



BARRISTERS & SOLICITORS

CALGARY OFFICE  
800, 550 – 11th Avenue SW  
Calgary, AB  
T2R 1M7  
(403) 266-1201 (t)  
(403) 266-2701 (f)  
[www.mauricelaw.com](http://www.mauricelaw.com)

**Ron S. Maurice**  
Office: (403) 266-1201 x719  
Cellular: (403) 874-5459  
Email: [rmaurice@mauricelaw.com](mailto:rmaurice@mauricelaw.com)

April 28, 2011

Alberta Electric System Operator  
2500, 330 – 5<sup>th</sup> Avenue SW  
Calgary Alberta

**Attention: Elizabeth Moore, Director Competitive Procurement**

Dear Ms. Moore:

**RE: *Competitive Process for Critical Transmission Infrastructure  
Comments on Draft Recommendation Paper***

We are writing on behalf of a number of Alberta First Nations to provide comments on the *Competitive Process for Critical Transmission Infrastructure Draft Recommendation Paper* dated September 17, 2010 (the “DRP”).

The 2009 *Long-Term Transmission System Plan* prepared by the Alberta Electric System Operator (“AESO”) states that:

The oilsands industry is expected to continue its growth and is the primary driver of the need for new electricity infrastructure development in the northeastern part of Alberta. Electrical demand is driven by facilities associated with the extraction, upgrading and refining of bitumen from the oilsands into synthetic crude.

The specific facilities being recommended for this reinforcement are a 500 kV AC line from the Genesee generating station to a new 500 kV substation in the Fort McMurray area, and a 500 kV AC line from the new Heartland substation to the new Fort McMurray 500 kV substation.

The total estimated capital cost of the project is \$2,045 million (in 2008 dollars). Construction is planned to begin in 2010 with all facilities in service by 2016.

According to the DRP, the AESO is seeking feedback from various stakeholders and intends to implement the new competitive process for the first Critical Transmission Infrastructure (“CTI”) project which consists of two single circuit 500 KW transmission facilities from the Edmonton region to the Fort McMurray region.

We currently represent a group of First Nations which are signatories to Treaty 6 and Treaty 8 and whose constitutionally protected *sui generis* rights and interests in land may potentially be adversely affected by the Alberta Government’s expansion of CTI in northeastern Alberta. We will be working with all First Nations whose reserve lands and traditional territories are traversed by the proposed CTI projects with a view toward creating a consortium of First

Nations who share two key goals: (1) a desire to engage in appropriate consultations with the AESO on behalf of the Government of Alberta to avoid or minimize any adverse impacts on their Aboriginal and Treaty rights that could potentially be caused by the projects; and (2) to maximize economic benefits and opportunities in relation to training and employment, procurement and construction contracts, and the development of partnerships that will facilitate the First Nations' ability to build, own and operate CTI through their traditional territories to generate a long-term sustainable source of revenue for these historically disadvantaged communities.

There can be no doubt that the exercise of First Nation's Treaty rights on lands along the proposed transmission corridors have remained important to their members since time immemorial, not only for the preservation and maintenance of their livelihood, but also their cultural identity. As the Supreme Court of Canada has clearly articulated in a number of decisions, any *prima facie* infringements of Treaty or Aboriginal rights must be accommodated so that they are impacted by government conduct and activities as little as possible, if at all. Further, the activities flowing from CTI development projects through the traditional territories of the First Nations inevitably engage the Crown's legal duty to participate in meaningful consultations with, and where appropriate, accommodate the interests of adversely affected First Nations.

The expansion of transmission infrastructure into the traditional territories of First Nations has, and will have, potentially serious impacts on the continued exercise of constitutionally guaranteed Treaty or Aboriginal rights. Connection to the electrical system has played an integral role in the development of oilsands projects on both a small and massive scale. As the DRP states, oilsands development remains the key driver for the investment of an estimated \$2.1 billion to expand "Critical Transmission Infrastructure". All of this development comes at a huge cost to the environment with cumulative impacts that threaten biodiversity and the health of wildlife, fowl, and fisheries habitat which First Nations necessarily depend upon for the exercise of their Treaty rights to hunt, fish and trap.

We trust that all parties involved in CTI development and regulation are conscious of both the broad scope and potentially harmful nature of the immediate and/or cumulative effects faced by First Nations communities which are directly or indirectly caused by the establishment of transmission facilities that foster oilsands development in Alberta. While some developers have engaged with First Nations located adjacent to their projects, it is regrettable that such consultations rarely generate tangible economic benefits for affected communities. More often than not, large scale industrial developments simply leave an environmental blight on the land and only serve to widen the economic gap between First Nations and other Albertans.

In light of the scope and magnitude of the proposed upgrades to the transmission system in northeastern Alberta, it is essential that the AESO and industry proponents engage affected First Nations in a meaningful process of consultation and accommodation of their rights, interests and concerns. The status quo for consultations with First Nations is usually ad hoc and characterized by irregular and sporadic negotiations between industry proponents and individual First Nations who lack sufficient resources to adequately assess and articulate the potential impacts on their rights and interests or the expertise to capitalize on economic benefits and opportunities in such projects. This process has proven to be both unpredictable for proponents and regulators, and inherently unfair to First Nations, who in many cases are expected to engage and carry on such negotiations with little or no resources. Accordingly, and in the interest of infusing an element of certainty into what is currently a flawed strategy for reconciliation with First Nations, we are proposing to seek accommodation in the form of a

process that will facilitate First Nation's ownership and substantive economic participation in the development and operation of future CTI projects in Alberta.

Up until this point in time, the possibility of long-term facility ownership of CTI by First Nations communities has been foreclosed by the operation of what has remained a government-regulated oligopoly. We submit that this regime has not only been inefficient and costly to Albertans, but it has also operated in a manner contrary to public policy which dictates that First Nations who exercise treaty and Aboriginal rights upon their traditional lands should derive some substantive benefits from developments that traverse their territories and diminish the exercise of their rights. Notwithstanding this and the fact that discussions surrounding CTI expansion have generally occurred without real consideration of Treaty rights and Aboriginal interests, we are optimistic that the AESO's stated mandate to inject competitive pressures into the transmission marketplace through an open and fair bidding process for CTI expansion may afford an opportunity for First Nations to formulate partnerships with established private sector developers to bid on and ultimately win the right to build, own and operate transmission facilities in Alberta.

While we acknowledge that competitive procurement of transmission facilities is a complex undertaking with financial, regulatory and engineering implications, we are confident in our ability to partner with an experienced and qualified industry proponent that has the capacity and expertise to develop ("up-front"), build, finance, own and operate CTI in Alberta.

We submit that any initiative undertaken by a First Nations-led consortium or transmission facility owner ("TFO") in the forthcoming CTI projects would offer advantages to the ratepayer in the form of Federal and Provincial programs that make funding available on a cost-effective basis, as well as potential tax advantages that decrease the cost of construction and ongoing operations. Further, we note that a significant amount of goodwill would be developed on behalf of the AESO and the electrical infrastructure sector at large if First Nations are invited to the table not as obstacles to the expansion of CTI, but rather as enthusiastic partners and proponents of these important infrastructure projects.

As proponents, First Nations communities would be able to seize the opportunity to exercise their right of self-determination and generate reliable, long term sources of revenue to their communities in the form of AUC-regulated rate base payments, training and jobs during the construction phase of the projects, and the opportunity for careers in the operation and maintenance of CTI assets. Such revenue sources would invariably place significant capital in the hands of First Nations communities and promote economic spin-offs that would benefit and stimulate Alberta's economy well into the foreseeable future.

While these advantages are remarkable, they remain modest relative to the unique benefit a First Nations consortium or TFO is capable of delivering with respect to securing timely access to large tracts of land that are crucial to CTI development. By directly involving First Nations with *sui generis* rights to the land, as equity owners, the current risk of protracted battles occurring between First Nations and CTI proponents over regulatory and environmental approvals would be either considerably mitigated or avoided altogether. In this regard, we would submit that First Nations' participation at the ownership level effectively fosters, and to some extent, even embodies a crucial aspect of the "regulatory predictability", which both the AESO and all commenting stakeholders have thus far identified as a paramount "Process Goal". The advancement of regulatory predictability for CTI by First Nations communities in this context would be largely unprecedented but could provide a model for future developments of major infrastructure projects in Alberta and the rest of Canada. Moreover, when secured by the

expertise of an experienced industry partner (which we are already seeking out), we are certain that an exceptionally efficient TFO could be created that would pose no threat to the integrity of Alberta's existing interconnected system; indeed, we feel confident that a First Nations' led proposal will also offer the AESO the opportunity to build these projects under budget and on-time, thus offering Albertans a reduction in their rates.

As the possibility of equity ownership in CTI by First Nations communities brings with it an exceptional means to advance the competitive expansion of CTI in Alberta, we would comment on the structure of the bidding process that would ultimately support such an undertaking. At this time we understand that the AESO is currently developing the evaluation criteria associated with the selection criteria for each of the Request for Qualifications ("RFQ") and Request for Proposal ("RFP") documents to be used in the Process. We understand further that the AESO is currently comparing the advantages and disadvantages of utilizing a weighted scoring system against those of a gated pass-fail system and considering further, the use of a possible hybrid of these two schemes. Based on the all of the foregoing, we submit that at least some element of a weighted scoring system should be utilized. Further, we would recommend that considerable weight should be given and merit assigned to any proposal by a qualified TFO which supports substantive economic participation by First Nations communities.

While we note that evidence of a TFO's plans to conduct consultation with a variety of stakeholders (including First Nations) in the proposed project area is currently within the RFQ selection criteria,<sup>1</sup> we feel that lumping First Nations in with "other relevant stakeholders" fails to appreciate or acknowledge the value that First Nations can add to the efficient and predictable development of new CTI in Alberta. For this reason, we would suggest that the existing criteria within the RFQ which identifies First Nations be amended.

Accordingly we propose that First Nations be appropriately recognized as the holders of *sui generis* rights that are recognized and protected by the Constitution. This could be easily achieved by providing First Nations with an enumerated criteria that gives additional weight to any competitive process that provides for substantial participation by First Nations in the form of (1) training and employment opportunities; (2) procurement and contractual set asides during the design and construction phase of the projects; and (3) equity participation. Further, we would suggest that this selection criteria shift in focus from seeking evidence of a respondent's plans to conduct mere "consultation" with First Nations, to seeking evidence of a respondent's plans to facilitate substantive economic participation by First Nations.

In ascending order, we would propose that graduated weight should be awarded based on compliance with the following sub-criteria, or similar forms thereof:

- Evidence of the respondent's plans to offer economic participation to First Nations communities by way of facilitating or providing substantive training and long-term employment opportunities;
- Evidence of the respondent's plans to offer economic participation to First Nations communities by way of providing First Nations with "set aside" opportunities within an Aboriginal procurement scheme; and,

---

<sup>1</sup> Competitive Process for Critical Transmission Infrastructure – Draft Recommendation Paper. March 31, 2011. Prepared by E. Moore at 43 [Appendix E - Selection Criteria (h)].

- Evidence of the respondent's plans to offer economic participation to First Nations communities by way of equity ownership facilitated through a partnership, joint venture or similar arrangement. Further, the higher the percentage of ownership, the more weight should be attributed to this criterion.

We thank you for the opportunity to provide the foregoing comments and look forward to further consultation by the AESO with First Nations in the continued development of the Competitive Process for Critical Transmission Infrastructure.

Sincerely,

**MAURICE LAW**

Per:   
\_\_\_\_\_  
**Ron S. Maurice**

cc. Chief and Council, Whitefish Lake No. 128 First Nation  
Chief and Council, Kehewin Cree Nation  
Chief and Council, Fort McMurray First Nation  
Shan Bhattacharya, Vice-President, Transmission



# Whitefish Lake FIRST NATION #128

GOODFISH LAKE Box 271, Alberta, Canada T0A 1R0

12 April, 2011

AESO

2500, 330 – 5<sup>th</sup> Ave

SW Calgary, Alberta

T2P 0L4

[elizabeth.moore@aeso.ca](mailto:elizabeth.moore@aeso.ca)

P: 403 539 2450

f: 403 539 2949

Dear Elizabeth Moore

As the Chief of WFL128 I wish to submit some observations and requests as you formulate the terms of a new competitive process for the future construction and maintenance of the provincial power grid.

This grid is already substantial and complex in its present form. However, unlike today, developments in the past have been relatively incremental and gradual as it kept pace with lands taken up for purposes of settlement and resource development. Currently, by contrast, there are vast and imminent projects planned for infrastructure – especially in central, northeast and east central Alberta – and billions of dollars will be invested and undoubtedly many more billions will be made as a result of such developments. Of great relevance to us here is that many of the proposed lines traverse not merely Crown lands but specifically ‘traditional lands’ subjacent to planned developments in the Lower Athabasca Region. In other words, the right of way of such lines may cross the traditional lands of several First Nations and, as you may know, even the potential for damage to the habitat of these lands triggers the legal duty to consult, accommodate and, where warranted, compensate the First Nations whose ‘traditional lands’ they are.

I would like to place the above in the context of our Treaty (1876) and our history within the province since its’ inception in 1905. Our understanding of these arrangements comes from our Elders as this has been passed down orally since Chief Pakan signed our Treaty: Indians and immigrants would share the land on the condition that the Indians would be able to continue to sustain themselves through traditional practices and Crown interests could, from time to time, ‘take up’ land for purposes of settlement and resource development.

Well, it has been well over a century since the signing of Treaty 6 and, in our view, the sharing has been entirely on the side of the Indians and the benefits of Treaty have been almost entirely on the side of the Province, the Federal government, and the immigrants who have come and, in ever increasing numbers, continue to come to our ‘traditional lands’. This is hardly what our leaders of long ago had in mind when they signed Treaty, nor could they have imagined what has occurred since where such huge areas of land have been ‘taken up’ as to render the substantive rights of Treaty utterly meaningless. And this does not at all address the related imbalances in quality of life between First Nation and immigrant populations in the areas of health, economy, justice and education.

As leaders these constitutional, legal and retrospective considerations are grounds and strong motivational reason for improving the hopes and opportunities available to our people. What we propose below, however, is much more prospective in nature. It is our intent to advance recommendations that address our present needs as a community, our responsibility to sustain our collective rights under Treaty, and to do so in manner that provides an articulate balance with the Crown right to 'take up' land.

We recommend that:

1. Every industry bid to build, own, operate and transfer a transmission line should entail an optional but significant First Nation component that is additional to the essential requirements of building and operating a powerline. These optional First Nation requirements should constitute a fixed proportion or percentage of points of each bid in the following manner:
  - a. The inclusion of resources and the implementation of a First Nation training plan for the purpose of developing a First Nation work force to maintain and operate the line - 5%
  - b. The formation of joint venture partnering arrangements with First Nation conglomerates to build a transmission line – 10%
  - c. Negotiate an equal equity interest for those First Nations whose traditional lands are traversed by the transmission line – 15%
2. The bid review committee must have at least one member appointed by the First Nations affected by any specific line proposal.
3. The new Transmission Facility Owners (TFO) will be the body that negotiates the powerline right-of-way through the 'traditional lands' of the relevant First Nations. In order to ensure standardization of terms and avoid the usual divisiveness associated with FN negotiations with government or industry these should be conducted with FN's collectively.

The above considerations and recommendations are currently being reviewed by several Tribal organizations in Treaty 6 and Treaty 8 and you will be hearing a collective expression of our views in the in the near future.

Sincerely,



**Chief James Jackson Jr**  
Whitefish Lake First Nation #128

**Cc: Ron Maurice, Maurice Law**  
**Cc: allison.mathews @aesoc.ca**