Ivanoff
PI:hi

c: C. Andersen
M. Lyle
S. Kennedy
D. Langelan
R. Sebastiano

Aleksandar Kojic

From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: April 14, 2011 5:17 PM
To: Michael Killeavy
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy; Sebastiano, Rocco
Subject: RE: TCE Matter - Arbitration ...[Privileged and Confidential]

Michael,

Further to our discussion of this afternoon, below please find the text of a draft letter to Alex Pourbaix from Colin regarding the arbitration.

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

To: Mr. Alex Pourbaix

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

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. The OPA requests that the parties meet to discuss an arbitration of the dispute between the parties and terms of reference of an arbitration. Please have your counsel contact ours in this regard.

[Signed Colin Andersen]

Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

osler.com

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

From: Michael Killeavy [<mailto:Michael.Killeavy@powerauthority.on.ca>]
Sent: Wednesday, April 13, 2011 4:50 PM
To: Ivanoff, Paul; Sebastiano, Rocco
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy
Subject: TCE Matter - Arbitration

Paul/Rocco,

We are being asked to:

1. Prepare a formal letter to TCE requesting mediation in a formal way, which sets out the reasons for mediation and where we think it might assist us. This will be a counsel to counsel letter; and,

2. Prepare a Notice of Arbitration to TCE.

Can you please start work on this. We want to send the mediation letter tomorrow.

We would like to be in a position to serve the Notice of Arbitration on Monday.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
416-969-6288 (office)
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Michael.killeavy@powerauthority.on.ca

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Aleksandar Kojic

From: Michael Killeavy
Sent: April 14, 2011 5:18 PM
To: 'PIvanoff@osler.com'
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy; 'RSebastiano@osler.com'
Subject: Re: TCE Matter - Arbitration[Privileged and Confidential]

Thanks for the quick turnaround.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
416-969-6288 (office)
416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca

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

From: Ivanoff, Paul [<mailto:PIvanoff@osler.com>]
Sent: Thursday, April 14, 2011 05:17 PM
To: Michael Killeavy
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy; Sebastiano, Rocco
<RSebastiano@osler.com>
Subject: RE: TCE Matter - Arbitration[Privileged and Confidential]

Michael,

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PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

To: Mr. Alex Pourbaix

Dear Alex:

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[Signed Colin Andersen]

Paul Ivanoff
Partner

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416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

osler.com

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

From: Michael Killeavy [<mailto:Michael.Killeavy@powerauthority.on.ca>]
Sent: Wednesday, April 13, 2011 4:50 PM
To: Ivanoff, Paul; Sebastiano, Rocco
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy
Subject: TCE Matter - Arbitration

Paul/Rocco,

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2. Prepare a Notice of Arbitration to TCE.

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Michael

Michael Killeavy, LL.B., MBA, P.Eng.
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Aleksandar Kojic

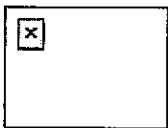
From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: April 14, 2011 7:44 PM
To: Michael Lyle; Susan Kennedy
Cc: JoAnne Butler; Michael Killeavy; Deborah Langelaan; Sebastiano, Rocco
Subject: OPA - TCE [Privileged and Confidential]
Attachments: v3 Common Interest Privilege Agreement, OPA 20420450_3.DOC

Mike and Susan,

Attached please find a draft Cooperation and Common Interest Privilege Agreement between the OPA and Her Majesty the Queen in right of Ontario as represented by the Minister of Energy. Let me know if you have any questions or would like to discuss.

Regards,

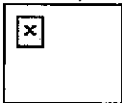
Paul



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



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**COOPERATION AND
COMMON INTEREST PRIVILEGE AGREEMENT**

THIS AGREEMENT is effective as of the _____ day of _____, 2011 (the “**Effective Date**”). [NTD: Consider whether this Agreement should be backdated.]

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 subsequent 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, experts and affiliates.
 - (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, with respect to either Party, any corporation, partnership, joint venture or other legal entity that is a direct or indirect parent or subsidiary of such Party or that directly or indirectly (i) owns or controls such Party, (ii) is owned or controlled by such Party, or (iii) is under common ownership or control with such Party. For purposes of this definition, "control" shall mean the power to direct the management or policies of such entity, whether through the ownership of voting securities, by contract, or otherwise, and, without limitation, 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.

INJUNCTIVE RELIEF

17. The Receiving Party acknowledges that disclosure of any Privileged Information to Third Parties in breach of this Agreement will cause the Disclosing Party to suffer irreparable harm for which there is no adequate legal remedy. The Parties therefore agree that immediate injunctive relief is an appropriate and necessary remedy for a breach or threatened or anticipated breach of this Agreement.

NOTICE

18. 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

Attention: Michael Lyle, General Counsel
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1

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
Attention: ●

GENERAL PROVISIONS

19. 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.
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. 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.
26. This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the Parties.
27. 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: _____

Aleksandar Kojic

From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: April 14, 2011 7:54 PM
To: Michael Lyle; Susan Kennedy
Cc: JoAnne Butler; Michael Killeavy; Deborah Langelaan; Sebastiano, Rocco
Subject: OPA - TCE [Privileged and Confidential]
Attachments: OPA - TCE [Privileged and Confidential]

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Aleksandar Kojic

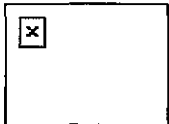
From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: April 14, 2011 7:54 PM
To: Michael Lyle; Susan Kennedy
Cc: JoAnne Butler; Michael Killeavy; Deborah Langelaan; Sebastiano, Rocco
Subject: OPA - TCE [Privileged and Confidential]
Attachments: v3 Common Interest Privilege Agreement, OPA 20420450_3.DOC

Mike and Susan,

Attached please find a draft Cooperation and Common Interest Privilege Agreement between the OPA and Her Majesty the Queen in right of Ontario as represented by the Minister of Energy. Let me know if you have any questions or would like to discuss.

Regards,

Paul



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



**COOPERATION AND
COMMON INTEREST PRIVILEGE AGREEMENT**

THIS AGREEMENT is effective as of the _____ day of _____, 2011 (the “Effective Date”). [NTD: Consider whether this Agreement should be backdated.]

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 subsequent 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, experts and affiliates.
 - (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, with respect to either Party, any corporation, partnership, joint venture or other legal entity that is a direct or indirect parent or subsidiary of such Party or that directly or indirectly (i) owns or controls such Party, (ii) is owned or controlled by such Party, or (iii) is under common ownership or control with such Party. For purposes of this definition, “control” shall mean the power to direct the management or policies of such entity, whether through the ownership of voting securities, by contract, or otherwise, and, without limitation, 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.

INJUNCTIVE RELIEF

17. The Receiving Party acknowledges that disclosure of any Privileged Information to Third Parties in breach of this Agreement will cause the Disclosing Party to suffer irreparable harm for which there is no adequate legal remedy. The Parties therefore agree that immediate injunctive relief is an appropriate and necessary remedy for a breach or threatened or anticipated breach of this Agreement.

NOTICE

18. 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

Attention: Michael Lyle, General Counsel
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1

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
Attention: ●

GENERAL PROVISIONS

19. 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.
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. 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.
26. This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the Parties.
27. 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: _____

Aleksandar Kojic

From: Michael Killeavy
Sent: April 15, 2011 10:38 AM
To: JoAnne Butler
Attachments: Draft Offer to Engage in Arbitration 14 Apr 2011.pdf; TCE Response to Mediation.pdf

As requested.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

Michael Killeavy

From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: April 14, 2011 5:17 PM
To: Michael Killeavy
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy; Sebastiano, Rocco
Subject: RE: TCE Matter - Arbitration[Privileged and Confidential]

Michael,

Further to our discussion of this afternoon, below please find the text of a draft letter to Alex Pourbaix from Colin regarding the arbitration.

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE
To: Mr. Alex Pourbaix

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

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. The OPA requests that the parties meet to discuss an arbitration of the dispute between the parties and terms of reference of an arbitration. Please have your counsel contact ours in this regard.

[Signed Colin Andersen]

Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

osler.com

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

From: Michael Killeavy [mailto:Michael.Killeavy@powerauthority.on.ca]
Sent: Wednesday, April 13, 2011 4:50 PM
To: Ivanoff, Paul; Sebastiano, Rocco
Cc: Deborah Langelaan; JoAnne Butler; Michael Lyle; Susan Kennedy
Subject: TCE Matter - Arbitration

Paul/Rocco,

We are being asked to:

1. Prepare a formal letter to TCE requesting mediation in a formal way, which sets out the reasons for mediation and where we think it might assist us. This will be a counsel to counsel letter; and,

2. Prepare a Notice of Arbitration to TCE.

Can you please start work on this. We want to send the mediation letter tomorrow.

We would like to be in a position to serve the Notice of Arbitration on Monday.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
416-969-6288 (office)
416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca

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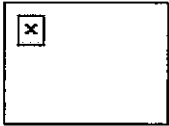
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Aleksandar Kojic

From: Ivanoff, Paul [Pivanoff@osler.com]
Sent: April 15, 2011 2:30 PM
To: Michael Killeavy; Susan Kennedy
Cc: Sebastiano, Rocco
Subject: OPA - TCE [Privileged and Confidential]
Attachments: Letter to Alex Pourbaix (OPA letterhead) April 15, 2011 20455701_1.doc

Further to our meetings this morning, attached please find a draft letter to Alex Pourbaix regarding mediation and arbitration.

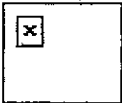
Regards,



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



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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

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May we please hear from you at your earliest opportunity.

Sincerely,

ONTARIO POWER AUTHORITY

Per:

Name: Colin Andersen
Title: Chief Executive Officer

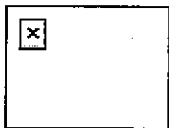
Draft & Privileged

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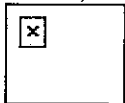
Regards,



Paul Ivanoff
Partner

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416.862.6666 FACSIMILE
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[ONTARIO POWER AUTHORITY LETTERHEAD]

April 15, 2011

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Per:

Name: Colin Andersen

Title: Chief Executive Officer

Draft & Privileged

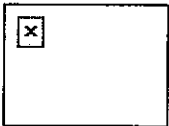
Aleksandar Kojic

From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: April 15, 2011 2:45 PM
To: Michael Lyle; Deborah Langelaan
Cc: Michael Killeavy; Susan Kennedy; Sebastiano, Rocco
Subject: FW: OPA - TCE [Privileged and Confidential]
Attachments: Letter to Alex Pourbaix (OPA letterhead) April 15, 2011 20455701_1.doc

Mike and Deb,

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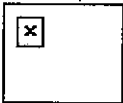
Paul



Paul Ivanoff
Partner

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Toronto, Ontario, Canada M5X 1B8



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Cc: Sebastiano, Rocco
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Regards,



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Partner

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Sincerely,

ONTARIO POWER AUTHORITY

Per:

Name: Colin Andersen

Title: Chief Executive Officer

Draft & Privileged

Aleksandar Kojic

From: Michael Lyle
Sent: April 15, 2011 2:50 PM
To: Susan Kennedy; Michael Killeavy; Deborah Langelaan
Subject: FW: OPA - TCE [Privileged and Confidential]
Attachments: Letter to Alex Pourbaix (OPA letterhead) April 15, 2011 20455701_1.doc

Can we get together in my office in the next 5 minutes to briefly go over Paul's letter? My proposal would be land with Paul and then quickly loop JoAnne and Kristin in before sending to Colin.

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

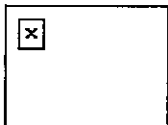
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Cc: Michael Killeavy; Susan Kennedy; Sebastiano, Rocco
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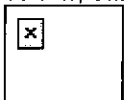
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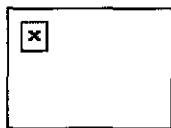
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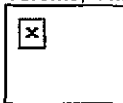
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ONTARIO POWER AUTHORITY

Per:

Name: Colin Andersen

Title: Chief Executive Officer

Draft & Privileged

Aleksandar Kojic

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
Attachments: 20455701_2.doc

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

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President, Energy and Oil Pipelines
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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.

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Per:

Name: Colin Andersen

Title: Chief Executive Officer

Draft & Privileged

Aleksandar Kojic

From: Sebastiano, Rocco [RSebastiano@osler.com]
Sent: April 18, 2011 7:33 PM
To: Michael Killeavy; JoAnne Butler
Cc: Deborah Langelaan; Susan Kennedy; Ivanoff, Paul; Smith, Elliot
Subject: RE: TCE Matter - OPA Second Counter-Proposal
Attachments: #20465379v1_LEGAL_1_ - Draft Second Project Proposal to TCE.DOC; WSComparison_#20297127v8_LEGAL_1_ - Draft Response to A. Pourbaix Letter with Project Proposal-#20465379v1_LEGAL_1_ - Draft Second Project Proposal to TCE.PDF

Michael and JoAnne,

Please find enclosed a second counter-proposal to TCE which reflects the points raised in the email below. As the OPA only delivered the first counterproposal in draft form, we have taken that draft and revised it to reflect the changed parameters. I have also included a blackline to the first counterproposal for ease of reference.

Regards, Rocco

From: Michael Killeavy [<mailto:Michael.Killeavy@powerauthority.on.ca>]
Sent: Monday, April 18, 2011 4:24 PM
To: Sebastiano, Rocco; Ivanoff, Paul; Susan Kennedy
Cc: Deborah Langelaan; JoAnne Butler
Subject: TCE Matter - OPA Second Counter-Proposal

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

There have been some developments on this file over the last few days. It has been decided that the OPA will make a second counter-proposal to TCE. The second counter-proposal will be identical to the first counter-proposal with the exception of:

1. AACC will be 481 MW;
2. Target Capital Cost of \$475 million;
3. Net Revenue Requirement of \$14,922/MW-month, which is inclusive of the OGS sunk costs estimated now at \$37 million;
4. Contract term of 25 year; and
5. The provincial government will not pass a regulation, similar to that which was enacted for the NYR project, to exempt the project from the *Planning Act*. In recognition of the fact that TCE will still have permitting and approvals risk we need to change the second paragraph in the "Permits and Approvals" section of the first counter-proposal. We need to state that in the event that the K-W peaking plant does not proceed, we will enter into good faith negotiations with TCE for: (i) the recovery of the OGS sunk costs; (ii) prudently incurred expenditures on the K-W peaking plant; and, (iii) the financial value of the OGS contract.

During our telephone call I misspoke when I said that the provincial government would enact a regulation to exempt the project from the *Planning Act*. It will not do so.

We would like to receive a draft of this second counter-proposal before 10am tomorrow. If this isn't possible, please let me know in advance.

Thank you,

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
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Dear Mr. Pourbaix:

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

As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner.

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages

associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by [0.000 012 681 3] multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the “NINRR” term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
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If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

[NTD: In light of the change to the AACC to 481 MW, should the capacity figures in (a), (b) and (c) below also be revised to reflect TCE's comments about the capabilities of the CTG's?]

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of **[250 MW]** at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times;
- (b) be able to provide a minimum of **[500 MW]** at 35 °C under N-2 System Conditions;
- (c) have a Season 3 Contract Capacity of not less than **[480 MW]**; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. **[Note: This assumes the Replacement Project is located at the Boxwood site.]**

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the

OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the “Generators”), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator’s output terminals) new and clean, at ISO conditions.

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A"; TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.
 - (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} - \$25,000,000) \times 0.50, \text{ provided that the OPA Share shall not exceed } \$25,000,000$$
 - (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} + \$25,000,000) \times 0.50$$
 - (c) The adjusted NRR shall be equal to the NRR set out in Schedule “B”, plus the OPA Share multiplied by [0.000 012 681 3]. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule “B”.
2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, “Interconnection Costs”, as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with “Good Engineering and Operating Practices” (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.
3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the

determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

~~We are writing to you in response to your letter to Colin Andersen, dated March 10, 2011. As stated in Colin’s October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.~~

The Government of Ontario’s Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the “Replacement Project”). We have set out in Schedule “A” to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the “Replacement Contract”) would be based on the final form of contract (the “NYR Contract”) included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule “A”. The financial parameters of the Replacement Contract would be as set out in Schedule “B” to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule “C” to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner, ~~or if they are not issued in a timely manner, that so long as the Replacement Project has been approved under Part II or Part II.1 of the *Environmental Assessment Act* or is the subject of (i) an order under section 3.1 or a declaration under section 3.2 of that Act, or (ii) an exempting regulation made under that Act, such *Planning Act* approvals do not impede the development of the Replacement Project.~~

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination ~~amount equal to payment~~ which the Parties would negotiate in good faith and would compensate TCE for reasonable damages associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000 ~~plus \$37,000,000~~, (ii) ~~fifty percent of the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with~~ prudently incurred in the development of the Replacement Project. ~~TCE would be solely responsible for all other permits and approvals required for the Replacement Project, subject to the standard Force Majeure provisions set out in the NYR, and (iii) the anticipated financial value of the Contract.~~

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by ~~10.000 012 681~~ 31 multiplied by the amount by which such costs are less than \$37,000,000.
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Yours very truly,

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- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
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[NTD: In light of the change to the AACC to 481 MW, should the capacity figures in (a), (b) and (c) below also be revised to reflect TCE's comments about the capabilities of the CTG's?]

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SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 12,500<u>14,922</u> / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	500<u>481</u> MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
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<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE "C" – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule "B" is based on a target capital cost for the design and construction of the Replacement Project of ~~\$375,000,000~~ \$475,000,000 (the "Target Capex"). So long as the actual cost to design and build the Replacement Project (the "Actual Capex") is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B" other than the NRR shall be subject to adjustment pursuant to this Schedule "C".

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule "B", plus the OPA Share multiplied by ~~[0.000 012 681 3-3]~~. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule "B".

2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, "Interconnection Costs", as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with "Good Engineering and Operating Practices" (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.
3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an "open book" process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the determination of the

Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

Aleksandar Kojic

From: Michael Killeavy
Sent: April 19, 2011 10:00 AM
To: 'safouh@smsenergy-engineering.com'
Cc: Deborah Langelaan; Ronak Mozayyan; JoAnne Butler
Subject: FW: TCE Matter - OPA Second Counter-Proposal
Attachments: #20465379v1_LEGAL_1_ - Draft Second Project Proposal to TCE.DOC; WSComparison_#20297127v8_LEGAL_1_ - Draft Response to A. Pourbaix Letter with Project Proposal-#20465379v1_LEGAL_1_ - Draft Second Project Proposal to TCE.PDF

Safouh,

The OPA has been asked by the government to amend its counter-proposal. Please review the attached revised draft of the OPA counter-proposal. In particular, we have revised the AACC downwards from 500 MW to 481 MW. In light of this change, do any of the capacities in Schedule A to the counter-proposal need to be revised as well?

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

From: Sebastiano, Rocco [<mailto:RSebastiano@osler.com>]
Sent: April 18, 2011 7:33 PM
To: Michael Killeavy; JoAnne Butler
Cc: Deborah Langelaan; Susan Kennedy; Ivanoff, Paul; Smith, Elliot
Subject: RE: TCE Matter - OPA Second Counter-Proposal

Michael and JoAnne,

Please find enclosed a second counter-proposal to TCE which reflects the points raised in the email below. As the OPA only delivered the first counterproposal in draft form, we have taken that draft and revised it to reflect the changed parameters. I have also included a blackline to the first counterproposal for ease of reference.

Regards, Rocco

From: Michael Killeavy [<mailto:Michael.Killeavy@powerauthority.on.ca>]
Sent: Monday, April 18, 2011 4:24 PM
To: Sebastiano, Rocco; Ivanoff, Paul; Susan Kennedy
Cc: Deborah Langelaan; JoAnne Butler
Subject: TCE Matter - OPA Second Counter-Proposal

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

There have been some developments on this file over the last few days. It has been decided that the OPA will make a second counter-proposal to TCE. The second counter-proposal will be identical to the first counter-proposal with the exception of:

1. AACC will be 481 MW;
2. Target Capital Cost of \$475 million;
3. Net Revenue Requirement of \$14,922/MW-month, which is inclusive of the OGS sunk costs estimated now at \$37 million;
4. Contract term of 25 year; and
5. The provincial government will not pass a regulation, similar to that which was enacted for the NYR project, to exempt the project from the *Planning Act*. In recognition of the fact that TCE will still have permitting and approvals risk we need to change the second paragraph in the "Permits and Approvals" section of the first counter-proposal. We need to state that in the event that the K-W peaking plant does not proceed, we will enter into good faith negotiations with TCE for: (i) the recovery of the OGS sunk costs; (ii) prudently incurred expenditures on the K-W peaking plant; and, (iii) the financial value of the OGS contract.

During our telephone call I misspoke when I said that the provincial government would enact a regulation to exempt the project from the *Planning Act*. It will not do so.

We would like to receive a draft of this second counter-proposal before 10am tomorrow. If this isn't possible, please let me know in advance.

Thank you,

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
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PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner.

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages

associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule “B” to this letter includes an amount equal to \$37,000,000 on account of TCE’s sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by [0.000 012 681 3] multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no “Budgeted Costs” included in the NRR on account of such costs, (ii) references to the “Simple Cycle Operation Date” shall be replaced with references to the “Commercial Operation Date”, and (iii) there shall be no “Excess H1 Amount”.
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule “B”, the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule “B” to this letter.

8. **Potential One Hour Runs.** Because of the absence of the “NINRR” term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule “B” is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

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SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

[NTD: In light of the change to the AACC to 481 MW, should the capacity figures in (a), (b) and (c) below also be revised to reflect TCE's comments about the capabilities of the CTG's?]

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of **[250 MW]** at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times;
- (b) be able to provide a minimum of **[500 MW]** at 35 °C under N-2 System Conditions;
- (c) have a Season 3 Contract Capacity of not less than **[480 MW]**; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. **[Note: This assumes the Replacement Project is located at the Boxwood site.]**

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NO_x) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NO_x and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NO_x and CO.
- (c) The Replacement Contract will require that the emission limits for NO_x and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NO_x and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the

OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the “Generators”), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator’s output terminals) new and clean, at ISO conditions.

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A", TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.
 - (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} - \$25,000,000) \times 0.50, \text{ provided that the OPA Share shall not exceed } \$25,000,000$$
 - (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} + \$25,000,000) \times 0.50$$
 - (c) The adjusted NRR shall be equal to the NRR set out in Schedule “B”, plus the OPA Share multiplied by [0.000 012 681 3]. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule “B”.
2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, “Interconnection Costs”, as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with “Good Engineering and Operating Practices” (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.
3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the

determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

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Dear Mr. Pourbaix:

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

~~We are writing to you in response to your letter to Colin Andersen, dated March 10, 2011. As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.~~

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

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The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner, ~~or if they are not issued in a timely manner, that so long as the Replacement Project has been approved under Part II or Part II.1 of the *Environmental Assessment Act* or is the subject of (i) an order under section 3.1 or a declaration under section 3.2 of that Act, or (ii) an exempting regulation made under that Act, such *Planning Act* approvals do not impede the development of the Replacement Project.~~

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination ~~amount equal to payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages associated with~~ (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000 ~~plus \$37,000,000~~, (ii) ~~fifty percent of the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with~~ prudently incurred in the development of the Replacement Project. ~~TCE would be solely responsible for all other permits and approvals required for the Replacement Project, subject to the standard Force Majeure provisions set out in the NYR, and (iii) the anticipated financial value of the Contract.~~

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by ~~10.000 012 681 31~~ multiplied by the amount by which such costs are less than \$37,000,000.
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Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

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SCHEDULE "A" – TECHNICAL REQUIREMENTS

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The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

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[NTD: In light of the change to the AACC to 481 MW, should the capacity figures in (a), (b) and (c) below also be revised to reflect TCE's comments about the capabilities of the CTG's?]

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [250 MW] at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times;
- (b) be able to provide a minimum of [500 MW] at 35 °C under N-2 System Conditions;
- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
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The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

IV. Operation Following a N-2 Contingency (Load Restoration)

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- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
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- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the OPA is

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not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

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The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

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SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 12,500 <u>14,922</u> / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	500 <u>481</u> MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A", TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of ~~\$375,000,000~~475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule “B”, plus the OPA Share multiplied by ~~10.000 012 681 3-31~~. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule “B”.

2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, “Interconnection Costs”, as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with “Good Engineering and Operating Practices” (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.

3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
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Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
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4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the determination of the

Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

Aleksandar Kojic

From: Safouh Soufi [safouh@smsenergy-engineering.com]
Sent: April 19, 2011 11:48 AM
To: Michael Killeavy
Cc: Deborah Langelaan; Ronak Mozayyan; JoAnne Butler
Subject: RE: TCE Matter - OPA Second Counter-Proposal
Attachments: #20465379v1_LEGAL_1_ - Draft Second Project Proposal to TCE (SMS).DOC

Micheal:

As requested, attached you will find our revisions to Schedule A. We have not made any changes to the capacity check test factor of 90%.

I trust you will find the attached in order and if you have any question, please feel free to contact me at any time.

Thanks,
Safouh

From: Michael Killeavy [mailto:Michael.Killeavy@powerauthority.on.ca]
Sent: April 19, 2011 11:10 AM
To: Safouh Soufi
Cc: Deborah Langelaan; Ronak Mozayyan; JoAnne Butler
Subject: RE: TCE Matter - OPA Second Counter-Proposal

Safouh,

I'm sorry for the confusion. I don't need you to complete the seasonal capacities or heat rates. It was more the specification-related content.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
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Sent: April 19, 2011 11:07 AM
To: Michael Killeavy
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Subject: RE: TCE Matter - OPA Second Counter-Proposal

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Below is a list of items that should be revised. We will revise and send back to you the Word document with track changes to incorporate the items below.

- Item 7 of the Letter to Pourbaix: the 90% capacity check test criteria is no longer practical and this should be revised to 95%
- Section II of Schedule A: the minimum of 500 MW at 35C under N-2, we will bullet the "500" with NTD
- Section II of Schedule A: Season 3 of not less than 480 MW, we will bullet the "480" or alternatively we can propose "470"

I am assuming the OPA, through the Implementation Agreement and as further information is provided by TCE, will be able to refine the heat rate figures in Schedule B1. Alternatively, you may want us to revise the figures before submission of the 2nd counter offer to TCE.

Please let me know your feedback on the above and will revise the Schedules accordingly.

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From: Michael Killeavy [mailto:Michael.Killeavy@powerauthority.on.ca]
Sent: April 19, 2011 10:00 AM
To: safouh@smsenergy-engineering.com
Cc: Deborah Langelaan; Ronak Mozayyan; JoAnne Butler
Subject: FW: TCE Matter - OPA Second Counter-Proposal

Safouh,

The OPA has been asked by the government to amend its counter-proposal. Please review the attached revised draft of the OPA counter-proposal. In particular, we have revised the AACC downwards from 500 MW to 481 MW. In light of this change, do any of the capacities in Schedule A to the counter-proposal need to be revised as well?

Michael

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From: Sebastiano, Rocco [mailto:RSebastiano@osler.com]
Sent: April 18, 2011 7:33 PM
To: Michael Killeavy; JoAnne Butler
Cc: Deborah Langelaan; Susan Kennedy; Ivanoff, Paul; Smith, Elliot
Subject: RE: TCE Matter - OPA Second Counter-Proposal

Michael and JoAnne,

Please find enclosed a second counter-proposal to TCE which reflects the points raised in the email below. As the OPA only delivered the first counterproposal in draft form, we have taken that draft and revised it to reflect the changed parameters. I have also included a blackline to the first counterproposal for ease of reference.

Regards, Rocco

From: Michael Killeavy [mailto:Michael.Killeavy@powerauthority.on.ca]

Sent: Monday, April 18, 2011 4:24 PM

To: Sebastiano, Rocco; Ivanoff, Paul; Susan Kennedy

Cc: Deborah Langelaan; JoAnne Butler

Subject: TCE Matter - OPA Second Counter-Proposal

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

There have been some developments on this file over the last few days. It has been decided that the OPA will make a second counter-proposal to TCE. The second counter-proposal will be identical to the first counter-proposal with the exception of:

1. AACC will be 481 MW;
2. Target Capital Cost of \$475 million;
3. Net Revenue Requirement of \$14,922/MW-month, which is inclusive of the OGS sunk costs estimated now at \$37 million;
4. Contract term of 25 year; and
5. The provincial government will not pass a regulation, similar to that which was enacted for the NYR project, to exempt the project from the *Planning Act*. In recognition of the fact that TCE will still have permitting and approvals risk we need to change the second paragraph in the "Permits and Approvals" section of the first counter-proposal. We need to state that in the event that the K-W peaking plant does not proceed, we will enter into good faith negotiations with TCE for: (i) the recovery of the OGS sunk costs; (ii) prudently incurred expenditures on the K-W peaking plant; and, (iii) the financial value of the OGS contract.

During our telephone call I misspoke when I said that the provincial government would enact a regulation to exempt the project from the *Planning Act*. It will not do so.

We would like to receive a draft of this second counter-proposal before 10am tomorrow. If this isn't possible, please let me know in advance.

Thank you,

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
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Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

DRAFT: APRIL 18, 2011, 7:15 PM

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner.

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages

associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by [0.000 012 681 3] multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

[NTD: In light of the change to the AACC to 481 MW, should the capacity figures in (a), (b) and (c) below also be revised to reflect TCE's comments about the capabilities of the CTG's?] [See below]

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [250 MW] at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; {NTD: Planning studies used 35 °C. Contract FM temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.}
- (b) be able to provide a minimum of [~~500~~ 500 MW] at 35 °C under N-2 System Conditions; {NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should be used}
- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

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III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving

the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.

- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A", TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE "C" – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule "B" is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the "Target Capex"). So long as the actual cost to design and build the Replacement Project (the "Actual Capex") is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B" other than the NRR shall be subject to adjustment pursuant to this Schedule "C".
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Draft & Privileged

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Sent: April 19, 2011 12:07 PM
To: 'Sebastiano, Rocco'; 'Smith, Elliot'; Susan Kennedy
Cc: JoAnne Butler; Deborah Langelaan; 'Ron Clark'; 'Safouh Soufi'
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Tracking:	Recipient	Recall
	'Sebastiano, Rocco'	
	'Smith, Elliot'	
	Susan Kennedy	Succeeded: 19/04/2011 12:18 PM
	JoAnne Butler	Succeeded: 19/04/2011 12:17 PM
	Deborah Langelaan	
	'Ron Clark'	
	'Safouh Soufi'	

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Attached are Safouh's comments on Schedule A in light of the reduction in AACC. Basically, I think we need to insert bullets for capacities as noted by Safouh that ought to be referenced in terms of 30 degrees Celsius and not 35 degrees.

Michael Killeavy, LL.B., MBA, P.Eng.
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Sent: April 19, 2011 11:48 AM
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Micheal:

As requested, attached you will find our revisions to Schedule A. We have not made any changes to the capacity check test factor of 90%.

I trust you will find the attached in order and if you have any question, please feel free to contact me at any time.

Thanks,
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416-967-1947 (FAX)

From: Sebastiano, Rocco [mailto:RSebastiano@osler.com]
Sent: April 18, 2011 7:33 PM
To: Michael Killeavy; JoAnne Butler
Cc: Deborah Langelaan; Susan Kennedy; Ivanoff, Paul; Smith, Elliot
Subject: RE: TCE Matter - OPA Second Counter-Proposal

Michael and JoAnne,

Please find enclosed a second counter-proposal to TCE which reflects the points raised in the email below. As the OPA only delivered the first counterproposal in draft form, we have taken that draft and revised it to reflect the changed parameters. I have also included a blackline to the first counterproposal for ease of reference.

Regards, Rocco

From: Michael Killeavy [mailto:Michael.Killeavy@powerauthority.on.ca]
Sent: Monday, April 18, 2011 4:24 PM
To: Sebastiano, Rocco; Ivanoff, Paul; Susan Kennedy
Cc: Deborah Langelaan; JoAnne Butler
Subject: TCE Matter - OPA Second Counter-Proposal

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

There have been some developments on this file over the last few days. It has been decided that the OPA will make a second counter-proposal to TCE. The second counter-proposal will be identical to the first counter-proposal with the exception of:

1. AACC will be 481 MW;
2. Target Capital Cost of \$475 million;

3. Net Revenue Requirement of \$14,922/MW-month, which is inclusive of the OGS sunk costs estimated now at \$37 million;
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During our telephone call I misspoke when I said that the provincial government would enact a regulation to exempt the project from the *Planning Act*. It will not do so.

We would like to receive a draft of this second counter-proposal before 10am tomorrow. If this isn't possible, please let me know in advance.

Thank you,

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
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DRAFT: APRIL 18, 2011, 7:15 PM

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Dear Mr. Pourbaix:

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

As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

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If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages

associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by [0.000 012 681 3] multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

[NTD: In light of the change to the AACC to 481 MW, should the capacity figures in (a), (b) and (c) below also be revised to reflect TCE's comments about the capabilities of the CTG's?] [See below]

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [250 MW] at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; {NTD: Planning studies used 35 °C. Contract FM temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.}
- (b) be able to provide a minimum of [●500 MW] at 35 °C under N-2 System Conditions; {NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should be used}
- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

Formatted: Font: Not Bold

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving

the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.

- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A", TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE "C" – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule "B" is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the "Target Capex"). So long as the actual cost to design and build the Replacement Project (the "Actual Capex") is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B" other than the NRR shall be subject to adjustment pursuant to this Schedule "C".
 - (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} - \$25,000,000) \times 0.50$$
 provided that the OPA Share shall not exceed \$25,000,000
 - (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} + \$25,000,000) \times 0.50$$
 - (c) The adjusted NRR shall be equal to the NRR set out in Schedule "B", plus the OPA Share multiplied by [0.000 012 681 3]. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule "B".
2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, "Interconnection Costs", as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with "Good Engineering and Operating Practices" (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.
3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an "open book" process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the

determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

Aleksandar Kojic

From: Michael Killeavy
Sent: April 19, 2011 12:15 PM
To: 'Sebastiano, Rocco'; 'Smith, Elliot'; Susan Kennedy
Cc: JoAnne Butler; Deborah Langelaan; Ronak Mozayyan; 'Safouh Soufi'
Subject: FW: TCE Matter - OPA Second Counter-Proposal
Attachments: #20465379v1_LEGAL_1_ - Draft Second Project Proposal to TCE (SMS).DOC

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Attached are Safouh's comments on Schedule A in light of the reduction in AACC. Basically, I think we need to insert bullets for capacities as noted by Safouh that ought to be referenced in terms of 30 degrees Celsius and not 35 degrees.

Michael Killeavy, LL.B., MBA, P.Eng.
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120 Adelaide Street West, Suite 1600
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From: Safouh Soufi [mailto:safouh@smsenergy-engineering.com]
Sent: April 19, 2011 11:48 AM
To: Michael Killeavy
Cc: Deborah Langelaan; Ronak Mozayyan; JoAnne Butler
Subject: RE: TCE Matter - OPA Second Counter-Proposal

Micheal:

As requested, attached you will find our revisions to Schedule A. We have not made any changes to the capacity check test factor of 90%.

I trust you will find the attached in order and if you have any question, please feel free to contact me at any time.

Thanks,
Safouh

From: Michael Killeavy [mailto:Michael.Killeavy@powerauthority.on.ca]
Sent: April 19, 2011 11:10 AM
To: Safouh Soufi
Cc: Deborah Langelaan; Ronak Mozayyan; JoAnne Butler
Subject: RE: TCE Matter - OPA Second Counter-Proposal

Safouh,

I'm sorry for the confusion. I don't need you to complete the seasonal capacities or heat rates. It was more the specification-related content.

Michael

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Sent: April 19, 2011 11:07 AM
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Cc: Deborah Langelaan; Ronak Mozayyan; JoAnne Butler
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Micheal,

Just a quick clarification, do you want SMS to complete the seasonal capacities in Schedule B1 based on the revised AACC. If so, do you want us to propose figures for the purpose of negotiating with TCE?

Below is a list of items that should be revised. We will revise and send back to you the Word document with track changes to incorporate the items below.

- Item 7 of the Letter to Pourbaix: the 90% capacity check test criteria is no longer practical and this should be revised to 95%
- Section II of Schedule A: the minimum of 500 MW at 35C under N-2, we will bullet the "500" with NTD
- Section II of Schedule A: Season 3 of not less than 480 MW, we will bullet the "480" or alternatively we can propose "470"

I am assuming the OPA, through the Implementation Agreement and as further information is provided by TCE, will be able to refine the heat rate figures in Schedule B1. Alternatively, you may want us to revise the figures before submission of the 2nd counter offer to TCE.

Please let me know your feedback on the above and will revise the Schedules accordingly.

Thanks,
Safouh

From: Michael Killeavy [mailto:Michael.Killeavy@powerauthority.on.ca]
Sent: April 19, 2011 10:00 AM
To: safouh@smsenergy-engineering.com
Cc: Deborah Langelaan; Ronak Mozayyan; JoAnne Butler
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Safouh,

The OPA has been asked by the government to amend its counter-proposal. Please review the attached revised draft of the OPA counter-proposal. In particular, we have revised the AACC downwards from 500 MW to 481 MW. In light of this change, do any of the capacities in Schedule A to the counter-proposal need to be revised as well?

Michael

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de le divulguer sans autorisation.

DRAFT: APRIL 18, 2011, 7:15 PM

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associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by [0.000 012 681 3] multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

[NTD: In light of the change to the AACC to 481 MW, should the capacity figures in (a), (b) and (c) below also be revised to reflect TCE's comments about the capabilities of the CTG's?] [See below]

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [250 MW] at 35 °C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; {NTD: Planning studies used 35 °C. Contract FM temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.}
- (b) be able to provide a minimum of [●500 MW] at 35 °C under N-2 System Conditions; {NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should be used}
- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

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III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving

the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.

- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A", TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE "C" – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule "B" is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the "Target Capex"). So long as the actual cost to design and build the Replacement Project (the "Actual Capex") is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B" other than the NRR shall be subject to adjustment pursuant to this Schedule "C".
 - (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} - \$25,000,000) \times 0.50$$
, provided that the OPA Share shall not exceed \$25,000,000
 - (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} + \$25,000,000) \times 0.50$$
 - (c) The adjusted NRR shall be equal to the NRR set out in Schedule "B", plus the OPA Share multiplied by [0.000 012 681 3]. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule "B".
2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, "Interconnection Costs", as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with "Good Engineering and Operating Practices" (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.
3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an "open book" process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the

determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Aleksandar Kojic

From: Irene Mauricette
Sent: April 19, 2011 1:27 PM
To: Kristin Jenkins; Michael Lyle; JoAnne Butler; Michael Killeavy; 'jim_hinds@irish-line.com'
Subject: FW: TransCanada Energy Ltd. and Ontario Power Authority
Attachments: Letter to C. Andersen_B. Duguid from M. Barrack dated April 19, 2011.PDF

From Colin fyi. Clare for Irene x 6010

From: Sharonlee Gorgichuk [<mailto:SGorgichuk@tgf.ca>]
Sent: April 19, 2011 11:02 AM
To: Colin Andersen; brad.duguid@ontario.ca
Cc: craig.maclennan@ontario.ca; jamison.steve@ontario.ca; sean.mullin@ontario.ca
Subject: TransCanada Energy Ltd. and Ontario Power Authority

Dear Sirs,

Please see attached correspondence of today's date from Michael Barrack.

Regards,
Sharonlee Gorgichuk



Sharonlee Gorgichuk | Assistant to Michael E. Barrack | sgorgichuk@tgf.ca | Direct Line: 416-304-1152 | Thornton Grout Finnigan LLP | Suite 3200, Canadian Pacific Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

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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.



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 'MBarrack', 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

Aleksandar Kojic

From: Michael Killeavy
Sent: April 19, 2011 1:28 PM
To: 'Sebastiano, Rocco'; 'Ivanoff, Paul'; 'Smith, Elliot'; Susan Kennedy
Cc: Deborah Langelaan; JoAnne Butler
Subject: FW: TransCanada Energy Ltd. and Ontario Power Authority
Attachments: Letter to C. Andersen_B. Duguid from M. Barrack dated April 19, 2011.PDF

Please see the attached letter.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

From: Irene Mauricette
Sent: April 19, 2011 1:27 PM
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From Colin fyi. Clare for Irene x 6010

From: Sharonlee Gorgichuk [<mailto:SGorgichuk@tgf.ca>]
Sent: April 19, 2011 11:02 AM
To: Colin Andersen; brad.duguid@ontario.ca
Cc: craig.maclennan@ontario.ca; jamison.steve@ontario.ca; sean.mullin@ontario.ca
Subject: TransCanada Energy Ltd. and Ontario Power Authority

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Suite 3200, Canadian Pacific Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-
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Michael E. Barrack
T: 416-304-1109
E: mbarrack@tgf.ca

April 19, 2011

VIA EMAIL

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

Ministry of Energy
4th Floor, Hearst Block
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Attn: Colin Andersen
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Michael E. Barrack
MEB/slg

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 Jamison Steve, Principal Secretary to the Premier
 Sean Mullin, Director of Policy, Office of the Premier

Aleksandar Kojic

From: Smith, Elliot [ESmith@osler.com]
Sent: April 19, 2011 3:08 PM
To: Michael Killeavy; Sebastiano, Rocco; Ivanoff, Paul; Susan Kennedy
Cc: Deborah Langelaan; JoAnne Butler
Subject: RE: TransCanada Energy Ltd. and Ontario Power Authority

Michael,
Further to your voice message, are you available to discuss at 4 PM?

Thanks,
Elliot

From: Michael Killeavy [<mailto:Michael.Killeavy@powerauthority.on.ca>]
Sent: Tuesday, April 19, 2011 1:28 PM
To: Sebastiano, Rocco; Ivanoff, Paul; Smith, Elliot; Susan Kennedy
Cc: Deborah Langelaan; JoAnne Butler
Subject: FW: TransCanada Energy Ltd. and Ontario Power Authority

Please see the attached letter.

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Aleksandar Kojic

From: Michael Killeavy
Sent: April 19, 2011 3:10 PM
To: 'ESmith@osler.com'; 'RSebastiano@osler.com'; 'PIvanoff@osler.com'; Susan Kennedy
Cc: Deborah Langelaan; JoAnne Butler
Subject: Re: TransCanada Energy Ltd. and Ontario Power Authority

Yes. I am.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
416-969-6288 (office)
416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca

From: Smith, Elliot [<mailto:ESmith@osler.com>]
Sent: Tuesday, April 19, 2011 03:08 PM
To: Michael Killeavy; Sebastiano, Rocco <RSebastiano@osler.com>; Ivanoff, Paul <PIvanoff@osler.com>; Susan Kennedy
Cc: Deborah Langelaan; JoAnne Butler
Subject: RE: TransCanada Energy Ltd. and Ontario Power Authority

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Sent: Tuesday, April 19, 2011 1:28 PM
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Subject: FW: TransCanada Energy Ltd. and Ontario Power Authority

Please see the attached letter.

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Aleksandar Kojic

From: John Zych
Sent: April 19, 2011 8:22 PM
To: Colin Andersen; ceb1618@aol.com; jim.hinds@irish-line.com; jrmichaelcostello@hotmail.com; rfitzgerald7@sympatico.ca; rfitzgerald7@sympatico.ca; ferrari@execulink.com; blourie@ivey.org; pjmon@yorku.ca; lynandneil@sympatico.ca
Cc: JoAnne Butler; Michael Lyle; Kristin Jenkins; Michael Killeavy; Irene Mauricette; Nimi Visram
Subject: BOARD TELECONFERENCE MEETING - WEDNESDAY, APRIL 20, 2010 AT 5:30 P.M., TORONTO TIME
Attachments: OGS_BOD_CM_20110420 v1.pptx

I wish to confirm that we will hold a Board teleconference meeting on Wednesday, April 20, 2010 at 5:30 p.m., Toronto time, on the subject of the Oakville generating station matter. It is expected to last about 45 minutes.

A slide deck is attached.

All Board members other than Lyn McLeod are expected to participate. (Lyn is away until April 26th and does not have access to e-mail, so I do not expect her to participate.)

This is an information matter, so there is no resolution. (If an OPA counter-offer to TransCanada Energy is agreed to by the Board and accepted by TransCanada Energy, an implementation agreement will be drafted by the parties, which our Board will be asked to approve before signing.)

The call-in number particulars are as follows:

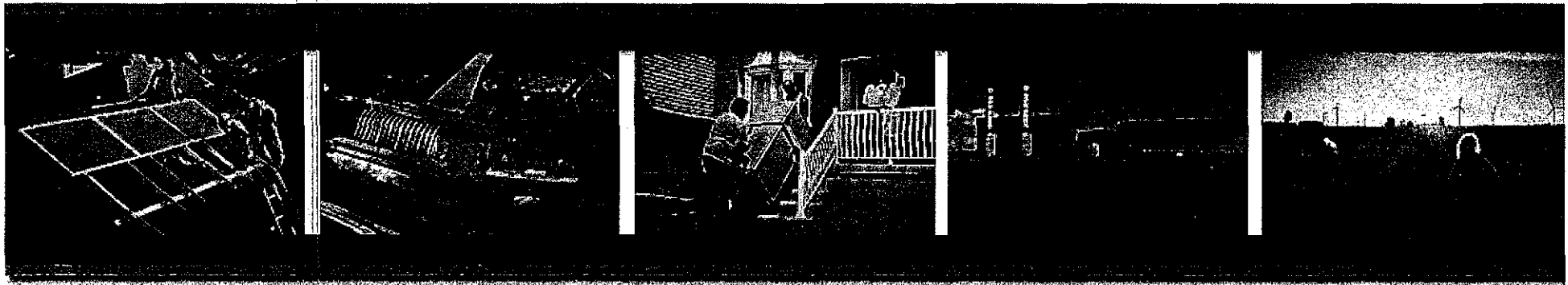
Toll Free: 1-877-320-7617

OPA Board Members' Access Code: 6802847

If any of our Board members are in downtown Toronto at the time of the meeting, they should feel free to attend in person in the 16th Floor Boardroom, if they wish to do so.

John Zych
Corporate Secretary
Ontario Power Authority
Suite 1600
120 Adelaide Street West
Toronto, ON M5H 1T1
416-969-6055
416-967-7474 Main telephone
416-967-1947 OPA Fax
416-416-324-5488 Personal Fax
John.Zych@powerauthority.on.ca

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Winding Up of the Oakville Generating Station (OGS) Contract

Board of Directors – For Information

April 20, 2011

Privileged and Confidential – Prepared in Contemplation of Litigation

Status

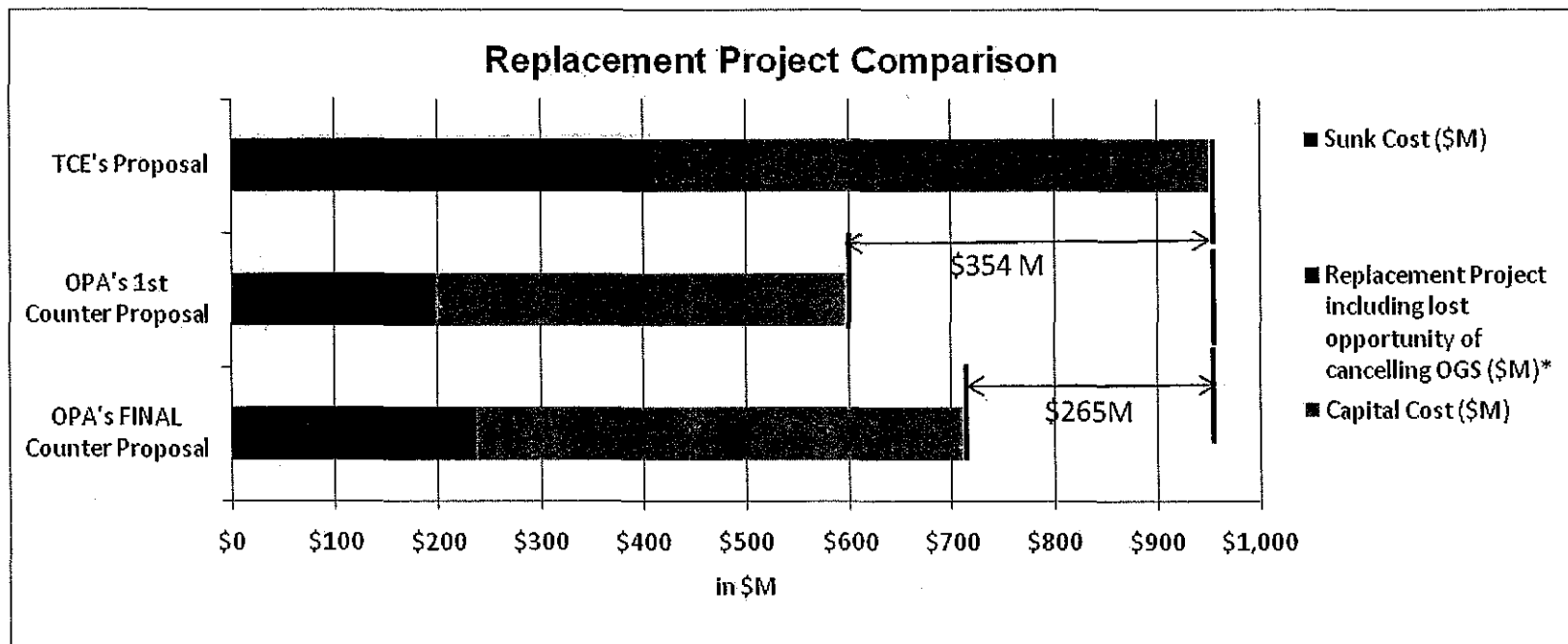
- TCE rejected OPA counter-proposal via telephone on April 1.
- Email exchange between Colin (asking for more information and proposing mediation) and Alex Pourbaix (strongly rejecting mediation proposal, imposing deadline for us to agree to their proposal or threat of litigation).
- Due diligence performed by our external and internal counsel regarding pros/cons of arbitration/litigation. Prepared letter from Colin to Alex to propose sitting down to agree to terms of reference for arbitration. Letter not sent.
- Meanwhile, TCE met with Government to express concerns over our proposal and more threat of litigation.
- TCE's approach of "divide and conquer" has worked as Government is now integrally involved and being lobbied by Government Relations rep from TransCanada.
- Government verbally directed us to send counter proposal which puts us in a position of weakness, ie. negotiating with ourselves. Government informed TCE that OPA would be coming back with another proposal.
- We believe that this proposal closes the value gap enough on the lost profits from OGS to prevent litigation without putting further undue obligation on the ratepayer because of not having a competitive procurement. TCE may think otherwise.
- TCE has sent letter from their litigation counsel on April 19 asking to sit down with our internal counsel to determine the appropriate dispute mechanism for resolving the matter. TCE remains willing to discuss alternatives, but not willing to suspend the formal process.

OPA Second Counter-Proposal

	TCE Proposal March 10, 2011	OPA Counter-Proposal March 28, 2011	OPA Second Counter Proposal April 21, 2011	Comments
NRR Net Revenue Requirement	\$16,900/MW-month	\$12,500/MW-month	\$14,922/MW-month	NRR covers capital costs, financing working capital, returns, fixed monthly payment over life of contract. Energy paid on a deemed dispatch basis, this plant will operate less than 10% of the time.
Financing Assumptions	Unknown	Assumed 7.5% Cost of Equity, all equity project.	TCE claimed "unleveraged" discount rate of 5.25%	TCE can finance/leverage how they want to increase NPV of project. We have assumed in second proposal what we believe that they would use.
Contract Term	20 Years + Option for 10 Year Exemption	25 Years	25 Years	We believe that TCE obtains all their value in the first 20 years. 10 Year Option is a "nice to have" sweetener. Precedent for 25 year contract. – Portlands Energy Centre has option for additional five years on the 20-year term.
Contract Capacity (Annual Average)	450 MW	500 MW	481 MW	LTEP indicates need for peaking generation in KWCG; need at least 450 MW of summer peaking capacity, average of 500 MW provides additional system flexibility and reduces NRR on per MW basis.
Sunk Cost Treatment	Lump Sum Payment of \$37mm	Amortize over 25 years – no returns	Amortize over 25 years – no returns	\$37mm currently being audited by Ministry of Finance for substantiation and reasonableness.
Gas/Electrical Interconnections	Payment in addition to the NRR	Payment in addition to the NRR	Payment in addition to the NRR	Precedent – Portlands Energy Centre, Halton Hills, and NYR Peaking Plant. Paid on a cost recovery basis, i.e. no opportunity to charge an additional risk premium on top of active costs. TCE estimate is \$100mm, ± 20%.
Capital Expenditures (CAPEX)	\$540mm	\$400mm	\$475 mm	Our CAPEX based on independent review by our Technical Expert and published information on other similar generation facilities. We have increased it by \$100mm; however, cannot really substantiate why. We are still proposing a target cost on CAPEX where there is a \$25 upper/lower band and then increases/decreases are shared.
Operational Expenditures (OPEX)	Little Visibility	Reasonable	Reasonable	TCE has given us limited insights into their operating expenses. We have used advice from our technical consultant on reasonable OPEX estimates.
Other	Assistance/Protection from mitigating Planning Act approvals risk	We would approach Government to provide Planning Act approvals exemption.	No government assistance with permitting and approvals combined with a good faith obligation to negotiate OGS compensation and sunk costs if the K-W Peaking Plant doesn't proceed because of permitting issues.	In the second counter-proposal the permitting risk is entirely transferred to TCE; however, the promise of finding compensation of OGS lost profits would continue until another option is found.

Quantum Comparison

	SUNK COSTS (\$M)	OGS LOST OPPORTUNITY (\$M)	CAPITAL EXPENDITURES (\$M)	GAP (\$M)
TCE Proposal	37	375	540	
OPA's First Proposal	37	160	400	354
OPA's Final Proposal	37	200	475	265



Financing Assumptions updated to reflect what we "think" that TCE would be using, ie. WACC – 5.25%

Proposal covers OGS and KWCG profits, no double dipping

Next Steps

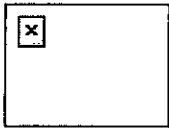
- Send out new counter proposal.
- TCE accepts – proceed to sign Implementation Agreement and work towards completing contract.
- TCE does not accept – legal teams will determine appropriate mechanism to resolve the matter. However, we have lost our leverage to try and get the dispute mechanisms on the table first.
- Reasonable probability that Government will continue to direct us to meet TCE's demands for fear of either private arbitration or public litigation.
- Send out strongly worded letter (prepared) to TCE indicating that they have breached their terms of the confidentiality agreement with us and are not negotiating in good faith.

Aleksandar Kojic

From: Ivanoff, Paul [Pivanoff@osler.com]
Sent: April 20, 2011 3:23 PM
To: JoAnne Butler; Michael Killeavy
Cc: Sebastiano, Rocco; Smith, Elliot; Deborah Langelaan; Susan Kennedy
Subject: OPA - TCE [Privileged and Confidential]
Attachments: Letter to Alex Pourbaix (OPA letterhead) April 20 2011 20472672_3.doc

Further to our meeting of yesterday afternoon, attached is the draft letter to TCE that we discussed.

Regards,
Paul



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



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de le divulguer sans autorisation.

[ONTARIO POWER AUTHORITY LETTERHEAD]

April [●], 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 Mr. Pourbaix:

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

As you know, the OPA and TCE entered into a Confidentiality Agreement dated October 8, 2010 (the “Confidentiality Agreement”) and a letter agreement dated December 21, 2010 (the “MOU”). We are writing to you at this time to advise you of our concerns regarding TCE’s failure to comply with its obligations under these two agreements.

We understand that on April 12, 2011, TCE delivered a presentation to the Government of Ontario entitled “SW-GTA Update”. Contained within this presentation were excerpts from confidential correspondence sent to TCE by the OPA, as well as confidential details of proposals relating to the Contract. Moreover, on April 19, 2011, your counsel, Thornton Grout Finnigan LLP, sent a letter to the Minister of Energy, the Office of the Premier and the OPA, which described confidential negotiations between the OPA and TCE. Each of these actions constitutes a breach by TCE of the Confidentiality Agreement.

Regarding the MOU, the parties acknowledged in that agreement that they were working together cooperatively to identify other generation projects that meet Ontario’s electricity system needs. The MOU contains express obligations requiring both TCE and the OPA to engage in good faith negotiations. In that regard, the MOU states that “[T]he OPA and TCE agree to work together in good faith to negotiate the definitive form of an agreement (the “Definitive Agreement”) in respect of the Potential Project, or an alternative project agreed to by the OPA and TCE.” The OPA maintains that the delivery by TCE of its presentation to the Government is not only a breach by TCE of the Confidentiality Agreement, but it also constitutes a failure to negotiate with the OPA in good faith as required by the MOU. To be clear, the OPA views TCE’s acts as a tactic made in bad faith in an attempt to advance its negotiating position as against the OPA. The OPA requires that TCE cease and desist from further breaches of the Confidentiality Agreement and the MOU and hereby puts TCE on notice that it reserves all of its rights and remedies against TCE respecting the actions referred to above.

As for communications from your external counsel to the OPA, I would request that you have your external counsel direct any future correspondence to Rocco Sebastiano and Paul Ivanoff at Osler, Hoskin & Harcourt LLP, in accordance with the Law Society of Upper Canada's Rules of Professional Conduct.

Lastly, in an effort to move forward with good faith negotiations, we are preparing a revised draft proposal and will be sending it to TCE shortly.

Yours truly,

JoAnne Butler
Vice President, Electricity Resources

cc. Colin Andersen, OPA
Michael Killeavy, OPA
Rocco Sebastiano, Osler, Hoskin & Harcourt LLP
Paul Ivanoff, Osler, Hoskin & Harcourt LLP

Draft & Privileged

Aleksandar Kojic

From: JoAnne Butler
Sent: April 20, 2011 7:34 PM
To: Michael Killeavy
Cc: Deborah Langelaan
Subject: FW: OPA - TCE [Privileged and Confidential]
Attachments: Letter to Alex Pourbaix (OPA letterhead) April 20 2011 20472672_3.doc

I think that we got from the Board meeting to fold in elements of this letter, into a letter from counsel to counsel...can you please talk to Paul about this?

JCB

JoAnne C. Butler
Vice President, Electricity Resources
Ontario Power Authority

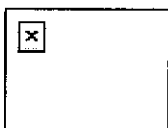
120 Adelaide Street West, Suite 1600
Toronto, Ontario M5H 1T1

416-969-6005 Tel.
416-969-6071 Fax.
joanne.butler@powerauthority.on.ca

From: Ivanoff, Paul [<mailto:PIvanoff@osler.com>]
Sent: Miércoles, 20 de Abril de 2011 03:23 p.m.
To: JoAnne Butler; Michael Killeavy
Cc: Sebastiano, Rocco; Smith, Elliot; Deborah Langelaan; Susan Kennedy
Subject: OPA - TCE [Privileged and Confidential]

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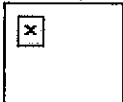
Regards,
Paul



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

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Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



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[ONTARIO POWER AUTHORITY LETTERHEAD]

April [●], 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 Mr. Pourbaix:

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Lastly, in an effort to move forward with good faith negotiations, we are preparing a revised draft proposal and will be sending it to TCE shortly.

Yours truly,

JoAnne Butler
Vice President, Electricity Resources

cc. Colin Andersen, OPA
Michael Killeavy, OPA
Rocco Sebastiano, Osler, Hoskin & Harcourt LLP
Paul Ivanoff, Osler, Hoskin & Harcourt LLP

Draft & Privileged

Aleksandar Kojic

From: JoAnne Butler
Sent: April 20, 2011 7:35 PM
To: Colin Andersen
Cc: Michael Killeavy; Deborah Langelaan
Subject: FW: Revised Second Proposal to TCE
Attachments: #20465379v2_LEGAL_1_ - Draft Second Project Proposal to TCE.DOC; WSComparison_#20465379v1_LEGAL_1_ - Draft Second Project Proposal to TCE-#20465379v2_LEGAL_1_ - Draft Second Project Proposal to TCE.pdf; Blackline to first counterproposal.pdf

Here are the soft copies, but as discussed, there will be some minor changes...

JCB

JoAnne C. Butler
Vice President, Electricity Resources
Ontario Power Authority

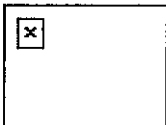
120 Adelaide Street West, Suite 1600
Toronto, Ontario M5H 1T1

416-969-6005 Tel.
416-969-6071 Fax.
joanne.butler@powerauthority.on.ca

From: Smith, Elliot [<mailto:ESmith@osler.com>]
Sent: Miércoles, 20 de Abril de 2011 04:16 p.m.
To: Michael Killeavy
Cc: Sebastiano, Rocco; Ivanoff, Paul; Deborah Langelaan; JoAnne Butler; Susan Kennedy
Subject: Revised Second Proposal to TCE

All,
Please find attached a revised draft of the second counter-proposal to TCE, along with two blacklines – one to the first counter-proposal and one to the preceding draft we circulated (i.e. before Safouh's comments and the revised NRR-Capex factor were incorporated).

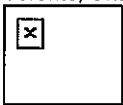
Elliot



Elliot Smith
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PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

As stated in Colin’s October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario’s Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the “Replacement Project”). We have set out in Schedule “A” to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the “Replacement Contract”) would be based on the final form of contract (the “NYR Contract”) included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule “A”. The financial parameters of the Replacement Contract would be as set out in Schedule “B” to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule “C” to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner.

~~If this did not occur and the delay in the issuance of such *Planning Act* approvals caused~~
TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages

associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by 0.000 015 213 3 multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the “NINRR” term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule “B” is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [● MW] at 30°C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; **[NTD: Planning studies used 35 °C. Contract Force Majeure temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.]**
- (b) be able to provide a minimum of [● MW] at 30°C under N-2 System Conditions; **[NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not be able to achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should therefore be used instead.]**
- (c) have a Season 3 Contract Capacity of not less than **[480 MW]**; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. **[Note: This assumes the Replacement Project is located at the Boxwood site.]**

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NO_x) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NO_x and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NO_x and CO.
- (c) The Replacement Contract will require that the emission limits for NO_x and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NO_x and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the

OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the “Generators”), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator’s output terminals) new and clean, at ISO conditions.

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A" TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE "C" – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule "B" is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the "Target Capex"). So long as the actual cost to design and build the Replacement Project (the "Actual Capex") is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B" other than the NRR shall be subject to adjustment pursuant to this Schedule "C".

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule "B", plus the OPA Share multiplied by 0.000 015 213 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule "B".

2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, "Interconnection Costs", as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with "Good Engineering and Operating Practices" (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.

3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an "open book" process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the

determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner.

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any

residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by ~~{0.000 012 681015 213 3}~~ multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.
8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production

intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.

9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

JoAnne Butler

- c. Colin Andersen, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

~~[NTD: In light of the change to the AACC to 481 MW, should the capacity figures in (a), (b) and (c) below also be revised to reflect TCE's comments about the capabilities of the CTG's?]~~

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [250● MW] at 35-30°C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; [NTD: Planning studies used 35 °C. Contract Force Majeure temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.]
- (b) be able to provide a minimum of [500● MW] at 35-30°C under N-2 System Conditions; [NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not be able to achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should therefore be used instead.]
- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such

application that such limits be imposed as conditions of such Certificate of Approval.

- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501 GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

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SCHEDULE “B” – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
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	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule “A”. TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

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OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule “B”, plus the OPA Share multiplied by ~~{0.000 012 681 3}~~0.015 213 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule “B”.

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3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the determination of the

Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

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

~~We are writing to you in response to your letter to Colin Andersen, dated March 10, 2011. As stated in Colin's October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.~~

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We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner, ~~or if they are not issued in a timely manner, that so long as the Replacement Project has been approved under Part II or Part II.1 of the *Environmental Assessment Act* or is the subject of (i) an order under section 3.1 or a declaration under section 3.2 of that Act, or (ii) an exempting regulation made under that Act, such *Planning Act* approvals do not impede the development of the Replacement Project.~~

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

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In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination ~~amount equal to payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages associated with~~ (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000 ~~plus \$37,000,000~~, (ii) ~~fifty percent of the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with~~ prudently incurred in the development of the Replacement Project, TCE ~~would be solely responsible for all other permits and approvals required for the Replacement Project, subject to the standard Force Majeure provisions set out in the NYR, and~~ (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by ~~0.000 012 684 015 213 3~~ multiplied by the amount by which such costs are less than \$37,000,000.
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7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a

Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

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SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of 250[● MW] at 35-30°C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; [NTD: Planning studies used 35 °C. Contract Force Majeure temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.]
- (b) be able to provide a minimum of 500[● MW] at 35-30°C under N-2 System Conditions; [NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not be able to achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should therefore be used instead.]
- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

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The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. [Note: This assumes the Replacement Project is located at the Boxwood site.]

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the OPA is

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not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501 GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

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SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 12,500<u>14,922</u> / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	500<u>481</u> MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A", TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE "C" – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule "B" is based on a target capital cost for the design and construction of the Replacement Project of ~~\$375,000,000~~ \$475,000,000 (the "Target Capex"). So long as the actual cost to design and build the Replacement Project (the "Actual Capex") is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B" other than the NRR shall be subject to adjustment pursuant to this Schedule "C".

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA's share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule "B", plus the OPA Share multiplied by 0.000 ~~012-681-015~~ 213 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule "B".

2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, "Interconnection Costs", as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with "Good Engineering and Operating Practices" (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.
3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an "open book" process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the determination of the

Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

Aleksandar Kojic

From: Michael Killeavy
Sent: April 20, 2011 7:42 PM
To: Michael Lyle
Subject: Fw: OPA - TCE [Privileged and Confidential]
Attachments: Letter to Alex Pourbaix (OPA letterhead) April 20 2011 20472672_3.doc

Was this your understanding?

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
416-969-6288 (office)
416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca

From: JoAnne Butler
Sent: Wednesday, April 20, 2011 07:34 PM
To: Michael Killeavy
Cc: Deborah Langelaan
Subject: FW: OPA - TCE [Privileged and Confidential]

I think that we got from the Board meeting to fold in elements of this letter, into a letter from counsel to counsel...can you please talk to Paul about this?

JCB

JoAnne C. Butler
Vice President, Electricity Resources
Ontario Power Authority

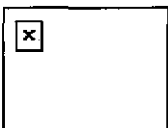
120 Adelaide Street West, Suite 1600
Toronto, Ontario M5H 1T1

416-969-6005 Tel.
416-969-6071 Fax.
joanne.butler@powerauthority.on.ca

From: Ivanoff, Paul [<mailto:PIvanoff@osler.com>]
Sent: Miércoles, 20 de Abril de 2011 03:23 p.m.
To: JoAnne Butler; Michael Killeavy
Cc: Sebastiano, Rocco; Smith, Elliot; Deborah Langelaan; Susan Kennedy
Subject: OPA - TCE [Privileged and Confidential]

Further to our meeting of yesterday afternoon, attached is the draft letter to TCE that we discussed.

Regards,
Paul



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



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Le contenu du présent courriel est privilégié, confidentiel et
soumis à des droits d'auteur. Il est interdit de l'utiliser ou
de le divulguer sans autorisation.

[ONTARIO POWER AUTHORITY LETTERHEAD]

April [●], 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 Mr. Pourbaix:

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

As you know, the OPA and TCE entered into a Confidentiality Agreement dated October 8, 2010 (the “Confidentiality Agreement”) and a letter agreement dated December 21, 2010 (the “MOU”). We are writing to you at this time to advise you of our concerns regarding TCE’s failure to comply with its obligations under these two agreements.

We understand that on April 12, 2011, TCE delivered a presentation to the Government of Ontario entitled “SW-GTA Update”. Contained within this presentation were excerpts from confidential correspondence sent to TCE by the OPA, as well as confidential details of proposals relating to the Contract. Moreover, on April 19, 2011, your counsel, Thornton Grout Finnigan LLP, sent a letter to the Minister of Energy, the Office of the Premier and the OPA, which described confidential negotiations between the OPA and TCE. Each of these actions constitutes a breach by TCE of the Confidentiality Agreement.

Regarding the MOU, the parties acknowledged in that agreement that they were working together cooperatively to identify other generation projects that meet Ontario’s electricity system needs. The MOU contains express obligations requiring both TCE and the OPA to engage in good faith negotiations. In that regard, the MOU states that “[T]he OPA and TCE agree to work together in good faith to negotiate the definitive form of an agreement (the “Definitive Agreement”) in respect of the Potential Project, or an alternative project agreed to by the OPA and TCE.” The OPA maintains that the delivery by TCE of its presentation to the Government is not only a breach by TCE of the Confidentiality Agreement, but it also constitutes a failure to negotiate with the OPA in good faith as required by the MOU. To be clear, the OPA views TCE’s acts as a tactic made in bad faith in an attempt to advance its negotiating position as against the OPA. The OPA requires that TCE cease and desist from further breaches of the Confidentiality Agreement and the MOU and hereby puts TCE on notice that it reserves all of its rights and remedies against TCE respecting the actions referred to above.

As for communications from your external counsel to the OPA, I would request that you have your external counsel direct any future correspondence to Rocco Sebastiano and Paul Ivanoff at Osler, Hoskin & Harcourt LLP, in accordance with the Law Society of Upper Canada's Rules of Professional Conduct.

Lastly, in an effort to move forward with good faith negotiations, we are preparing a revised draft proposal and will be sending it to TCE shortly.

Yours truly,

JoAnne Butler
Vice President, Electricity Resources

cc. Colin Andersen, OPA
Michael Killeavy, OPA
Rocco Sebastiano, Osler, Hoskin & Harcourt LLP
Paul Ivanoff, Osler, Hoskin & Harcourt LLP

Draft & Privileged

Aleksandar Kojic

From: Michael Killeavy
Sent: April 21, 2011 9:55 AM
To: JoAnne Butler; Colin Andersen; Brett Baker; Michael Lyle
Cc: Deborah Langelaan
Subject: TCE Matter - Government-Instructed Counter-Proposal to TCE
Attachments: #20465379v3_LEGAL_1_ - Draft Second Project Proposal to TCE.doc

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Attached is an updated version of the counter-proposal with the revisions discussed last evening incorporated into the draft. Please note that this updated document has not yet been reviewed by our litigation counsel.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
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M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

As stated in ~~Colin's~~ my October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner.

~~If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).~~

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages

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associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by 0.000 015 213 3 multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all ~~out-of-pocket~~reasonable costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".
4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.

8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

~~JoAnne Butler~~ Colin Andersen

- c. ~~Colin Andersen~~ JoAnne Butler, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [● MW] at 30°C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; **[NTD: Planning studies used 35 °C. Contract Force Majeure temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.]**
- (b) be able to provide a minimum of [● MW] at 30°C under N-2 System Conditions; **[NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not be able to achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should therefore be used instead.]**
- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. **[Note: This assumes the Replacement Project is located at the Boxwood site.]**

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
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- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
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- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the

OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

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Net Revenue Requirement	\$ 14,922 / MW-month
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Nameplate Capacity	[●] MW
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SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.
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$$\text{OPA Share} = (\text{Actual Capex} - \text{Target Capex} - \$25,000,000) \times 0.50, \text{ provided that the OPA Share shall not exceed } \$25,000,000$$
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determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

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Draft & Privileged

Aleksandar Kojic

From: Michael Killeavy
Sent: April 21, 2011 10:09 AM
To: Susan Kennedy
Subject: Fw: TCE Matter - Government-Instructed Counter-Proposal to TCE
Attachments: #20465379v3_LEGAL_1_ - Draft Second Project Proposal to TCE.doc

FYI ..

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
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Michael.killeavy@powerauthority.on.ca

From: Michael Killeavy
Sent: Thursday, April 21, 2011 09:55 AM
To: JoAnne Butler; Colin Andersen; Brett Baker; Michael Lyle
Cc: Deborah Langelaan
Subject: TCE Matter - Government-Instructed Counter-Proposal to TCE

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Attached is an updated version of the counter-proposal with the revisions discussed last evening incorporated into the draft. Please note that this updated document has not yet been reviewed by our litigation counsel.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
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PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Dear Mr. Pourbaix:

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

As stated in ~~Colin’s~~ my October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario’s Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the “Replacement Project”). We have set out in Schedule “A” to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the “Replacement Contract”) would be based on the final form of contract (the “NYR Contract”) included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule “A”. The financial parameters of the Replacement Contract would be as set out in Schedule “B” to this letter. In consideration of the uncertainties in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule “C” to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner.

~~If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).~~

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages

associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

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If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

~~JoAnne Butler~~ Colin Andersen

- c. ~~Colin Andersen~~ JoAnne Butler, *Ontario Power Authority*
Michael Killeavy, *Ontario Power Authority*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

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The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [● MW] at 30°C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; **[NTD: Planning studies used 35 °C. Contract Force Majeure temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.]**
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- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

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The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. **[Note: This assumes the Replacement Project is located at the Boxwood site.]**

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NOx) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NOx and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NOx and CO.
- (c) The Replacement Contract will require that the emission limits for NOx and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NOx and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the

OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

SCHEDULE "B" – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule "A" TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule “B”, plus the OPA Share multiplied by 0.000 015 213 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule “B”.
2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, “Interconnection Costs”, as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with “Good Engineering and Operating Practices” (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.
3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the

determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.

5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Draft & Privileged

Aleksandar Kojic

From: Deborah Langelaan
Sent: April 21, 2011 11:07 AM
To: 'Sebastiano, Rocco'; Michael Killeavy
Cc: 'Smith, Elliot'; 'Ivanoff, Paul'; Susan Kennedy
Subject: RE: Government-Instructed Counter-Proposal to TCE
Attachments: OPA_Ltr_TCE_Govt_Proposal_20110421 (w schedules).doc

This time with Schedules attached - no changes were made to the Schedules.

Deb

From: Sebastiano, Rocco [<mailto:RSebastiano@osler.com>]
Sent: April 21, 2011 10:57 AM
To: Deborah Langelaan; Michael Killeavy
Cc: Smith, Elliot; Ivanoff, Paul; Susan Kennedy
Subject: RE: Government-Instructed Counter-Proposal to TCE

Deb and Michael, was there a specific reason for changing the words "out-of-pocket" have been replaced with "reasonable" in reference to the reimbursement of costs incurred by TCE for the gas and electrical interconnection? For purposes of the proposal, this change is not a problem or material in the context of the entire proposal (albeit, this would let TCE charge its internal costs and possibly, a mark-up for overhead), but was wondering if there was a reason for the change.

Have there been any changes to the Schedules? There were a couple of notes to draft which were still in the proposal document that we sent over yesterday afternoon.

Lastly, the in first cc, delete "Anderson" as it reads "JoAnne Butler, Andersen,".

Also, I gather that the other letter is not going to be sent out.

Thanks, Rocco

From: Deborah Langelaan [<mailto:Deborah.Langelaan@powerauthority.on.ca>]
Sent: Thursday, April 21, 2011 10:17 AM
To: Sebastiano, Rocco; Ivanoff, Paul
Cc: Smith, Elliot; Michael Killeavy
Subject: Government-Instructed Counter-Proposal to TCE
Importance: High

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Rocco and Paul;

Attached is an updated version of the counter-proposal document with a couple of minor revisions that were discussed last evening (i.e. letter signed by Colin rather than JoAnne). Would you please review and provide your comments?

Thanks,

Deb

This e-mail message is privileged, confidential and subject to
copyright. Any unauthorized use or disclosure is prohibited.

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soumis à des droits d'auteur. Il est interdit de l'utiliser ou
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PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

VIA E-MAIL

April 21, 2011

Alex Pourbaix
President, Energy & Oil Pipelines
TransCanada Energy Inc.
450 - 1st Street S.W.
Calgary, Alberta
T2P 5H1

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Ontario Power Authority

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<u>Contract Capacity</u> Note: Subject to Schedule "A", TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule “B”, plus the OPA Share multiplied by 0.000 015 213 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule “B”.

2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, “Interconnection Costs”, as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with “Good Engineering and Operating Practices” (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.

3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.
5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Aleksandar Kojic

From: Deborah Langelaan
Sent: April 21, 2011 12:08 PM
To: 'Sebastiano, Rocco'; 'Ivanoff, Paul'
Cc: 'Smith, Elliot'; Michael Killeavy; JoAnne Butler; Cathy Schell
Subject: Final - Gov't Instructed Counter-Proposal to TCE
Attachments: OPA_Ltr_TCE_Govt_Proposal_20110421 (w schedules).doc

Importance: High

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Rocco and Paul;

Attached is the final version of the counter proposal that will be sent to Alex today.

Deb



120 Adelaide Street West
Suite 1600
Toronto, Ontario M5H 1T1
T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

VIA E-MAIL

April 21, 2011

Alex Pourbaix
President, Energy & Oil Pipelines
TransCanada Energy Inc.
450 - 1st Street S.W.
Calgary, Alberta
T2P 5H1

Dear Mr. Pourbaix:

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

As stated in my October 7, 2010 letter to you, we wish to work with you to identify projects and the extent to which such projects may compensate TCE for termination of the Contract while appropriately protecting the interests of ratepayers. We have reviewed the proposal contained in the draft implementation agreement and schedules TCE provided to us, and find that it does not meet this requirement. We would like to suggest an alternative proposal which we believe meets this requirement.

The Government of Ontario's Long-Term Energy Plan has identified a need for a peaking natural gas-fired plant in the Kitchener-Waterloo-Cambridge area. We believe such a plant is a project that could compensate TCE for the termination of the Contract and at the same time protect the interests of ratepayers (the "Replacement Project"). We have set out in Schedule "A" to this letter a technical description of the requirements of the Replacement Project.

We would propose to enter into a contract with TCE for TCE to construct, own, operate and maintain the Replacement Project as compensation for the termination of the Contract. The contract for the Replacement Project (the "Replacement Contract") would be based on the final form of contract (the "NYR Contract") included as part of the Northern York Region Peaking Generation Request for Proposals, subject to the changes set out below and otherwise as necessitated by Schedule "A". The financial parameters of the Replacement Contract would be as set out in Schedule "B" to this letter. In consideration of the uncertainties

Ontario Power Authority

in the Replacement Project, we would include a mechanism in the Replacement Contract to adjust the NRR upon commercial operation on the basis set out in Schedule "C" to this letter.

The following sets out the changes to the NYR Contract that would be applicable to the Replacement Contract:

1. **Permits and Approvals.** With respect to the approvals required pursuant to the *Planning Act* to construct the Replacement Project, the OPA would work with TCE, the host municipality and the Province of Ontario to ensure that once all of the requirements for the *Planning Act* approvals have been satisfied, the approvals are issued in a timely manner.

If this did not occur and the delay in the issuance of such *Planning Act* approvals caused TCE not to achieve Commercial Operation by the Milestone Date for Commercial Operation, such delay would be considered an event of Force Majeure, and TCE would be entitled to recover its reasonable, out-of-pocket costs resulting from such delay, by way of a corresponding increase in the Net Revenue Requirement (NRR).

In addition, the OPA would not have the right to terminate the Replacement Contract for such event of Force Majeure, unless the event of Force Majeure resulted in a delay that was greater than two years and the OPA paid TCE a termination payment which the Parties would negotiate in good faith and would compensate TCE for reasonable damages associated with (i) the total amount of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station, provided however that such total amount shall not exceed \$37,000,000, (ii) the total amount of the verified, non-recoverable sunk costs (net of any residual value) prudently incurred in the development of the Replacement Project, and (iii) the anticipated financial value of the Contract.

2. **Oakville Sunk Costs.** The NRR set out in Schedule "B" to this letter includes an amount equal to \$37,000,000 on account of TCE's sunk costs associated with the development of the Oakville Generating Station. To the extent that the total of the verified, non-recoverable sunk costs (net of any residual value) associated with the development of the Oakville Generating Station is less than \$37,000,000, the NRR shall be reduced by 0.000 015 213 3 multiplied by the amount by which such costs are less than \$37,000,000.
3. **Interconnection Costs.** The Replacement Contract would provide that all reasonable, out-of-pocket costs incurred by TCE for the electrical and natural gas interconnection of the Replacement Project would be reimbursed by the OPA. Such costs would be reimbursed on terms that are substantially the same as the terms set out in Section 1 of Exhibit S of the Accelerated Clean Energy Supply Contract between the OPA and Portland Energy Centre L.P. with the necessary conforming changes being made, provided that (i) there shall be no "Budgeted Costs" included in the NRR on account of such costs, (ii) references to the "Simple Cycle Operation Date" shall be replaced with references to the "Commercial Operation Date", and (iii) there shall be no "Excess H1 Amount".

4. **Gas Delivery and Management Services Costs.** Unlike the NYR Contract, the NRR for the Replacement Contract would take into account all gas delivery and management services costs, and TCE would be responsible for managing natural gas delivery and management services, consistent with the approach taken in the Contract.
5. **Net Revenue Requirement Indexing Factor (NRRIF).** As set out in Schedule "B", the NRRIF would be equal to 20%. In the course of finalizing the Replacement Contract, the OPA would be willing to consider accepting a higher NRRIF, so long as there was a corresponding reduction in the NRR.
6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.
8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

Colin Andersen

cc: JoAnne Butler, Ontario Power Authority
Michael Killeavy, Ontario Power Authority
Rocco Sebastiano, Osler, Hoskin & Harcourt LLP

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [**● MW**] at 30°C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; **[NTD: Planning studies used 35 °C. Contract Force Majeure temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.]**
- (b) be able to provide a minimum of [**● MW**] at 30°C under N-2 System Conditions; **[NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not be able to achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should therefore be used instead.]**
- (c) have a Season 3 Contract Capacity of not less than [**480 MW**]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [**●**]th transmission tower (Tower #**●**) leaving the Preston TS connecting to the Galt TS. **[Note: This assumes the Replacement Project is located at the Boxwood site.]**

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NO_x) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NO_x and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NO_x and CO.
- (c) The Replacement Contract will require that the emission limits for NO_x and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NO_x and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the

OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

SCHEDULE “B” – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule “A”, TCE to determine Seasonal Contract Capacities so long as the AACC is 500 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.
 - (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000
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<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
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4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.
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Aleksandar Kojic

From: Michael Killeavy
Sent: April 21, 2011 12:12 PM
To: 'Sebastiano, Rocco'; 'Ivanoff, Paul'; 'Smith, Elliot'
Cc: Susan Kennedy; Michael Lyle; Deborah Langelaan; JoAnne Butler
Subject: TCE Matter - Letter Re: Breach of the Confidentiality Agreement and MOU AND Next Steps
Attachments:
Letter to Alex Pourbaix (OPA letterhead) April 20 2011 20472672_3.doc
Importance: High

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Rocco, Paul, and Elliot,

We would like the attached letter revised as follows:

1. We would like this to be a letter from you as our counsel, to TCE's litigation counsel;
2. Please include a request that TCE refrain from further discussing the matter between us with the government; and
3. Please remove the content related to any breach by TCE of the MOU good faith obligation. We would rather that you convey these same sentiments to TCE's counsel during a telephone conversation.

Please let me know if you have any comments or concerns with these changes.

We plan to send the government-instructed counter-proposal to TCE today. We will not be engaging TCE in a parallel track of discussion on arbitration or mediation until we hear back from TCE on this counter-proposal.

Thanks,
Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

[ONTARIO POWER AUTHORITY LETTERHEAD]

April [●], 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 Mr. Pourbaix:

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

As you know, the OPA and TCE entered into a Confidentiality Agreement dated October 8, 2010 (the “Confidentiality Agreement”) and a letter agreement dated December 21, 2010 (the “MOU”). We are writing to you at this time to advise you of our concerns regarding TCE’s failure to comply with its obligations under these two agreements.

We understand that on April 12, 2011, TCE delivered a presentation to the Government of Ontario entitled “SW-GTA Update”. Contained within this presentation were excerpts from confidential correspondence sent to TCE by the OPA, as well as confidential details of proposals relating to the Contract. Moreover, on April 19, 2011, your counsel, Thornton Grout Finnigan LLP, sent a letter to the Minister of Energy, the Office of the Premier and the OPA, which described confidential negotiations between the OPA and TCE. Each of these actions constitutes a breach by TCE of the Confidentiality Agreement.

Regarding the MOU, the parties acknowledged in that agreement that they were working together cooperatively to identify other generation projects that meet Ontario’s electricity system needs. The MOU contains express obligations requiring both TCE and the OPA to engage in good faith negotiations. In that regard, the MOU states that “[T]he OPA and TCE agree to work together in good faith to negotiate the definitive form of an agreement (the “Definitive Agreement”) in respect of the Potential Project, or an alternative project agreed to by the OPA and TCE.” The OPA maintains that the delivery by TCE of its presentation to the Government is not only a breach by TCE of the Confidentiality Agreement, but it also constitutes a failure to negotiate with the OPA in good faith as required by the MOU. To be clear, the OPA views TCE’s acts as a tactic made in bad faith in an attempt to advance its negotiating position as against the OPA. The OPA requires that TCE cease and desist from further breaches of the Confidentiality Agreement and the MOU and hereby puts TCE on notice that it reserves all of its rights and remedies against TCE respecting the actions referred to above.

As for communications from your external counsel to the OPA, I would request that you have your external counsel direct any future correspondence to Rocco Sebastiano and Paul Ivanoff at Osler, Hoskin & Harcourt LLP, in accordance with the Law Society of Upper Canada's Rules of Professional Conduct.

Lastly, in an effort to move forward with good faith negotiations, we are preparing a revised draft proposal and will be sending it to TCE shortly.

Yours truly,

JoAnne Butler
Vice President, Electricity Resources

cc. Colin Andersen, OPA
Michael Killeavy, OPA
Rocco Sebastiano, Osler, Hoskin & Harcourt LLP
Paul Ivanoff, Osler, Hoskin & Harcourt LLP

Draft & Privileged

Aleksandar Kojic

From: Deborah Langelaan
Sent: April 21, 2011 12:19 PM
To: 'Sebastiano, Rocco'; 'Ivanoff, Paul'
Cc: 'Smith, Elliot'; Michael Killeavy; JoAnne Butler; Cathy Schell; Michael Lyle
Subject: Revised Final - Gov't Instructed Counter Proposal to TCE
Attachments: OPA_Ltr_TCE_Govt_Proposal_20110421 (w schedules).doc

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Rocco and Paul;

The wrong contract capacity was used in the 2nd table on Schedule B. It has been corrected and the revised letter is attached.

Deb



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Toronto, Ontario M5H 1T1
T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

VIA E-MAIL

April 21, 2011

Alex Pourbaix
President, Energy & Oil Pipelines
TransCanada Energy Inc.
450 - 1st Street S.W.
Calgary, Alberta
T2P 5H1

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Ontario Power Authority

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6. **Term of Replacement Contract.** The term of the Replacement Contract would be 25 years. For greater certainty, this would be the definitive length of the term and not an option.
7. **Capacity Check Test.** The Capacity Check Test provisions of the Replacement Contract would be modified so that as long as the demonstrated capacity was not less than 90% of the applicable Seasonal Contract Capacity, the failure to achieve the required Seasonal Contract Capacity would not be an event of default. If the demonstrated capacity was greater than 90% but less than 100% of the applicable Seasonal Contract Capacity, a Capacity Reduction Factor would apply in accordance with the provisions of Exhibit J. In addition, there would be a requirement as part of a Capacity Check Test to confirm that the Replacement Project is capable of achieving the Contract Ramp Rate set out in Schedule "B" to this letter.
8. **Potential One Hour Runs.** Because of the absence of the "NINRR" term in Exhibit J to the NYR Contract, we do not believe that the potential for single hour imputed production intervals would be detrimental to TCE. We are not proposing any change to Exhibit J but would be willing to discuss any concerns TCE may have in this regard.
9. **Commercial Operation Date.** The NRR set out in Schedule "B" is based on the assumption that Commercial Operation occurs on July 1, 2015. If Commercial Operation were to occur before that date, the NRR would be adjusted downwards to account for the value of having the payments under the Replacement Contract start earlier than if Commercial Operation had occurred on July 1, 2015.

If this proposal is acceptable to you, we will prepare the necessary documentation for your review. For greater certainty, although this proposal is made in good faith, it remains subject to internal OPA approvals and does not constitute an offer capable of acceptance.

Yours very truly,

Colin Andersen

cc: JoAnne Butler, Ontario Power Authority
Michael Killeavy, Ontario Power Authority
Rocco Sebastiano, Osler, Hoskin & Harcourt LLP

SCHEDULE "A" – TECHNICAL REQUIREMENTS

I. Replacement Project

The Replacement Project shall:

- (a) be a dispatchable facility designed for maximum operational flexibility;
- (b) be a simple cycle configuration generating facility;
- (c) utilize natural gas supplied by pipeline as the fuel; and
- (d) comply with Section 6 (Generation Connection Criteria), as specified in the 'Ontario Resources and Transmission Assessment Criteria' document published by the IESO.

II. Contract Capacity

The Replacement Project will be a single generating facility and will:

- (a) be able to provide a minimum of [● MW] at 30°C under both N-1 System Conditions and N-1 Generating Facility Conditions simultaneously. For further clarity, the Replacement Project must be designed to supply either transmission circuit M20D or M21D at all times. Each unit must be able to supply either transmission circuit at all times; **[NTD: Planning studies used 35 °C. Contract Force Majeure temperature is 30°C and consequently the equivalent capacity at 30°C should be used instead.]**
- (b) be able to provide a minimum of [● MW] at 30°C under N-2 System Conditions; **[NTD: Based on peak load planning studies at 35°C, the total planned generation capacity should be at least 500 MW. The Replacement Project may not be able to achieve such capacity at the above mentioned ambient condition. The Replacement Project's maximum capacity at 30°C should therefore be used instead.]**
- (c) have a Season 3 Contract Capacity of not less than [480 MW]; and
- (d) have a Contract Capacity of not more than 550 MW in any Season.

III. Electrical Connection

The Replacement Project will be connected directly to the IESO-Controlled Grid via new double circuit 230 kV transmission lines. Notwithstanding the foregoing, the Replacement Project may also connect to a Local Distribution System for the purpose of providing Islanding Capability.

The Replacement Project will have a connection point located with a direct connection to the Hydro One circuits M20D and M21D between the [●]th transmission tower (Tower #●) leaving the Preston TS connecting to the Galt TS. **[Note: This assumes the Replacement Project is located at the Boxwood site.]**

IV. Operation Following a N-2 Contingency (Load Restoration)

If a disruption occurs that leads to N-2 system conditions, TCE shall be required to use Commercially Reasonable Efforts (as such term is defined in the Contract) to assist the IESO, as directed by the IESO, in restoring load in accordance with Section 7 of the Ontario Resource and Transmission Assessment Criteria. This obligation would replace the provision for Islanding Capability set out in Section 1.11 of the NYR Contract.

V. Operational Flexibilities

The Replacement Project must be such that the two combustion turbines combined are capable of ramping at a rate equal to or greater than the Contract Ramp Rate. The Contract Ramp Rate will be subject to verification as part of the Capacity Check Test.

VI. Emissions Requirements.

- (a) The emissions from the Replacement Project shall meet or exceed the following criteria:
 - (i) Nitrogen Oxides (NO_x) in a concentration not exceeding 15 ppmv (based upon Reference Conditions (as such term is defined in the Contract) and 15% O₂ in the exhaust gases on a dry volume basis) as measured using an emissions measurement methodology substantially based on Exhibit W to the Contract (the "Emissions Measurement Methodology"); and
 - (ii) Carbon Monoxide (CO) in a concentration not exceeding 10 ppmv (based upon Reference Conditions and 15% O₂ in the exhaust gases on a dry volume basis) as measured using the Emissions Measurement Methodology.
- (b) TCE will provide evidence to support the stated emission levels of NO_x and CO in the form of a signed certificate by an authorized representative of any of: (1) the original equipment manufacturer of the Replacement Project's turbines, (2) the supplier or manufacturer of any post combustion emission control equipment utilized by the Replacement Project, or (3) the engineering company responsible for the design of the Replacement Project, which certificate must state that the Replacement Project, as designed, will operate within these stated limits for NO_x and CO.
- (c) The Replacement Contract will require that the emission limits for NO_x and CO be (i) incorporated into the Replacement Project's Environmental Review Report or its completed environmental assessment, and (ii) reflected in the Replacement Project's application to the Ministry of the Environment for a Certificate of Approval (Air) Operating Permit, together with a specific request in such application that such limits be imposed as conditions of such Certificate of Approval.
- (d) The emission limits for NO_x and CO stated in the Replacement Contract will form the basis of an ongoing operating requirement. For greater certainty, the

OPA is not requiring TCE to adopt any specific facility design or utilize any particular control equipment with respect to air emissions, provided, however, the Replacement Project must comply with the NOx and CO limits set out above, including, without limitation, at the time of attaining Commercial Operation and during any Capacity Check Test.

VII. Fuel Supply

The Replacement Project will obtain gas distribution services from Union Gas Limited, and TCE cannot by-pass Union Gas Limited.

VIII. Project Major Equipment.

The Replacement Project will be designed utilizing (2) M501GAC Fast Start gas-fired combustion turbine generators to be supplied by MPS Canada, Inc. (the "Generators"), with evaporative cooling and emission reduction equipment. Each Generator shall be nominally rated at [●] MW (measured at the Generator's output terminals) new and clean, at ISO conditions.

SCHEDULE “B” – FINANCIAL PARAMETERS

Net Revenue Requirement	\$ 14,922 / MW-month
Net Revenue Requirement Indexing Factor	20 %
Annual Average Contract Capacity	481 MW
Nameplate Capacity	[●] MW
Start-Up Gas for the Contract Facility	700 MMBTU/start-up
Start-Up Maintenance Cost	\$30,000/start-up
O&M Costs	\$0.89 / MWh
OR Cost	\$0.50 / MWh

	<u>Season 1</u>	<u>Season 2</u>	<u>Season 3</u>	<u>Season 4</u>
<u>Contract Heat Rate</u>	10.42 MMBTU/MWh (HHV)	10.55 MMBTU/MWh (HHV)	10.66 MMBTU/MWh (HHV)	10.58 MMBTU/MWh (HHV)
<u>Contract Capacity</u> Note: Subject to Schedule “A”, TCE to determine Seasonal Contract Capacities so long as the AACC is 481 MW.	[●] MW	[●] MW	[●] MW	[●] MW
<u>10nORCC</u>	0 MW	0 MW	0 MW	0 MW
<u>Contract Ramp Rate</u>	37.8 MW/minute	35.8 MW/minute	33.0 MW/minute	35.2 MW/minute

SCHEDULE “C” – ADJUSTMENT METHODOLOGY

1. The Net Revenue Requirement set out in Schedule “B” is based on a target capital cost for the design and construction of the Replacement Project of \$475,000,000 (the “Target Capex”). So long as the actual cost to design and build the Replacement Project (the “Actual Capex”) is within \$25,000,000 higher or lower than the Target Capex, there shall be no adjustment in the NRR. For greater certainty, none of the parameters in Schedule B” other than the NRR shall be subject to adjustment pursuant to this Schedule “C”.

- (a) If the Actual Capex is more than \$25,000,000 greater than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex – \$25,000,000) × 0.50, provided that the OPA Share shall not exceed \$25,000,000

- (b) If the Actual Capex is less than \$25,000,000 less than the Target Capex, the OPA’s share of any difference between the Target Capex and the Actual Capex shall be determined as follows:

OPA Share = (Actual Capex – Target Capex + \$25,000,000) × 0.50

- (c) The adjusted NRR shall be equal to the NRR set out in Schedule “B”, plus the OPA Share multiplied by 0.000 015 213 3. For greater certainty, if the OPA Share is a negative number, the adjusted NRR shall be less than the NRR set out in Schedule “B”.

2. The determination of the Actual Capex shall not include: (i) any costs being reimbursed by the OPA, including, without limitation, “Interconnection Costs”, as set out above, (ii) any costs incurred by TCE that were not reasonably required to be incurred in order for TCE to fulfill its obligations under the Replacement Contract or that were not incurred in accordance with “Good Engineering and Operating Practices” (as such term is defined in the Contract), or (iii) any costs not substantiated to the reasonable satisfaction of the OPA.

3. The following costs shall be considered fixed components of the Target Capex not subject to change in determining the Actual Capex:

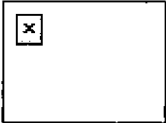
<u>Cost</u>	<u>Fixed Price</u>
Main Turbine Original Costs (excluding change orders)	USD\$[144,900,000]
Main Turbine Additional Scope (excluding change orders)	USD\$[36,295,000]
Costs of Hedging USD to CAD	CAD\$[13,500,000]

4. The determination of the Actual Capex shall be done through an “open book” process, such that all costs incurred by TCE in designing and building the Replacement Project shall be transparent to the OPA and fully auditable. Any dispute relating to the determination of the Actual Capex shall be resolved in accordance with the dispute resolution provisions of the Replacement Contract.
5. All dollar amounts referenced in this letter are in Canadian dollars, unless otherwise specified.

Aleksandar Kojic

From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: April 21, 2011 5:17 PM
To: Michael Killeavy; Susan Kennedy; Michael Lyle
Cc: Deborah Langelaan; JoAnne Butler; Sebastiano, Rocco; Smith, Elliot
Subject: RE: TCE Matter - Letter Re: Breach of the Confidentiality Agreement and MOU AND Next Steps[Privileged and Confidential]
Attachments: Letter to Alex Pourbaix (Osler letterhead) April 21 2011 20472672_5.doc

Attached is the draft letter to TCE. Let us know if you are content with it and we'll send it out. We think that the sooner it goes out, the more impact it will have.



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



From: Michael Killeavy [<mailto:Michael.Killeavy@powerauthority.on.ca>]
Sent: Thursday, April 21, 2011 12:12 PM
To: Sebastiano, Rocco; Ivanoff, Paul; Smith, Elliot
Cc: Susan Kennedy; Michael Lyle; Deborah Langelaan; JoAnne Butler
Subject: TCE Matter - Letter Re: Breach of the Confidentiality Agreement and MOU AND Next Steps
Importance: High

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Rocco, Paul, and Elliot,

We would like the attached letter revised as follows:

1. We would like this to be a letter from you as our counsel, to TCE's litigation counsel;
2. Please include a request that TCE refrain from further discussing the matter between us with the government; and
3. Please remove the content related to any breach by TCE of the MOU good faith obligation. We would rather that you convey these same sentiments to TCE's counsel during a telephone conversation.

Please let me know if you have any comments or concerns with these changes.

We plan to send the government-instructed counter-proposal to TCE today. We will not be engaging TCE in a parallel track of discussion on arbitration or mediation until we hear back from TCE on this counter-proposal.

Thanks,

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

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Toronto

Montréal

Ottawa

Calgary

New York

April 21, 2011

Paul A. Ivanoff
Direct Dial: 416.862.4223
pivanoff@osler.com
Our Matter Number: 1126205

SENT BY FACSIMILE

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

Mr. Michael E. Barrack
Thornton Grout Finnigan LLP
Canadian Pacific Tower
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto ON M5K 1K7

Dear Mr. Barrack:

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

We are in receipt of your letter dated April 19, 2011, which the OPA forwarded to us.

The OPA and TCE entered into a Confidentiality Agreement dated October 8, 2010 (the "Confidentiality Agreement"). We are writing to you at this time to advise you of our concerns regarding TCE's failure to comply with its obligations under the Confidentiality Agreement. We understand that on April 12, 2011, TCE delivered a presentation to the Government of Ontario entitled "SW-GTA Update". Contained within this presentation were excerpts from confidential correspondence sent to TCE by the OPA, as well as confidential details of proposals relating to the Contract. Moreover, on April 19, 2011, you sent a letter to the Minister of Energy, the Office of the Premier and the OPA, which described confidential negotiations between the OPA and TCE. Each of these actions constitutes a breach by TCE of the Confidentiality Agreement. The OPA requires that TCE cease and desist from further breaches of the Confidentiality Agreement and refrain from any further discussions with the Government of Ontario or others on matters that are the subject of the Confidentiality Agreement. We are hereby putting TCE on notice that the OPA reserves all of its rights and remedies against TCE respecting the actions referred to above.

Draft & Privileged

Lastly, I would request that you direct any of your future correspondence to me, in accordance with the Law Society of Upper Canada's Rules of Professional Conduct.

Yours truly,

Paul A. Ivanoff
PI:es

c: Colin Andersen, *OPA*
JoAnne Butler, *OPA*
Michael Killeavy, *OPA*
Michael Lyle, *OPA*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

Aleksandar Kojic

From: Michael Lyle
Sent: April 25, 2011 8:48 AM
To: Michael Killeavy
Subject: FW: TCE Matter - Letter Re: Breach of the Confidentiality Agreement and MOU AND Next Steps[Privileged and Confidential]
Attachments: Letter to Alex Pourbaix (Osler letterhead) April 21 2011 20472672_5.doc

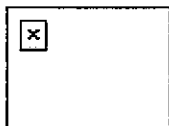
Can you meet with Colin and I re this letter in my office at 11 this morning?

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: Ivanoff, Paul [<mailto:PIvanoff@osler.com>]
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Cc: Deborah Langelan; JoAnne Butler; Sebastiano, Rocco; Smith, Elliot
Subject: RE: TCE Matter - Letter Re: Breach of the Confidentiality Agreement and MOU AND Next Steps[Privileged and Confidential]

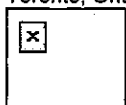
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Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



From: Michael Killeavy [<mailto:Michael.Killeavy@powerauthority.on.ca>]
Sent: Thursday, April 21, 2011 12:12 PM
To: Sebastiano, Rocco; Ivanoff, Paul; Smith, Elliot

Cc: Susan Kennedy; Michael Lyle; Deborah Langelaan; JoAnne Butler

Subject: TCE Matter - Letter Re: Breach of the Confidentiality Agreement and MOU AND Next Steps

Importance: High

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Rocco, Paul, and Elliot,

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1. We would like this to be a letter from you as our counsel, to TCE's litigation counsel;
2. Please include a request that TCE refrain from further discussing the matter between us with the government; and
3. Please remove the content related to any breach by TCE of the MOU good faith obligation. We would rather that you convey these same sentiments to TCE's counsel during a telephone conversation.

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Thanks,
Michael

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
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M5H 1T1
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Toronto

April 21, 2011

Montréal

Paul A. Ivanoff
Direct Dial: 416.862.4223
pivanoff@osler.com
Our Matter Number: 1126205

Ottawa

SENT BY FACSIMILE

Calgary

PRIVILEGED, CONFIDENTIAL AND WITHOUT PREJUDICE

New York

Mr. Michael E. Barrack
Thornton Grout Finnigan LLP
Canadian Pacific Tower
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto ON M5K 1K7

Dear Mr. Barrack:

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

We are in receipt of your letter dated April 19, 2011, which the OPA forwarded to us.

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Lastly, I would request that you direct any of your future correspondence to me, in accordance with the Law Society of Upper Canada's Rules of Professional Conduct.

Yours truly,

Paul A. Ivanoff
PI:es

c: Colin Andersen, *OPA*
JoAnne Butler, *OPA*
Michael Killeavy, *OPA*
Michael Lyle, *OPA*
Rocco Sebastiano, *Osler, Hoskin & Harcourt LLP*

Draft & Privileged

Aleksandar Kojic

From: Susan Kennedy
Sent: April 28, 2011 4:26 PM
To: Michael Killeavy; 'Sebastiano, Rocco'; 'Ivanoff, Paul'
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

Susan H. Kennedy
Director, Corporate/Commercial Law Group

From: Calwell, Carolyn (MEI) [<mailto:Carolyn.Calwell@ontario.ca>]
Sent: April 28, 2011 4:22 PM
To: Susan Kennedy
Cc: Michael Lyle; Perun, Halyna N. (MEI)
Subject: TransCanada Energy Limited v. Her Majesty in right of Ontario

Susan – thanks for your message. The attached reached us through MAG.

Also, I took a look at the Cooperation and Common Interest Privilege Agreement. I will call you about the one change that I propose and we can discuss the best approach to the effective date.

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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Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

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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 black ink, appearing to read 'M. Barrack'.

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.

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CONTACTS

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

Ministry of Energy
ontario.ca/energy

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– Kevin Flynn
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LAST MODIFIED: FEBRUARY 14, 2011

Aleksandar Kojic

From: Susan Kennedy
Sent: April 28, 2011 4:26 PM
To: Michael Killeavy; 'Sebastiano, Rocco'; 'Ivanoff, Paul'
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

Susan H. Kennedy
Director, Corporate/Commercial Law Group

From: Calwell, Carolyn (MEI) [<mailto:Carolyn.Calwell@ontario.ca>]
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To: Susan Kennedy
Cc: Michael Lyle; Perun, Halyna N. (MEI)
Subject: TransCanada Energy Limited v. Her Majesty in right of Ontario

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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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Thornton Grout Finnigan LLP
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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
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Thornton Grout Finnigan LLP

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Michael E. Barrack
MEB/slg

Cc *Craig MacLennan, Chief of Staff to the Minister of Energy*
 Jamison Steve, Principal Secretary to the Premier
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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

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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:

A handwritten signature in black ink, appearing to read "Colin Andersen", written over a horizontal line.

Name: Colin Andersen

Title: Chief Executive Officer



- Facebook

-

Oakville Power Plant Not Moving Forward

October 7, 2010 1:15 AM

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Sent: April 28, 2011 4:34 PM
To: JoAnne Butler; Deborah Langelaan
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

Here is the notice to the Crown.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

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Ministry of Energy
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Name: Colin Andersen

Title: Chief Executive Officer



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They've been served, so to speak.

Susan H. Kennedy
Director, Corporate/Commercial Law Group



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LAST MODIFIED: FEBRUARY 14, 2011

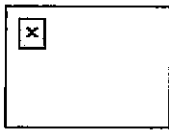
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Sent: April 28, 2011 4:40 PM
To: Susan Kennedy
Cc: Michael Killeavy; Sebastiano, Rocco
Subject: RE: TransCanada Energy Limited v. Her Majesty in right of Ontario

Susan,

Can you inquire as to the date that this was served, the manner in which it was served, and whether there was any cover letter that was served with the notice.

Regards,
Paul



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



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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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Aleksandar Kojic

From: Susan Kennedy
Sent: April 28, 2011 4:46 PM
To: Michael Killeavy
Cc: Michael Lyle; Kristin Jenkins
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario

Privileged and Confidential (In Contemplation of Litigation)

MK,

Please see below.

I believe the answer to KJ's question is "no" but wanted to confirm.

Susan H. Kennedy
Director, Corporate/Commercial Law Group

From: Kristin Jenkins
Sent: April 28, 2011 4:43 PM
To: Susan Kennedy
Subject: RE: TransCanada Energy Limited v. Her Majesty in right of Ontario

Did we respond to the April 19, beyond the letter about violating the confidentiality agreement.

From: Susan Kennedy
Sent: April 28, 2011 4:36 PM
To: Colin Andersen; JoAnne Butler; Kristin Jenkins; Brett Baker
Cc: Michael Lyle; Michael Killeavy
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario

They've been served, so to speak.

Susan H. Kennedy
Director, Corporate/Commercial Law Group

Aleksandar Kojic

From: Michael Killeavy
Sent: April 28, 2011 5:00 PM
To: Susan Kennedy
Cc: Michael Lyle; Kristin Jenkins
Subject: RE: TransCanada Energy Limited v. Her Majesty in right of Ontario

*** PRIVILEGED AND CONFIDENTIAL – PREPARED IN CONTEMPLATION OF LITIGATION ***

Correct. Our response back went from our counsel to their counsel and address the Confidentiality Agreement issues we identified.

There was a telephone call from our counsel to their counsel where our counsel raised the issue of the TCE not negotiating in good faith.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

From: Susan Kennedy
Sent: April 28, 2011 4:46 PM
To: Michael Killeavy
Cc: Michael Lyle; Kristin Jenkins
Subject: FW: TransCanada Energy Limited v. Her Majesty in right of Ontario

Privileged and Confidential (In Contemplation of Litigation)

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I believe the answer to KJ's question is "no" but wanted to confirm.

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

They've been served, so to speak.

Susan H. Kennedy
Director, Corporate/Commercial Law Group

Aleksandar Kojic

From: Ivanoff, Paul [PIvanoff@osler.com]
Sent: May 3, 2011 8:25 AM
To: Susan Kennedy
Cc: Michael Lyle; JoAnne Butler; Michael Killeavy; Deborah Langelaan; Sebastiano, Rocco
Subject: OPA - TCE [Privileged and Confidential]
Attachments: #20420450v4_LEGAL_1_ - v4 Common Interest Privilege Agreement, OPA.DOC;
WSComparison_#20420450v3_LEGAL_1_ - v3 Common Interest Privilege Agreement,
OPA-#20420450v4_LEGAL_1_ - v4 Common Interest Privilege Agreement, OPA.pdf

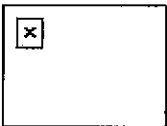
Susan,

Attached is a revised draft Cooperation and Common Interest Privilege Agreement between the OPA and Her Majesty the Queen in right of Ontario as represented by the Minister of Energy along with a blackline highlighting the revisions. The main changes are as follows:

- April 1st has been inserted as the Effective Date. Note that paragraph #4 provides that: "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."
- the definition of "Third Party" has been simplified.
- the definition of "Party" has been revised so as to remove the word "affiliates".

Note that for paragraph #18, we will need to add the contact information for Ontario. Let me know once you hear back from counsel on that front.

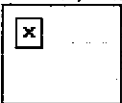
If you would like to discuss further, please give me a call.



Paul Ivanoff
Partner

416.862.4223 DIRECT
416.862.6666 FACSIMILE
pivanoff@osler.com

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8



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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.

INJUNCTIVE RELIEF

17. The Receiving Party acknowledges that disclosure of any Privileged Information to Third Parties in breach of this Agreement will cause the Disclosing Party to suffer irreparable harm for which there is no adequate legal remedy. The Parties therefore agree that immediate injunctive relief is an appropriate and necessary remedy for a breach or threatened or anticipated breach of this Agreement.

NOTICE

18. 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

Attention: Michael Lyle, General Counsel
120 Adelaide Street West, Suite 1600
Toronto, Ontario

M5H 1T1

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

Attention: ●

GENERAL PROVISIONS

19. 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.
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. 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.
26. This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the Parties.
27. 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: _____

Draft & Privileged

**COOPERATION AND
COMMON INTEREST PRIVILEGE AGREEMENT**

THIS AGREEMENT is effective as of the _____^{1st} day of April, 2011 (the “Effective Date”).
~~[NTD: Consider whether this Agreement should be backdated.]~~

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 subsequent 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 ~~and affiliates~~.
 - (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;

Draft & Privileged

- (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, with respect to either Party, any corporation, partnership, joint venture or other legal entity that is a direct or indirect parent or subsidiary of such Party or that directly or indirectly (i) owns or controls such Party, (ii) is owned or controlled by such Party, or (iii) is under common ownership or control with such Party. For purposes of this definition, "control" shall mean the power to direct the management or policies of such entity, whether through the ownership of voting securities, by contract, or otherwise, and, without limitation, 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.

INJUNCTIVE RELIEF

17. The Receiving Party acknowledges that disclosure of any Privileged Information to Third Parties in breach of this Agreement will cause the Disclosing Party to suffer irreparable harm for which there is no adequate legal remedy. The Parties therefore agree that immediate injunctive relief is an appropriate and necessary remedy for a breach or threatened or anticipated breach of this Agreement.

NOTICE

18. 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

Attention: Michael Lyle, General Counsel
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1

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
Attention: ●

GENERAL PROVISIONS

19. 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.
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. 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.
26. This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the Parties.
27. This Agreement may be signed in counterparts and by facsimile and all counterparts together shall constitute the Agreement.

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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: _____

Draft & Privileged

Aleksandar Kojic

From: Michael Lyle
Sent: May 10, 2011 1:24 PM
To: Colin Andersen; JoAnne Butler; Amir Shalaby; Kristin Jenkins; Kim Marshall; Brett Baker; Michael Killeavy; Deborah Langelaan; John Zych; Susan Kennedy; Robert Godhue; Nimi Visram; Sarah Diebel; Aaron Cheng
Subject: TCE Potential Litigation
Attachments: TCE Document Retention Memo.doc

Please see the attached memo with respect to the potential litigation with TCE and the need to preserve records relating to that potential litigation. Please read this document carefully. We would be happy to answer any questions that you might have.

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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May 31, 2012

MEMO TO: Colin Andersen, Kristin Jenkins, Andrew Pride, JoAnne Butler, Amir Shalaby, Kim Marshall, Brett Baker, Susan Kennedy, Shawn Cronkwright, Deborah Langelaan, Michael Killeavy, Robert Godhue, Nimi Visram, Aaron Cheng, John Zych, Sarah Diebel

FROM: Michael Lyle

RE: TransCanada Energy Ltd. Oakville Generating Station, Southwest GTA CES
Contract– Document Retention & Preservation

PLEASE READ THIS MEMORANDUM CAREFULLY

Please be advised that Ontario Power Authority (“OPA”) reasonably anticipates the possibility of legal proceedings in relation to matters involving TransCanada Energy Ltd. and the Oakville Generating Station, Southwest GTA project (the “OGS Project”).

As such, all documents and records (both electronic and paper) that relate to the anticipated or pending litigation must be retained until any such proceedings are finally concluded.

As a recipient of this memo, you are required to preserve all documents and records pertaining to the OGS Project, as more clearly described below.

Preservation of Records Relating to Litigation

To assist the OPA in meeting its documentary discovery obligations, in the event that OPA is named as a party in legal proceedings in matters relating to the OGS Project, it is important that you preserve all documents and records that relate in any way, directly or indirectly, to this matter.

A party to litigation is required to disclose the existence of every document relating to any matter in issue in the legal proceedings that is or has been in the party’s possession, control or power, whether or not privilege is claimed in respect of a document.

As such, in order to ensure that the OPA meets its obligations and in order to assist the OPA in legal proceedings, documents and records that relate in any way, directly or indirectly, to the OGS Project should be clearly identified so as to avoid inadvertent destruction and should be kept in a secure location.

Documents Which Must Be Disclosed – “Relevance”

You should be aware that relevancy is a legal consideration and that it is not your job to determine what documents in your possession, control or power are in fact relevant. In that regard, you should not attempt when gathering documents to determine what documents you believe are relevant or covered by any form of privilege. At this time, it is important that all documents relating to the OGS Project be preserved.

“Documents” includes all Paper, Computer and Electronic Records and Information

“Documents” required to be disclosed are defined broadly and include paper records (such as letters and notes), any data and information in electronic form (such as emails and computerized account records), manuals, business records, sound recordings, videotapes, photographs, charts, graphs, maps, plans, surveys, and books of accounting. Note that this is not an exhaustive list – any record, data and information in any format must be preserved.

An important part of document preservation is to consider electronic records - including electronic versions of documents as well as documents which may only exist electronically and data which may only exist in computer files and records.

As well as preserving all paper documents at your desk and filing cabinets, steps must be taken to preserve all electronic and computerized documents and records. This includes information stored in servers, computers, laptops, palm pilots, blackberries, and cell phones.

IT Personnel

It is imperative that IT personnel preserve the OPA’s e-mail server, back-up tapes and the computer hard drives of all those employees who might reasonably be in possession of documents and records relating in any way directly or indirectly to the OGS Project or issues raised in anticipated or pending legal proceedings. Even if back-up tapes are not readily accessible and will not be reviewed at this juncture, they must be preserved so that in the event there is a need to review those back-up tapes, they will be available.

The General Issues

While all documents relating directly or indirectly to the OGS Project must be preserved, it may be helpful for you to know that, in broad terms, the following issues may be relevant in the anticipated or pending litigation:

1. the procurement and administration of the CES Contract between the OPA and TCE;
2. the OPA’s planning analysis of the needs in Southwest GTA;
3. the communications between the OPA and the Government relating to the OGS;
4. the Minister of Energy’s decision and announcement that the OGS will not proceed;



Please ensure that all documents relating to the OGS Project, including those documents relating to the general issues outlined above are appropriately segregated and preserved.

If you have any questions or concerns, please contact either:

Michael Lyle: at extension 6035, or

Susan Kennedy: extension 6054

Aleksandar Kojic

From: Michael Killeavy
Sent: May 10, 2011 1:31 PM
To: Anshul Mathur; Ronak Mozayyan
Cc: Deborah Langelaan
Subject: FW: TCE Potential Litigation
Attachments: TCE Document Retention Memo.doc

Please review the attached memorandum and comply with it.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
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Email: michael.lyle@powerauthority.on.ca

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May 31, 2012

MEMO TO: Colin Andersen, Kristin Jenkins, Andrew Pride, JoAnne Butler, Amir Shalaby, Kim Marshall, Brett Baker, Susan Kennedy, Shawn Cronkwright, Deborah Langelaan, Michael Killeavy, Robert Godhue, Nimi Visram, Aaron Cheng, John Zych, Sarah Diebel

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If you have any questions or concerns, please contact either:

Michael Lyle: at extension 6035, or

Susan Kennedy: extension 6054

Aleksandar Kojic

From: Michael Killeavy
Sent: May 20, 2011 12:23 PM
To: 'RSebastiano@osler.com'; 'PIvanoff@osler.com'; 'ESmith@osler.com'; Susan Kennedy
Cc: JoAnne Butler; Michael Lyle
Subject: Fw: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

This is an interesting development. Perhaps we could teleconference later today?

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
416-969-6288 (office)
416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca

From: John Mikkelsen [mailto:john_mikkelsen@transcanada.com]
Sent: Friday, May 20, 2011 12:18 PM
To: Deborah Langelan
Cc: Michael Killeavy; JoAnne Butler; Michael Barrack <MBarrack@tgf.ca>; John Finnigan <JFinnigan@tgf.ca>; Geoff Murray <geoff_murray@transcanada.com>; Terry Bennett <terry_bennett@transcanada.com>; John Cashin <john_cashin@transcanada.com>; Jody Johnson <jody_johnson@transcanada.com>; Doug McLean <doug_mclean@transcanada.com>
Subject: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

With Prejudice

Dear Deborah,

Further to my e-mail of January 31, 2011 wherein we informed you of our decision to release MPS Canada, Inc. ("MPS") from suspension, we are nearing completion of the negotiation of the amended Equipment Supply Agreement No. 6519 ("ESA") with MPS. The amended ESA incorporates modifications to the original agreement in accordance with the firm price proposal provided by MPS on February 28, 2011 (and communicated to the OPA on the same date) for conversion of the ESA to fast start and simple cycle configuration, with the exception that the additional scope (the closed cooling system and stacks) previously a fixed price, has now been incorporated as an exclusive supply option in favour of MPS that will be triggered as a change order at a future date. The option is only triggered if the MPS gas turbines are installed by TransCanada in a simple cycle configuration under a contract between TransCanada and the OPA to replace the SW GTA Clean Energy Supply Contract. In addition, MPS has a first right of offer to provide the power train for a combined cycle build out, consistent with the letter agreements (also shared with the OPA) should the turbines be installed by TransCanada in a combined cycle application under a contract between TransCanada and the OPA to replace the SW GTA Clean Energy Supply Contract. Given the fact there is no agreement with the OPA to date on the Cambridge project or an alternative project that would utilize the gas turbines, TransCanada has proceeded with this solution on the basis that it preserves the ability to use the turbines in a future simple cycle or combined cycle replacement project, but mitigates the exposure to further cost increases and increases the marketability of the turbines for reuse or resale in the event a replacement project is not defined.

In addition to the above changes, MPS and TransCanada have also agreed to include "make good" performance on ramp rate and start-up time in the amended contract. The start-up time has been restated to be "press start to 100% load" and allows for new NFPA requirements, resulting in guaranteed start-up time of 26 minutes to 100% load.

TransCanada will execute the amended MPS agreement as described above as it provides both TransCanada and the OPA with maximum flexibility in the future, both in terms of mitigation efforts and any potential future projects. We trust that the OPA concurs with this decision.

Yours Truly,

John Mikkelsen, P.Eng.

Director, Eastern Canada, Power Development

TransCanada

Royal Bank Plaza
200 Bay Street
24th Floor, South Tower
Toronto, Ontario M5J 2J1

Tel: 416.869.2102

Fax: 416.869.2056

Cell: 416.559.1664

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Aleksandar Kojic

From: Michael Killeavy
Sent: May 20, 2011 1:29 PM
To: Colin Andersen
Cc: Brett Baker; JoAnne Butler
Subject: FW: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

FYI. Please see below.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
416-967-1947 (FAX)

From: John Mikkelsen [mailto:john_mikkelsen@transcanada.com]
Sent: May 20, 2011 12:19 PM
To: Deborah Langelaan
Cc: Michael Killeavy; JoAnne Butler; Michael Barrack; John Finnigan; Geoff Murray; Terry Bennett; John Cashin; Jody Johnson; Doug McLean
Subject: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

With Prejudice

Dear Deborah,

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Yours Truly,

John Mikkelsen, P.Eng.

Director, Eastern Canada, Power Development

TransCanada

Royal Bank Plaza
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Toronto, Ontario M5J 2J1

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Aleksandar Kojic

From: Deborah Langelaan
Sent: May 20, 2011 4:33 PM
To: 'rsebastiano@osler.com'; 'pivanoff@osler.com'; 'safouh@smsenergy-engineering.com'; Susan Kennedy; Michael Lyle
Cc: Michael Killeavy
Subject: Fw: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

FYI

From: John Mikkelsen [mailto:john_mikkelsen@transcanada.com]
Sent: Friday, May 20, 2011 12:18 PM
To: Deborah Langelaan
Cc: Michael Killeavy; JoAnne Butler; Michael Barrack <MBarrack@tgf.ca>; John Finnigan <JFinnigan@tgf.ca>; Geoff Murray <geoff_murray@transcanada.com>; Terry Bennett <terry_bennett@transcanada.com>; John Cashin <john_cashin@transcanada.com>; Jody Johnson <jody_johnson@transcanada.com>; Doug McLean <doug_mclean@transcanada.com>
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Yours Truly,

John Mikkelsen, P.Eng.

Director, Eastern Canada, Power Development

TransCanada

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Aleksandar Kojic

From: Deborah Langelaan
Sent: May 20, 2011 4:41 PM
To: Michael Killeavy
Subject: Re: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

Thanks, you too.

From: Michael Killeavy
Sent: Friday, May 20, 2011 04:40 PM
To: Deborah Langelaan
Subject: RE: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

Good. You both survived. See you Tuesday. Have a nice long weekend.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario
M5H 1T1
416-969-6288
416-520-9788 (CELL)
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From: Deborah Langelaan
Sent: May 20, 2011 4:39 PM
To: Michael Killeavy
Subject: Re: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

Oh...I didn't see them on the original distribution list.

We just finished the course and am waiting for my ride to the airport. Really informative course.

Deb

From: Michael Killeavy
Sent: Friday, May 20, 2011 04:36 PM
To: Deborah Langelaan
Subject: RE: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

Yes, we all got it.

This is curious. Why in the world would they take the time and effort to negotiate an LTSA if they weren't committed to a compromise settlement? I think this may signal that they aren't as committed to litigation as they often claim they are.

Have a safe trip home. I hope it's not too bumpy for Ronak.

Michael Killeavy, LL.B., MBA, P.Eng.
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Aleksandar Kojic

From: Safouh Soufi [safouh@smsenergy-engineering.com]
Sent: May 20, 2011 7:26 PM
To: Deborah Langelaan
Cc: Michael Killeavy; 'Ivanoff, Paul'; 'Sebastiano, Rocco'
Subject: RE: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

Privileged & Confidential

Thank you - Deborah.

For your information I received from Paul Ivanoff of Osler earlier today a copy of the long awaited LTSA. I am assuming the purpose of its submission is so that TransCanada is not seen delinquent on any promises it made to the OPA during the "negotiation" process and it is done Without Prejudice. If this is the case then I suggest that we don't review the LTSA at this time.

Otherwise, please let us know what action SMS is required to take in respect of this document.

Have a great long weekend everyone,

Thanks,
Safouh

From: Deborah Langelaan [mailto:Deborah.Langelaan@powerauthority.on.ca]
Sent: May 20, 2011 4:33 PM
To: rsebastiano@osler.com; pivanoff@osler.com; safouh@smsenergy-engineering.com; Susan Kennedy; Michael Lyle
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Yours Truly,

John Mikkelsen, P.Eng.

Director, Eastern Canada, Power Development

TransCanada

Royal Bank Plaza
200 Bay Street
24th Floor, South Tower
Toronto, Ontario M5J 2J1

Tel: 416.869.2102

Fax: 416.869.2056

Cell: 416.559.1664

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Aleksandar Kojic

From: Safouh Soufi [safouh@smsenergy-engineering.com]
Sent: May 20, 2011 7:40 PM
To: Deborah Langelaan
Cc: Michael Killeavy; rsebastiano@osler.com; pivanoff@osler.com; Susan Kennedy; Michael Lyle
Subject: RE: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

Reissue to include Susan Kennedy and Micheal Lyle who inadvertently were not copied on original email.

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Have a great long weekend everyone,

Thanks,
Safouh

From: Deborah Langelaan [mailto:Deborah.Langelaan@powerauthority.on.ca]
Sent: May 20, 2011 4:33 PM
To: rsebastiano@osler.com; pivanoff@osler.com; safouh@smsenergy-engineering.com; Susan Kennedy; Michael Lyle
Cc: Michael Killeavy
Subject: Fw: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

FYI

From: John Mikkelsen [mailto:john_mikkelsen@transcanada.com]
Sent: Friday, May 20, 2011 12:18 PM
To: Deborah Langelaan
Cc: Michael Killeavy; JoAnne Butler; Michael Barrack <MBarrack@tgf.ca>; John Finnigan <JFinnigan@tgf.ca>; Geoff Murray <geoff_murray@transcanada.com>; Terry Bennett <terry_bennett@transcanada.com>; John Cashin <john_cashin@transcanada.com>; Jody Johnson <jody_johnson@transcanada.com>; Doug McLean <doug_mclean@transcanada.com>
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From: Michael Killeavy
Sent: May 20, 2011 8:06 PM
To: 'safouh@smsenergy-engineering.com'; Deborah Langelaan
Cc: 'RSebastiano@osler.com'; 'Pivanoff@osler.com'; Susan Kennedy; Michael Lyle
Subject: Re: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

Deb and I will meet with JoAnne next week and decide on next steps.

Michael Killeavy, LL.B., MBA, P.Eng.
Director, Contract Management
Ontario Power Authority
120 Adelaide St. West, Suite 1600
Toronto, Ontario, M5H 1T1
416-969-6288 (office)
416-969-6071 (fax)
416-520-9788 (cell)
Michael.killeavy@powerauthority.on.ca

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Sent: Friday, May 20, 2011 07:40 PM
To: Deborah Langelaan
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Have a great long weekend everyone,

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Cc: Michael Killeavy

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From: John Mikkelsen [mailto:john_mikkelsen@transcanada.com]

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Aleksandar Kojic

From: Safouh Soufi [safouh@smsenergy-engineering.com]
Sent: May 21, 2011 5:43 PM
To: Michael Killeavy
Subject: Re: TransCanada Oakville GS - Notice of Amended Equipment Supply Contract #6519 between TransCanada Energy Ltd. and MPS Canada, Inc.

Thanks Micheal.

From: "Michael Killeavy" <Michael.Killeavy@powerauthority.on.ca>
Date: Fri, 20 May 2011 20:05:34 -0400
To: <safouh@smsenergy-engineering.com>; Deborah Langelaan<Deborah.Langelaan@powerauthority.on.ca>
Cc: <RSebastiano@osler.com>; <PIvanoff@osler.com>; Susan Kennedy<Susan.Kennedy@powerauthority.on.ca>; Michael Lyle<Michael.Lyle@powerauthority.on.ca>
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Aleksandar Kojic

From: Michael Lyle
Sent: June 17, 2011 11:16 AM
To: Colin Andersen; JoAnne Butler
Cc: Michael Killeavy
Subject: FW: Memo re Strategic Options for Arbitration with TCE
Attachments: Memo re Strategic Considerations for Arbitration with TCE 20838721_2.DOC

FYI

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

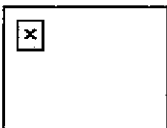
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From: Smith, Elliot [<mailto:ESmith@osler.com>]
Sent: June 16, 2011 1:59 PM
To: Michael Lyle; Michael Killeavy
Cc: Ivanoff, Paul; Sebastiano, Rocco
Subject: Memo re Strategic Options for Arbitration with TCE

Michael and Michael,

Further to your meeting earlier this week with Paul and Rocco, please find attached a draft memo we have prepared setting out strategic considerations for a possible arbitration with TCE. If you have any questions, please let us know.

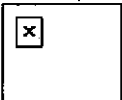
Elliot



Elliot Smith
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Memorandum

Privileged & Confidential

To: Michael Lyle, *OPA*

Date: June 16, 2011

c: Michael Killeavy, *OPA*

From: Elliot Smith and Paul Ivanoff

Tel: 416.862.6435 and
416.862.4223

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

Matter No: 1126205

1. Background

TCE and the OPA are currently in a dispute over the proper compensation to be paid to TCE in exchange for the mutual termination of the Contract. This memorandum is intended to set out strategic considerations relevant to the resolution of the dispute by an arbitrator.

Both TCE and the OPA have an interest in resolving the dispute by way of arbitration rather than litigation as this could permit the dispute to be resolved on a confidential basis. TCE has set out three conditions that must be satisfied before it will agree to arbitration. These conditions were relayed in a telephone conversation on May 10, 2011 between Michael Barrack, litigation counsel to TCE, and Paul Ivanoff, counsel to the OPA, with Elliot Smith also in attendance. We understand that TCE has not communicated these conditions to the OPA in writing and therefore this memo is based on the recollections of Mr. Smith and Mr. Ivanoff from such call with TCE's litigation counsel. We understand that Mr. Barrack has also conveyed these conditions to counsel for the Ministry of Energy.

The conditions set by TCE are that any arbitration (i) be a three-party arbitration between TCE, the OPA and Her Majesty in right of Ontario (the "Crown"), (ii) recognize the terms of the October 7, 2010 letter from Colin Andersen to Alex Pourbaix (the "October 7 Letter") and (iii) ~~not preclude TCE from participating in future OPA procurements. Each of these conditions is~~ discussed in greater detail below.

2. Conditions for TCE to Agree to Arbitration

(a) Arbitration Must Include the Crown

We remain unclear on TCE's motivation to include the Crown in any arbitration of the dispute, but have two hypotheses. Firstly, TCE may wish to include the Crown as a party to the dispute in order to have the benefit of document production from the Crown. TCE may believe or

suspect that there is correspondence or other documents in the Crown's possession which either contain certain promises to TCE regarding compensation for the mutual termination of the Contract or which provide evidence to support a favourable interpretation of the words in the October 7 Letter. As we do not have the Crown's records for review, it is difficult to comment on how important this factor is to TCE; however, we would note that to the extent the terms of the arbitration concede liability to TCE for loss of profits, there is less value in whatever documents the Crown may have as the only determination for the arbitrator in such case would be the quantum of damages and not whether the OPA waived the exclusion of consequential damages set out in the Contract.

Secondly, TCE may be concerned about its ability to collect on any judgment from the OPA and therefore would like to have the Crown included as a party to the arbitration. This concern may be derived from (or exacerbated by) concern that the OPA may cease to exist in the near future (given certain statements made in the media and the uncertainty of the results of next October's election). In any event, we believe that this concern may not be well-founded as we understand that the OPA continues to hold the same credit rating as the Crown.

While in litigation (as opposed to a confidential arbitration) there may be political or public relations considerations that would motivate a desire by TCE to include the Crown, because the proposed arbitration would be confidential, we do not believe that this is a factor in the present circumstances.

We believe it would not be in the OPA's best interests to have the Crown included as a party to an arbitration of the dispute. We do not see a benefit to the OPA in having the Crown as a party and there are potential drawbacks as it would likely increase the cost and complexity of the proceedings. If the Crown were to be a party to the arbitration, there is also the possibility that unfavourable documentation would be produced during document production which might harm the OPA's potential defences.

(b) Arbitration Must Recognize the Terms of the October 7 Letter

It is unclear what precisely is the nature of this condition; however, we believe based on discussions with TCE's counsel that TCE does not want the OPA to be permitted to take the position that the exclusion of consequential damages set out in s. 14.1 of the Contract precludes TCE from recovering any amounts from the OPA on account of loss of profits. This would be, in effect, to treat the October 7 Letter as a waiver by the OPA of the benefit of the exclusion for loss of profits set out in s. 14.1.

If the OPA were to concede that the October 7 Letter constituted a waiver, it would be important to ensure (i) that such waiver did not affect aspects of s. 14.1 not related to loss of profits, e.g., the exclusion of punitive or special damages and (ii) that the OPA did not waive the exclusion of other indirect lost profits, i.e., losses of other profits that TCE might have earned by developing the Oakville Generating Station (for example, selling excess steam to Ford). A narrow waiver of the exclusion for lost profits from the Contract may be acceptable to the OPA, if in exchange for such a waiver, TCE was willing to concede to arbitration without the Crown as a party *and*

cooperate in either negotiating a replacement project or an assignment of the gas turbines, as further discussed below.

(c) **Arbitration Must Not be an Impediment to TCE Participating in Future OPA Procurements**

TCE has stipulated that any agreement to arbitrate must not be an impediment to their participation in future OPA procurements. While this is obviously of great importance to TCE, the OPA's interests in this point may also be aligned. Given how few developers are currently active in the Ontario market for electricity supply from natural gas, despite the dispute between the OPA and TCE, it would likely not be in the OPA's interests to run a procurement where TCE was not permitted to participate as this would simply reduce the competition in the procurement and result in less competitive bids. One point that may be contentious with TCE is that while the OPA may agree not to exclude TCE from future procurements by reason of the arbitration, it would be difficult to commit with certainty that TCE would be permitted to participate in any future procurements as there may be other criteria in a future procurement which TCE would not be able to satisfy (for example, as part of a pre-qualification process).

3. Potential OPA Conditions to Agree to Arbitration

In light of the above analysis, it may be possible for the OPA to propose terms of arbitration to TCE which are acceptable to TCE and provide benefits to the OPA. The OPA's main objective in negotiating terms of arbitration may be to provide for an efficient use of the gas turbines originally acquired for the Oakville Generation Station, since these comprise a substantial proportion of the sunk costs incurred in connection with the Contract. It appears that the highest value use for these gas turbines would be to use them in a peaking generation project in the Kitchener-Waterloo-Cambridge area (the "Peaking Project"). There are principally two ways in which this could be achieved: (i) the OPA could run a competitive procurement for a developer to take an assignment of the equipment supply contract (the "Equipment Supply Contract") between TCE and MPS Canada, Inc. ("MPS") and build the Peaking Project using these turbines, or (ii) the OPA could negotiate a replacement contract with TCE (the "Replacement Contract") for TCE to build the Peaking Project using these turbines.

(a) **Assignment of Turbines**

The terms of the Equipment Supply Contract permit it, subject to MPS's consent, to be assigned by TCE to a third party that would take on all of TCE's rights and obligations under the Equipment Supply Contract. In exchange for taking an assignment of the Equipment Supply Contract, the assignee would normally be expected to pay to TCE an amount equal to all amounts already paid by TCE pursuant to the Equipment Supply Contract to make TCE whole. Such an assignee could then make any remaining payments pursuant to the Equipment Supply Contract and ultimately take delivery of the turbines to utilize them in the construction of the Peaking Project. This would, in effect, fully mitigate TCE's damages relating to the Equipment Supply Contract.

In order to find a third party willing to take an assignment of the Equipment Supply Contract, the OPA would likely run a procurement for a developer to enter into a CES-style contract (perhaps similar to the form of the peaking generation contract from Northern York Region) with the OPA whereby the developer would design, construct, own and operate the Peaking Project using the turbines in exchange for a monthly payment from the OPA. As part of this process, each proponent in the procurement process would agree that if selected as the successful proponent, they would enter into an assignment of the Equipment Supply Contract and pay TCE an amount equal to all amounts previously paid by TCE pursuant to the Equipment Supply Contract.

In order to set up the legal framework for this, MPS, the OPA and TCE would need to enter into an agreement for TCE to assign its interest in the Equipment Supply Contract to the successful proponent (the "Agreement to Assign"), and pursuant to which MPS would consent to such an assignment. The Agreement to Assign would contain, as a schedule, the form of assignment agreement (the "Assignment Agreement") to be entered into by the successful proponent, TCE and MPS, upon conclusion of the procurement process. This form of Assignment Agreement, along with a copy of the Equipment Supply Contract, would be included as documents in the procurement process so that prospective proponents could properly evaluate the arrangement that the successful proponent would be required to enter into. Upon the determination of a successful proponent, the Agreement to Assign would contractually obligate TCE and MPS to enter into the Assignment Agreement with the successful proponent.

Impediments by TCE to the Assignment of the Turbines

The most likely impediment to any assignment of the turbines would be that TCE could refuse to cooperate in the negotiation of an Agreement to Assign, particularly if TCE expects that it will not be permitted to participate in the procurement process for the Peaking Project. This risk could be somewhat mitigated if TCE were permitted to participate in the procurement for the Peaking Project; however, TCE may still resist on the basis that if they block an assignment of the Equipment Supply Contract, they would still be the preferred developer to build the Peaking Project. In order to counter this strategy by TCE, the OPA could advise TCE that if it refuses to cooperate in the negotiation of an Agreement to Assign, the OPA will make a "with prejudice" offer to take an assignment of the Equipment Supply Contract from TCE at full price. A refusal by TCE to accept this offer could be seen as a failure by TCE to reasonably mitigate its damages in connection with the cancellation of the Contract. In particular, as this proposed arrangement would fully mitigate any damages to TCE relating to the Equipment Supply Contract, by failing to accept this offer and properly mitigating its damages, TCE would be taking on the risk of reselling the turbines or repurposing them for another project. Either of these results would not mitigate TCE's damages to the same extent as the proposed assignment arrangement, and therefore potentially exposes TCE to a finding by a court or arbitrator that it failed to properly mitigate its damages and that the OPA is not liable for damages incurred by TCE relating to the Equipment Supply Contract which would have otherwise been mitigated by assigning it to the OPA. As a result, although TCE may not be eager to negotiate an Agreement to Assign, if TCE were to refuse to cooperate, this has the potential to expose it to significant losses which may not be recoverable from the OPA. **[NTD: We are undertaking further research on this point and will advise if there is any new information which affects the analysis.]**

Impediments by MPS to the Assignment of the Turbines

Experience to date with MPS suggests that there is also the possibility that MPS may not cooperate with the OPA in the negotiation of an Agreement to Assign. However, the Equipment Supply Contract contemplates the potential assignment of that agreement and therefore a refusal of MPS to negotiate an Agreement to Assign would be inconsistent with the Equipment Supply Contract. In order to effect an assignment by TCE, MPS's consent is required and such consent cannot be unreasonably withheld. The Equipment Supply Contract sets out three grounds pursuant to which it is not unreasonable for MPS to withhold consent: (i) if it has a reasonable basis for doubting the financial creditworthiness of a prospective assignee, (ii) if such prospective assignee is a direct competitor of MPS, or (iii) if such prospective assignee does not agree to be bound by all terms and conditions of the Equipment Supply Contract.

Each of these three grounds can be addressed in a procurement process for the Peaking Project. With respect to the first ground, the OPA could address this by requiring proponents to have a minimum creditworthiness (or an appropriate related company guarantee) in order to participate in the procurement process. Alternatively, the OPA could consider an approach where in exchange for a security interest in the Peaking Project, the OPA would provide the necessary guarantees itself. Each of the second and third grounds for MPS to refuse consent can be readily addressed by making them prerequisites for participating in the procurement process for the Peaking Project.

Note that although each of the enumerated grounds for MPS to be able to refuse to consent to an assignment can be addressed, these enumerated grounds are not necessarily exhaustive and MPS may raise further grounds for refusing to consent to an assignment, so long as such grounds are "reasonable". One such reason which MPS may raise relates to the necessity of sharing of its confidential information with multiple proponents. This could be addressed, or at least partly addressed, by requiring proponents to enter into a confidentiality agreement with MPS prior to providing them with the Equipment Supply Contract. Note that this still may not satisfy MPS and it may be necessary to consider other approaches to address concerns raised by MPS.

Lastly, it is also relevant that on March 23, 2011, MPS provided a notice of force majeure to TCE relating to the March 11, 2011 earthquake in Japan. The notice itself provided no details regarding the anticipated effect of the force majeure. TCE has not provided the OPA with any further detail regarding the potential effect of this force majeure, and it is uncertain whether MPS has provided any such detail to TCE. Potential proponents in the procurement process for the Peaking Project may not be willing to accept an assignment of the Equipment Supply Contract until the full effect of this force majeure claim is known, or unless they are offered an indemnity for any impacts of such event of force majeure.

[NTD: We should consider how other proponents (e.g. Veresen and Northland) would feel about such a procurement if TCE were also participating. Would they worry about being stalking horses or would they view the OPA's tendering process as being sufficiently robust to address this concern? This may require further consideration.]

(b) Replacement Contract with TCE

The alternative approach to utilizing the turbines in the Peaking Project would be to negotiate an agreement with TCE for TCE to develop this project utilizing the turbines pursuant to a Replacement Contract. There are three main issues between TCE and the OPA in coming to agreement on the terms of a Replacement Contract: (i) the amount to be included in the Replacement Contract on account of the “anticipated financial value of the Contract”, (ii) the methodology to determine the capital cost of building the Peaking Project and how that would be included in the Replacement Contract, and (iii) the proper allocation of permitting and development risk between TCE and the OPA.

The first issue is the issue to be decided by an arbitrator. The Replacement Contract (or term sheet setting out the main provisions of the Replacement Contract) could leave this as an amount to be determined through the arbitration process. The second issue relating to the methodology to determine the capital cost of the Replacement Project is an issue that we believe has the potential to be resolved by the parties through negotiations. With the right level of risk sharing and auditing rights, the parties should be able to reach a compromise on the treatment of the capital cost for the Peaking Project. Despite a failure to reach such an agreement previously, we believe that if TCE were to learn that the OPA was seriously contemplating pursuing the assignment of turbines option, an option which TCE would have difficulty blocking as result of their duty to mitigate damages, they may be more motivated to reach agreement on terms with the OPA that provides the Peaking Project to TCE on a sole-source basis rather than requiring them to compete for it.

The final issue between TCE and the OPA on the allocation of permitting and development risk is the most difficult to resolve. TCE has made it clear to the OPA that TCE cannot accept a Replacement Contract as compensation for the mutual termination of the Contract which contains the same risks that prevented it from successfully developing the Oakville Generating Station in the lead up to the October 7 Letter. The OPA has offered to provide limited permitting relief, but TCE has insisted upon full permitting and extensive development and other force majeure risk and cost relief. It is conceivable that even with OPA pursuing the assignment of turbines option, there may not be enough to convince TCE to accept a level of permitting and development risk that would be acceptable to the OPA. TCE’s representatives have repeatedly stated that they do not want to be in a position where they feel that have “traded one bad contract for another”.

4. Conclusion

We remain of the view that it will be very difficult to reach agreement with TCE on the terms of a Replacement Contract, even if the level of compensation for the termination of the Contract is left to an arbitrator to determine. It would take extensive negotiations to resolve the outstanding issue relating to the appropriate capital cost for the Peaking Project, and it would appear that the greatest level of permitting and development risk that TCE would be willing to accept would still be less than what the OPA would require them to take on. As a result, we believe that it would be worthwhile to focus greater efforts on arranging an assignment of the gas turbines while

developing terms of reference for arbitration on TCE's compensation for the termination of the Contract. If the OPA were able to obtain TCE's cooperation in arranging an assignment of the gas turbines in exchange for settling on favourable terms of arbitration, this would be valuable to the OPA, since it would otherwise be much more difficult to arrange an assignment of the turbines without TCE's cooperation. Although TCE may not be eager to assist the OPA with this, they would at least be motivated to do so in order to properly mitigate their damages.

There are a number of benefits to this approach:

- (i) the Peaking Project would be developed at a cost to the ratepayer that has been competitively bid and therefore, represents better value than a negotiated price;
- (ii) by tendering the Peaking Project, the OPA could decide on the appropriate level of risk sharing between it and the developer without having to resolve TCE's unwillingness to take on an appropriate level of permitting or development risk;
- (iii) the dispute between the OPA and TCE would be narrowed to the issue of quantum of damages rather than having to resolve a number of other issues in connection with negotiating a Replacement Contract; and
- (iv) the further this option is pursued, the more TCE is motivated to negotiate a Replacement Contract, such that if the OPA were to revert to that option it would do so from a position of greater leverage.

The principal drawback to this approach is that it requires making a lump-sum payment to TCE in an amount to be determined by an arbitrator, without any direct return of value from TCE; however, the resolution and eventual payment of compensation to TCE would likely not occur for a minimum of 6-12 months after the commencement of the arbitration.

Aleksandar Kojic

From: Michael Killeavy
Sent: June 21, 2011 4:06 PM
To: Michael Lyle
Subject: TCE Matter - Aird & Berlis Memorandum
Attachments: Memo re_ Termination of SWGTA Contract.DOCX

Mike,

This is the only document I can find that refers to the exclusion of any *"special, indirect, incidental, punitive, exemplary or consequential damages, including loss of profits ..., loss of use of property or claims of customers or contractors of the Parties for any such damages."*

I wasn't involved in briefing anyone outside the OPA, so I am unaware if the contents of this memorandum was shared with other decision-makers in whole or in summary form.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.
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MEMORANDUM

STRICTLY PRIVILEGED AND CONFIDENTIAL

TO: Ontario Power Authority (the "OPA")

FROM: Aird & Berlis LLP

DATE: February 17, 2010

RE: Southwest GTA Clean Energy Supply Agreement dated as of October 9, 2009 between TransCanada Energy Ltd. (the "Supplier") and the OPA (the "SW GTA Contract") in respect of Oakville Generating Station (the "Facility"): Consequences of Termination by OPA

File #: 103661 – SWGTA

Client #: 33770 – Ontario Power Authority

I. Introduction

The Supplier won the right to enter into the SW GTA Contract with the OPA following a competitive request-for-proposals ("RFP") procurement process carried on by the OPA. As part of that process, the winner of the RFP was required to enter into the form of SW GTA Contract without the possibility of amending or modifying any of the terms of that contract (other than those specific to the Facility, such as specifications and connection).

Since the date of execution of the SW GTA Contract, the development of the Facility by the Supplier has faced significant local opposition. Furthermore, an explosion at a natural gas-fired plant located in Middletown, Connecticut on February 7, 2010, although in no way related to the Facility, has heightened concerns in Oakville.

The OPA is currently exploring various options with respect to the SW GTA Contract. This memorandum addresses issues related to potential termination of the SW GTA Contract by the OPA.

All capitalized terms herein have the same defined meanings as in the SW GTA Contract.

II. Executive Summary

The OPA can itself terminate the SW GTA Contract or rely on others to take certain steps that may result in its termination.

The first option is for the OPA to terminate the SW GTA Contract of its own volition. This would likely constitute a Buyer (i.e. OPA) Event of Default under the SW GTA Contract or a repudiation under general contract law. Express remedies in the case of a Buyer Event of Default are available to the Supplier, but those enumerated in the SW GTA Contract are not particularly helpful to the Supplier.

Remedies under general contract law would provide a more useful avenue for the Supplier. Under this route, the Supplier would be entitled to bring an action against the OPA for damages, including sunk

costs and expected future profits. These amounts could be estimated at between \$1 and \$2 billion, assuming discount rates of 7% to 10%.

However, any such remedies would be subject to an exclusionary clause contained in the SW GTA Contract. Section 14.1 provides that, notwithstanding any provision of the SW GTA Contract, neither Party will be liable for any "special, indirect, incidental, punitive, exemplary or consequential damages, including loss of profits ..., loss of use of property or claims of customers or contractors of the Parties for any such damages."

If enforceable, this provision would severely limit the amounts for which OPA would be liable. However, recent case law raises serious issues about whether the OPA could rely on a court to apply Section 14.1. In a situation where (a) the OPA may have difficulty justifying termination of the contract, and (b) the contract was not subject to negotiation due to the nature of the procurement process, the court may be less likely to uphold such a blanket exclusion.

The OPA could terminate the SW GTA Contract if a delay of 24 months was occasioned by a Force Majeure, such as an act of the Ontario Government or the municipality of Oakville. Following such 24-month period, the OPA would have the option of terminating the SW GTA Contract without liability.

Force Majeure is defined as an act, etc. that prevents a Party from performing its obligations and that is beyond a Party's reasonable control. This includes an "order, judgment, legislation, ruling or direction" by a Governmental Authority, not caused by the OPA's fault or negligence, and with respect to which the OPA must have used Commercially Reasonable Efforts to oppose.

Formally, acts of the Ontario Government are beyond the control of the OPA. An issue is whether a court, in this situation, would distinguish between the OPA and the Ontario Government. If it did, the OPA would still have to show that it made Commercially Reasonable Efforts to prevent or remedy the Force Majeure.

Even if such an act of the Ontario Government constituted Force Majeure, the question would arise whether the government's action constituted Discriminatory Action. Discriminatory Action is defined as a law, order-in-council or regulation, or direct or indirect amendment of the contract, without the agreement of the Supplier, by the Provincial Government or Legislature. If Discriminatory Action applied, the Supplier would be entitled to receive damages potentially amounting to sums similar to those available under the breach of contract scenario described above.

If Oakville, rather than the Ontario Government, caused the Force Majeure, this would mean that such acts would not constitute Discriminatory Action and the Discriminatory Action remedy set out above would not be available to the Supplier.

III. Discussion

a. Supplier's contractual remedies for breach by OPA

This analysis is based on the assumption that OPA simply tells the Supplier that the project is cancelled. For the purposes of this portion of the analysis, we have assumed that no event of force majeure is alleged and that there is nothing that might come within the definition of "Discriminatory Action" within the meaning of section 13.1 of the SW GTA Contract.

If the OPA to terminate the SW GTA Contract of its own volition this would likely constitute a Buyer (i.e. OPA) Event of Default under section 10.3 of the SW GTA Contract and a repudiation of the contract under general contract law. Express remedies in the case of a Buyer Event of Default are available to the Supplier under section 10.4. However, such enumerated remedies provide that the Supplier may

set off payment due to the Buyer (of which there are none) against amounts payable by the Buyer to the Supplier. Thus, such remedies are not particularly helpful to the Supplier.

Remedies under general contract law would provide a more useful avenue for the Supplier. Under this route, the Supplier would be entitled to bring an action against the OPA for damages, including sunk costs and expected future profits.

Article 14, Liability and Indemnification, provides:

14.1 Exclusion of Consequential Damages

Notwithstanding anything contained herein to the contrary, neither Party will be liable under this Agreement or under any cause of action relating to the subject matter of this Agreement for any special, indirect, incidental, punitive, exemplary or consequential damages, including loss of profits (save and except as provided in section 13.2), loss of use of any property or claims of customers or contractors of the Parties for any such damages

On the assumption that the damages suffered by the Supplier by OPA's repudiation will consist of two principal claims, viz., a claim to recover the sunk costs of the project up to the date of the repudiation and the present value of the net profits that would have been earned over the term of the SW GTA Contract—the question then is how those claims would be dealt with in the light of the exclusion in section 14.1

The OPA could argue that the language of section 14.1 is effective to deny the Supplier any claim for breach of contract. The exclusion with respect to "loss of profits" would prevent a claim for the present value of the Supplier's future profits and the exclusion with respect to "special damages" could prevent a claim for the Supplier's sunk costs.

The phrase "special damages" is not commonly used in cases of a breach of contract. It is more common to find the term "direct damages" used to describe the most easily established damages. In a case where, for example, a seller failed to deliver goods, the buyer's direct damages would be the difference between the contract price and the market price when the buyer went into the market to buy replacement goods. The term "special damages" is often encountered in torts cases and is there distinguished from general damages, e.g. damages for pain and suffering. A convenient way to distinguish special from general is that the former will generally be supported by receipts.

Since a plain reading of section 14.1 could lead to the conclusion that, on OPA's repudiation of the Agreement, the Supplier gets nothing, it can be assumed that a judge might seek to find a basis for avoiding this result. This was arguably the outcome in a recent Supreme Court of Canada case.

b. The Supreme Court's Decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 ("*Tercon*") [Feb 12, 2010].

The question in *Tercon* was the enforceability of a clause in a tender document purporting to limit the liability of the defendant province, in the circumstances.

The facts of *Tercon* were that the B.C. Government, through the Minister of Transportation and Highways, sought, through a "Request for Expressions of Interest" (RFEI), to get expressions of interest for the design and construction of a highway in a remote area of the province. Six teams responded, including Tercon Contractors and one other, Brentwood. The province then changed its mind, undertook the design function itself and then issued an RFP. Only those contractors who had responded to the RFEI were entitled to bid under the RFP. In the result, the province awarded the contract to Brentwood, which company, by the date when the tender was submitted, had, by entering

into a joint venture with an unqualified company, become an unqualified bidder. Tercon Contractors immediately sued the province for breach of an undertaking to use only qualified bidders.

In defending the action, the province relied on section 2.10 of the RFP which stated:

2.10 ... Except as expressly and specifically permitted in the Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

The trial judge upheld that the breach by the plaintiff was so egregious that the limitation of liability clause did not operate to protect the province. The British Columbia Court of Appeal allowed the province's appeal and held that the clause protected the province in the circumstances.

On further appeal to the Supreme Court, the full court agreed that the doctrine of fundamental breach should be discarded. The court, both majority and minority, further agreed with Binnie J. who said: (paras 122, 123):

[122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (Hunter, at p. 462). This second issue has to do with contract formation, not breach.

[123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

The disagreement between the majority and minority centered on the meaning of the phrase, "as a result of participating in this RFP" in section 2.10. In Cromwell J.'s view, what the province did (in accepting a bid from a non-compliant bidder) took the process outside the scope of the clause. Cromwell J. said: (para. 74)

[74] I turn to the text of the clause which the Province inserted in its RFP. It addresses claims that result from "participating in this RFP". As noted, the limitation on who could participate in this RFP was one of its premises. These words must, therefore, be read in light of the limit on who was eligible to participate in this RFP. As noted earlier, both the ministerial approval and the text of the RFP itself were unequivocal: only the six proponents qualified through the earlier RFEI process were eligible and proposals received from any other party would not be considered. Thus, central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

Cromwell J. emphasized throughout his reasons that the province had behaved badly. He adopted the view of the trial judge that the breach had been egregious (para. 6) and that the conduct (para. 78) "... of the Province in this case strikes at the heart of the integrity and business efficacy of the tendering process".

The minority adopted the point of view of the British Columbia Court of Appeal and held that the limitation of liability clause applied in the circumstances. Nevertheless, with respect to the third inquiry that Binnie J. outlined, he said, (para. 82):

... Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon Contractors) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties....

c. Application of Decision in *Tercon* to SW GTA Contract

Tercon can be read as standing for the proposition that a court, faced with a limitation of liability clause that purports to limit the liability of a potential defendant too much, will find a way to limit its scope. The Supplier under the SW GTA Contract can make a very strong claim to be paid its costs that are now to be thrown away. If the clause were interpreted to deny the Supplier the recovery of those costs, a court might be moved to hold that it should not be carried so far. Various arguments can be made to support the Supplier's claim to its costs thrown away: a claim for such costs would be a claim for its "direct costs", i.e., the head of damages that would be normal in a case of breach of contract, not, as has been mentioned, a claim for special damages in tort. In other words, the language of section 14.1 of the SW GTA Contract may not limit the Supplier's claim for its costs, i.e., its direct costs, thrown away.

The second concern over the decision in *Tercon* arises from the admission by both the majority and the minority that egregious conduct or public policy might limit the scope of a limitation of liability clause. Until this case, there were very few examples of decisions cutting back or limiting a clause like section 14.1 on the ground that the defendant's conduct was very bad. It had been assumed in Canada that a party guilty of fraud might be unable to rely on an exemption clause. This position had been taken in a Delaware case, *ABRY Partners v. F&W Acquisition, LLC*, 891 A.2d 1032 (Del. Ch. 2006), and it would not be surprising if a Canadian court had followed it.

While there is no suggestion that either OPA or the government would engage in fraud or any bad conduct with respect to the termination of the SW GTA Contract, it is not obvious that bad conduct by a defendant necessarily means that a limitation of liability clause is ineffective.

The "public policy" exception to the general enforceability of a limitation of liability clause, is even more worrying as the court does not explain just what public policy is or might be engaged in *Tercon*.

Without engaging in an exhaustive analysis of the cases on construction tendering, it can be said that it is not obvious that what the province did in *Tercon* was contrary to public policy—or at least so contrary to public policy that the protection the province reasonably thought that it had should be stripped away.

In the case facing OPA or the Ontario government, the question would be whether a deliberate breach of a contract would be regarded by the courts as so egregious as to justify stripping away the protection of section 14.1.

A factor present in both *Tercon* and this case is that the parties are experienced entities, able, one would have thought, to be held to the terms of the contracts they make, whether or not they were offered the agreements on a take-it-or-leave-it basis.

d. Conclusions re: Potential Liability

With two important qualifications, the plain words of section 14.1 support an argument that, on a breach by OPA, the Supplier has no claim to compensation; all its claims being excluded by the plain language of the section.

The first qualification is that the Supplier will be seen by the court to have a very good claim to some compensation, if only to reimbursement for the costs it will have been forced to throw away. A court which considers that one party has been hard done by will often be moved to provide it with some relief and section 14.1 might not be effective in this situation.

The second qualification is the scope given to public policy in *Tercon*. A court moved, like the trial judge and the majority in the Supreme Court, by the enormity of what a defendant has done may simply say that it would violate public policy to enforce such a clause.

e. Discriminatory Action

A Discriminatory Action is defined in Section 13.1(a) of the SW GTA Contract to occur if:

- (i) the Legislative Assembly of Ontario causes to come into force any statute that was introduced as a government bill in the Legislative Assembly of Ontario or causes to come into force or makes any order-in-council or regulation first having legal effect on or after the date of the submission of the Proposal in response to the RFP: or
- (ii) the Legislative Assembly of Ontario directly or indirectly amends this Agreement without the agreement of the Supplier.

A Discriminatory Action will not occur if Laws and Regulations of general application are enacted. However, please note the memorandum dated July 7, 2009, provided to the OPA, a copy of which is attached, that shows that in certain circumstances a law of general application can be interpreted as being a law of specific application.

The strict wording of the SW GTA Contract requires for Discriminatory Action that the Legislative Assembly of Ontario enacts a statute or the government of Ontario enacts an order-in-council or regulation. As such, a Ministerial Direction to simply repudiate the SW GTA Contract would not likely qualify under that definition. Also according to the strict wording of the provisions, a repudiation of the SW GTA Contract would not be an amendment of it, as none of the provisions would be altered.

However, there remains some risk that a court may find that the Ontario government indirectly "amended" the SW GTA contract by way of Ministerial Direction by causing the OPA to repudiate it, in particular in light of the exception in the exclusion clause of Section 14.1

While it may be that the strict wording of the agreement may govern, courts are inclined to provide remedies to parties who have suffered damages. In the event that the courts were to find that a Discriminatory Action occurred, then Section 13.2 of the SW GTA Contract would apply. This section states:

13.2 If a Discriminatory Action occurs, the Supplier shall have the right to obtain, without duplication, compensation (the "Discriminatory Action Compensation") from the Buyer for:

- (a) the amount of the increase in the costs that the Supplier would reasonably be expected to incur in respect of Contracted Facility Operation as a result of the occurrence of such Discriminatory Action, commencing on the first day of the first Calendar month following the date of the Discriminatory Action and ending at the expiry of the Term, but excluding the portion

of any costs charged by a Person who does not deal at Arm's Length with the Supplier that is in excess of the costs that would have been charged had such Person been at Arm's Length with the Supplier; and

(b) the amount by which (i) the net present value of the net revenues from the Electricity and Related Products in respect of Contracted Facility Operation that are forecast to be earned by the Supplier during the period of time commencing on the first day of the first calendar month following the date of the discriminatory Action and ending at the expiry of the Term, exceeds (ii) the net present value of the net revenues from the Electricity and Related Products in respect of Contracted Facility Operation that are forecast to be earned by the Supplier during the period of time commencing on the first day of the first calendar month following the date of the Discriminatory Action and ending on the expiry of the Term, taking into account the occurrence of the Discriminatory Action and any actions that the Supplier should reasonably be expected to take to mitigate the effect of the Discriminatory Action, such as by mitigating operating expenses and normal capital expenditures of the business of the generation and delivery of the Electricity and Related Products in respect of Contracted Facility Operation.

In essence, if it is found that there is a Discriminatory Action then the SW GTA Contract provides that the Supplier can recover its lost profits and any increase in costs that it will suffer as a result of the Discriminatory Action. This would be very similar to the damages available in contract for a repudiation.

f. Force Majeure Effects and Definitions – OPA may terminate due to Force Majeure after 24 Months if OPA uses Commercially Reasonable Efforts to oppose the Ministerial Directive.

Section 11.1 of the SW GTA Contract sets out the effects of invoking Force Majeure:

11.1(h) If, by reason of Force Majeure, the COD is delayed by more than twenty-four (24) months after the original Milestone Date for attaining Commercial Operation of the Facility (prior to any extension pursuant to Section 11.1(f)), then notwithstanding anything in this Agreement to the contrary, either Party may terminate this Agreement upon notice to the other Party without any costs or payments of any kind to either Party, and all security shall be returned forthwith.

Force Majeure is defined in Section 11.3 as:

"any act, event cause or condition that prevents a Party from performing its obligations (other than payment obligations) hereunder, and that is beyond the affected Party's reasonable control".

Sections 11.3(g) and 11.3(h) further stipulate that Force Majeure includes:

(g) an order, judgment, legislation, ruling or direction by Governmental Authorities restraining a Party, provided that the affected Party has not applied for or assisted in the application for and has used Commercially Reasonable Efforts to oppose said order, judgment, legislation, ruling or direction.

11.3(h) any inability to obtain, or to secure the renewal or amendment of, any permit, certificate, impact assessment, licence or approval of any Governmental Authority or Transmitter required to perform or comply with any obligation under this Agreement, unless the revocation or modification of any such necessary permit, certificate, impact assessment, licence or approval was caused by the violation of the terms thereof or consented to by the Party invoking Force Majeure;

Commercially Reasonable Efforts are defined as meaning:

"efforts which are designed to enable a Party, directly or indirectly, to satisfy a condition to, or otherwise assist in the consummation of, the transactions contemplated by this Agreement and which do not require the performing Party to expend any funds or assume liabilities, other than expenditures and liabilities which are reasonable in nature and amount in the context of the transactions contemplated by this Agreement."

g. Exclusions to Force Majeure

The OPA may not invoke Force Majeure under the SW GTA Contract in the following circumstances:

- 1) if the OPA has caused the Force Majeure by its own fault or negligence (s. 11.2(a)); and
- 2) if and to the extent the OPA has not used Commercially Reasonable Efforts to remedy or remove the Force Majeure.

h. OPA may only rely on Force Majeure to terminate SW GTA Contract if it actively opposes cancellation of contract by Ministerial Directive.

Given the exclusions to the Force Majeure definition, it would be necessary for the OPA to actively oppose any Ministerial Directive if the OPA were seeking to cancel the SW GTA Contract as a result of Force Majeure. The OPA must not have applied for or assisted in the application for the Ministerial Directive. The OPA further is required by the SW GTA Contract to actively oppose the Ministerial Directive, using Commercially Reasonable Efforts. While Commercially Reasonable Efforts require some effort, they do not require that the OPA expend funds or assume liabilities in order to oppose the Ministerial Directive.

The SW GTA Contract is silent as to whether the opposition to any Ministerial Directive would need to be public, however, although it would be necessary to provide to the Supplier a copy of any active opposition to avoid litigation on the Force Majeure point.

i. OPA may rely on Force Majeure to terminate SW GTA Contract if a Third Party denies it relevant permits without actively opposing such denial of permits (but it cannot consent thereto).

It is an open question whether the OPA would be considered equivalent to the Ministry if a Provincial permit were denied. The Supplier may raise arguments that the OPA and the Ontario Ministry are so closely related that they should be treated as a single entity for the purposes of relying on Force Majeure to cancel the contract. There may be other administrative law issues that are raised if an Ontario Ministry were to deny a permit, rather than the arms-length actions of a third party. Our advice is to assume that it is necessary that a third party block the issuance of a permit to ensure that section 11.3(h) is available to the OPA.

If a third party were to deny issuance of a permit necessary for the Facility to reach COD, there are no requirements that the OPA actively oppose such denial. The only requirement under the SW GTA Contract is that the OPA not consent to such denial of the permit.

j. Quantum of Potential Damages

In the case that s. 14.1 is not effective, and a Force Majeure claim is not available, the OPA would be liable to the Supplier for all of its damages, including its sunk costs to date and loss of future profits.

An estimate of the magnitude of the damages can be made by calculating the net present value of the Net Revenue Requirement of the SW GTA Contract, which is equal to \$17,277/MW/Month, times 900 MW (equal roughly to \$15.5 million per month). Assuming a reasonable discount rate (7%-10%), the

net present value of this amount is roughly equal to \$1-\$2 billion, and accounts for the potential lost revenue for Electricity and Related Products. This amount should also approximate the capital costs of the project with an internal rate of return.

The Supplier will be required to mitigate their damages, but it is difficult to see how in the current climate for gas-fired generation that they would be able to obtain a similar investment.

The precise figures for lost profit and damages are difficult to calculate precisely, but the numbers above should give an indication of the magnitude of the potential claim. In particular, the figure cited above does not take into consideration actual sunk costs, any extra revenues over the revenue floor provided by the Net Revenue Requirements, or any value for the lost capital asset that would remain at the end of the Term of the SW GTA Contract, all of which would increase the potential liability. It likewise does not estimate the Supplier's rate of return on its lost revenue stream, which could lower the potential liability, or any form of mitigation of damages in the form of alternate investments. If a more detailed estimate of damages is required, it will be necessary to retain an expert in damages quantification and valuation.

6374668.4

Aleksandar Kojic

From: Michael Killeavy
Sent: July 14, 2011 8:06 PM
To: JoAnne Butler
Subject: RE: TCE Briefing ...
Attachments: Briefing_for_Govt_20110714.ppt; Briefing_for_Govt_20110714.pptx
Importance: High

Here you go.

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

From: JoAnne Butler
Sent: Thu 14-Jul-11 5:59 PM
To: Michael Killeavy
Subject: RE: TCE Briefing ...

OK....no problem....maybe we can look at them at our meeting at eight, if ready...

JCB

JoAnne C. Butler
Vice President, Electricity Resources
Ontario Power Authority

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

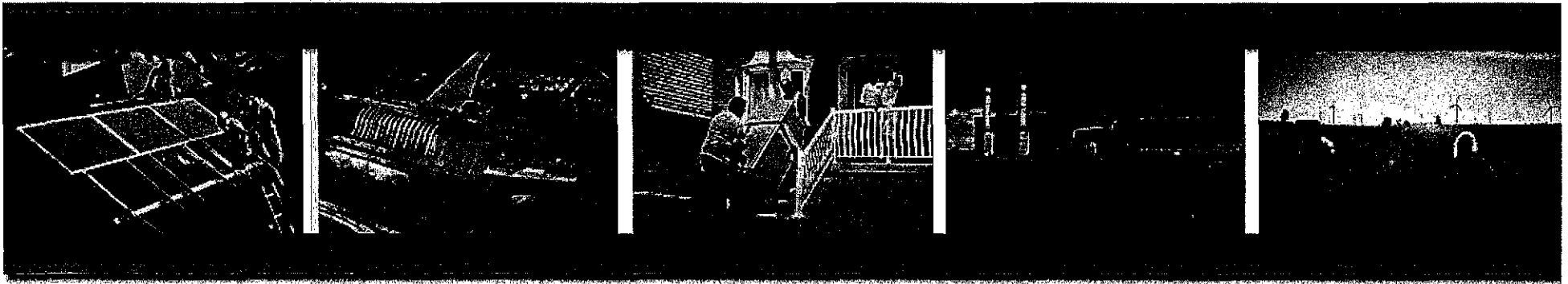
416-969-6005 Tel.
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-----Original Message-----

From: Michael Killeavy
Sent: Jueves, 14 de Julio de 2011 05:58 p.m.
To: JoAnne Butler
Subject: TCE Briefing ...

I will revise the slides for David tonight. I will send them to you either tonight or tomorrow morning.

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Winding Up of the Oakville Generating Station (OGS) Contract

Government Briefing

June 29, 2011

Privileged and Confidential – Prepared in Contemplation of Litigation

Southwest Greater Toronto Area (SW GTA) Supply

- Need for generation identified in OPA's proposed Integrated Power System Plan (IPSP) submitted to OEB in August 2007
- GTA has experienced robust growth and generation in the area continues to be significantly less than the GTA load
- Has resulted in heavy reliance on the Transmission System and the ability of existing infrastructure to service this area
- Expected to fall short by 2015 or sooner

Southwest Greater Toronto Area (SW GTA) Supply

- In addition to aggressive conservation efforts the OPA has identified the need for new electricity generation in this area
- New electricity generation will:
 - Support coal-fired generation replacement by 2014
 - Provide system supply adequacy
 - Address reliability issues such as local supply and voltage support
 - Defer Transmission needs in the Western GTA

OPA Procurement Process – Ministry Directive

- Ministry of Energy issued Directive to OPA in August 2008 to:
 - Competitively procure
 - Combined-cycle, natural gas-fired electricity generation facility
 - Rated capacity up to ~850 MW
 - In-service date not later than December 31, 2013
 - Connected to the 230 kV Transmission System corridor between the Oakville Transformer Station in Oakville to the Manby Transformer Station in Etobicoke
 - Not to be located at the former Lakeview Generating Station site in Mississauga

OPA Procurement Process – RFQ & RFP

1. Request for Qualifications
 - Released October 2008
 - 9 Qualification Submissions were received
 - Short-list of 4 Qualified Applicants representing 7 proposed projects resulted
2. Request for Proposals
 - Released February 2009
 - 4 Proposals from 4 Proponents were received
 - Proposals evaluated on Completeness; Mandatory Requirements; Rated Criteria and Economic Bid
 - Project with lowest Adjusted Evaluated Cost selected

Procurement Process - Contract

- SW GTA Contract based on Clean Energy Supply (CES) Contract
 - 20 year term
 - Contract-for-Differences based on Deemed Dispatch logic:
 - Generator guaranteed Net Revenue Requirement (NRR)
 - Market Revenues < NRR = Payment from OPA
 - Market Revenues > NRR = Payment from Generator
- TCE awarded SW GTA CES Contract on October 2009

Opposition to Gas-Fired Generation

- Procurement process fraught with local opposition
- Town of Oakville passed several by-laws:
 - Interim control of power generation facilities on certain lands in the Town of Oakville (2009-065)
 - Town of Oakville Official Plan Livable Oakville (2009-112)
 - Health Protection and Air Quality By-law (2010-035)
 - Amendment to the Official Plan of the Oakville Planning Area (Power Generation Facilities) (2010-151)
 - Amend the Comprehensive Zoning By-law 1984-63 to make modifications for power generation facilities (2010-152)
 - Amend the North Oakville Zoning By-law 2009-189 to make modifications for power generation facilities (2010-153)

Opposition to Gas-Fired Generation

- Town of Oakville rejected TCE's:
 - Site plan application
 - Application for minor variances
- Mississauga Mayor Hazel McCallion publically opposed project
- Liberal MPP Kevin Flynn publically opposed project
- C4CA (Citizens For Clean Air) is a non-profit Oakville organization opposed to locating power plants close to homes and schools. Frank Clegg is the Chairman and Director and former President of Microsoft Canada

Government Cancellation

- October 7, 2010 Energy Minister Brad Duguid, along with Oakville Liberal MPP Kevin Flynn, announced the Oakville power plant was not moving forward
- OPA provided TCE with letter that stated “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.”
- OPA Contract contains an Exclusion of Consequential Damages clause (including loss of profits)

TCE Initial Concerns

- TCE identified 3 immediate concerns:
 1. Canadian Securities Administrators (CSA) disclosure requires TCE to report a write down on the project if out-of-pocket costs not resolved by year-end (~\$37 MM)
 2. Handling of Mitsubishi (MPS Canada, Inc.) gas turbine order (\$210 MM)
 3. Economic value of OGS
- TCE met with Premier's Office and advised that Ontario has other generation needs; TCE is a good counterparty; and asked TCE to be patient and not sue immediately

Negotiations

- All OPA/TCE discussions have occurred on a “Without Prejudice” basis
- Oct. 8th OPA/TCE entered into Confidentiality Agreement to ensure certain communications remain confidential, without prejudice and subject to settlement privilege
- OPA/TCE negotiating teams met on a weekly basis commenced Oct. 15/10 & ceased Feb. 17/11
- Discussions focused on the following issues:
 - Capital costs of replacement project
 - Financial value of OGS
 - Residual Value of OGS
 - Disposition of Mitsubishi gas turbines
 - Proper allocation of project risk

MOU

- TCE's Treasury Department needed documentation from the OPA stating there was a replacement project to which the OGS's out-of-pocket costs could be applied to avoid having to write them off at year-end
- MOU executed December 21, 2010:
 - Potential Project site identified for Cambridge
 - Potential Project will utilize the gas turbines sourced for OGS
 - OPA & TCE agree to work together in good faith to negotiate a Definitive Agreement for the Potential Project
 - Potential Project to be Simple Cycle
 - Expired June 30, 2011

Replacement Project

- It was determined that the replacement project would be a gas-fired peaking generation (i.e. simple cycle) plant with a contract capacity of 400 - 450 MW
- TCE owns a site in Cambridge (Eagle St.) but close to schools and residential areas
- TCE identified the Boxwood Industrial Park in Cambridge as its preferred site
- TCE has had preliminary discussions with the City of Cambridge and they seem to be a willing host
- C4CA has commenced a letter writing campaign against the replacement project
- The 2 Mitsubishi M501GAC gas turbines purchased for OGS will be repurposed for the replacement project

Ministry of Energy Directive

- OPA has worked closely with Ministry of Energy on the drafting of a Directive to authorize negotiations with TCE for the replacement project
- OPA requires a Directive to enter into the Definitive Agreement
- Ministry wants the Directive to be silent on including the financial value of the OGS Contract into the revenue requirement for the replacement project
- Directive remains outstanding

Settlement Proposals

- March 10th OPA received TCE's Potential Project Pricing and Terms Proposal
 - Commercial parameters for the proposed peaking plant along with proposed revisions to the peaking contract
- TCE proposing to pass through majority of risk to Ontario ratepayer
- OPA retained Financial Consultant to assist with due diligence of TCE's Proposal
- March 28th OPA made a counter-proposal to TCE
- April 6th TCE rejected OPA's counter-proposal

Settlement Proposals

- April 21st OPA made Government-instructed Second Counter-Proposal
- April 29th TCE rejected OPA's Government-instructed Second Counter-Proposal

Comparison of Settlement Proposals

	TCE Proposal March 10, 2011	OPA Counter-Proposal March 28, 2011	Government-Instructed Second Counter-Proposal April 21, 2011	TCE Response to Government-Instructed Second Counter-Proposal April 29, 2011	Comments
NRR Net Revenue Requirement	\$16,900/MW-month	\$12,500/MW-month	\$14,922/MW-month	Unknown	NRR covers capital costs, financing working capital, returns, fixed monthly payment over life of contract. Energy paid on a deemed dispatch basis, this plant will operate less than 10% of the time.
Financing Assumptions	Unknown	Assumed 7.5% Cost of Equity, all equity project.	TCE claimed "unleveraged" discount rate of 5.25%	Unknown	TCE can finance/leverage how they want to increase NPV of project. We have assumed in second proposal what we believe that they would use.
Contract Term	20 Years + Option for 10-Year Extension	25 Years	25 Years	20 Years + Option for 10-Year Extension	We believe that TCE obtains all their value in the first 20 years. 10 Year Option is a "nice to have" sweetener. Precedent for 25-year contract. – Portlands Energy Centre has option for additional five years on the 20-year term.
Contract Capacity (Annual Average)	450 MW	500 MW	481 MW	450 MW	LTEP indicates need for peaking generation in KWCG; need at least 450 MW of summer peaking capacity. Average of 500 MW provides additional system flexibility and reduces NRR on per MW basis
Sunk Cost Treatment	Lump Sum Payment of \$37mm	Amortize over 25 years – no returns	Amortize over 25 years – no returns	Unknown	\$37MM to be audited by Ministry of Finance for substantiation and reasonableness
Gas/Electrical Interconnections	Payment in addition to the NRR	Payment in addition to the NRR	Payment in addition to the NRR	Unknown	Precedent – Portlands Energy Centre, Halton Hills, and NYR Peaking Plant. Paid on a cost recovery basis, i.e. no opportunity to charge an additional risk premium on top of active costs. TCE estimate is \$100MM ± 20%.
Capital Expenditures (CAPEX)	\$540mm	\$400mm	\$475 mm	Unknown but we infer from the reference to a ~\$65 mm difference that it is \$540 mm	Our CAPEX based on independent review by our Technical Expert and published information on other similar generation facilities. We have increased it by \$75MM; however, cannot really substantiate why. Therefore, we are still proposing a target cost on CAPEX where increases/decreases are shared.
Operational Expenditures (OPEX)	Little Visibility	Reasonable	Reasonable	Unknown	TCE has given us limited insights into their operating expenses. We have used advice from our technical consultant on reasonable OPEX estimates.
Other	Assistance/Protection from mitigating Planning Act approvals risk	We would approach Government to provide Planning Act approvals exemption.	No government assistance with permitting and approvals combined with a good faith obligation to negotiate OGS compensation and sunk costs if the K-W Peaking Plant doesn't proceed because of permitting issues.	TCE is willing to accept permitting risk provided that it has a right to (a) terminate the Replacement Contract and (b) receive a lump sum payment for (i) sunk costs and (ii) financial value of the OGS contract. This would apply to any and all permits, not just those issued under the <i>Planning Act</i> .	In the Government-Instructed counter-proposal the permitting risk is entirely transferred to TCE; however, the promise of finding compensation of OGS lost profits would continue until another option is found.

Status of Negotiations

- On April 26th TCE served the government with 60 day advance notice of its intent to sue the Crown pursuant to Section 7(1) of the Proceedings Against the Crown Act
- 60 day waiting period expired June 25th and TCE in a position to serve a Statement of Claim against the Crown
- Radio silence between TCE and OPA since end mid-May
- TCE and OPA dispute centres around the proper compensation to be paid to TCE in exchange for the mutual termination of the OGS Contract

Fundamental Disagreement – Value of OGS

- TCE has claimed that the financial value of the OGS contract is \$500 million.
- On 16 December 2010 TCE presented a project pro forma for the OGS bid into the SWGTA RFP.
- The model shows a NPV of after-tax cash flows of \$503 million.
- It also shows a discount rate of 5.25% for discounting the cash flows – TCE's purported unlevered cost of equity.

Residual Value of the OGS

- The \$503 million NPV is calculated over the thirty year life of the project, whereas the contract has a 20-year term.
- Cash flows over the term of the contract amount to \$262 million. Almost half of the claimed value of OGS comes from a very speculative residual value.
- TCE maintains that the residual value of the OGS after the expiry of the term was high because it would get a replacement contract.

Effect of Residual Value on OGS NPV

- With the very low discount rate of 5.25% used by TCE to calculate NPV, the residual value of the OGS has a significant impact on NPV of after-tax cash flows.
- We believe that the TCE claim of a 5.25% unlevered cost of equity is too low and that a value of 7.5% is more appropriate based on published financial information.

Effect of Residual Value on OGS NPV

- In arriving at the \$503 million NPV, TCE is discounting the final 10 years at the same discount rate as the contract cash flows.
- Usually, residual value cash flows are not discounted at the same rate as project cash flows because they are inherently riskier.

Arbitration

- Both TCE and OPA have an interest in resolving the dispute by way of arbitration rather than litigation as this could permit a resolution on a confidential basis
- TCE has set out 3 conditions to arbitration:
 - Must include the Crown
 - Must recognize the terms of the OPA October 7 letter
 - Must not be an impediment to TCE participating in future OPA procurements

Litigation

- OPA retained litigation counsel (Osler, Hoskin & Harcourt).
- OPA has not been served with a statement of claim.

Competitive Procurement

- OPA is considering taking assignment of the gas turbines from TCE. This is possible based on our review of its agreement with Mitsubishi.
- OPA could then launch a competitive procurement for the Replacement Project (K-W peaking plant).
- We believe that this is the only way to drive down the cost to construct the balance of plant.

Potential Outcomes

- The following graphic sets out several cases for litigation/arbitration and settlement.
- TCE's proposal to build the Replacement Project costs the ratepayer more than our potentially worst case if we were to go to litigation.
- The cost of the OPA's Government-instructed Second Counter-Proposal is close to the worst case if we were to go to litigation.

Financial Value of Potential Outcomes

