

**GWAYAKOCCHIGEWIN LIMITED PARTNERSHIP (GLP)**

Eagle Lake First Nation • Fort William First Nation • Lac La Croix First Nation • Lac Seul First Nation • Nigigoosiminikaaning First Nation • Seine River First Nation • Wabigoon Lake Ojibway Nation • Ojibway Nation of Saugeen

**SUBMISSION FROM GLP**

**APRIL 27, 2021**

**Re: ERO POSTING NUMBER 019-3007, PROPOSAL FROM ENDM RE LTEP AND CHANGES TO THE ELECTRICITY ACT 1998**

This submission is in respect of the Minister of Energy, Northern Development and Mines (ENDM) posting of a proposal to revoke provisions of the *Electricity Act, 1998*<sup>1</sup> dealing with Long Term Energy Planning (LTEP) and to potentially employ some other undefined manner of conducting long term energy planning (or not).

Gwayakocchigewin Limited Partnership (GLP) is composed of the following First Nations as limited partners: Eagle Lake First Nation, Wabigoon Lake Ojibway Nation, Lac La Croix First Nation, Seine River First Nation, Lac Seul First Nation, Fort William First Nation, Nigigoosiminikaaning First Nation and Ojibway Nation of Saugeen. It is a limited partnership established to engage and participate in the development of the Waasigan Transmission Project by Hydro One. GLP and its limited partners stand to be affected and potentially substantially affected by any changes to LTEP, especially as the Waasigan Project has not yet been approved for construction and its fate as part of Ontario's energy plans is not yet known.

In no way may this submission be used by any party including ENDM or any other part of the Ontario Government as fulfilling any aspect of any Duty to Consult and Accommodate GLP's partner First Nations in respect of the subject matter hereof, as the posting is framed in ways that render the intent of ENDM undeterminable.

While not stated in the posting, the provisions of the *Electricity Act* that ENDM is considering revoking are likely s. 25.29 through s. 25.31.

These provisions require the issuance of an LTEP, outline what is required of an LTEP, empower the minister to issue implementation directives to the IESO or OEB, and require that

---

<sup>1</sup> SO 1998, c 15, Sch A. [the "*Electricity Act*"]

## **GWAYAKOCCHIGEWIN LIMITED PARTNERSHIP (GLP)**

Eagle Lake First Nation • Fort William First Nation • Lac La Croix First Nation • Lac Seul First Nation • Nigoonsiminikaaning First Nation • Seine River First Nation • Wabigoon Lake Ojibway Nation • Ojibway Nation of Saugeen

the IESO and OEB submit an implementation plan to the minister in accordance with any implementation directive.

**This submission is intended to create a threshold or gatekeeper function for ENDM's decision-making in respect of the LTEP and any contemplated changes to LTEP. The threshold is this:**

- (1) No further work on changes to the LTEP regime should be undertaken without meaningful engagement with GLP;**
  
- (2) No ultimate outcome in terms of LTEP in the future should be approved unless there is meaningful representation from indigenous peoples in any planning body (be it IESO or something else) and meaningful engagement with all affected indigenous peoples to seek their free, prior and informed consent to substantive changes to any LTEP regime or plan that are likely to affect rights including self-determination.**

LTEP and other aspects of the *Electricity Act* relate to indigenous peoples in particular ways. Section 25.29(2) states that a LTEP may include goals and objectives respecting “(f) consultation with aboriginal peoples and their participation in the energy sector, and the engagement of interested persons, groups and communities in the energy sector”. Section 25.29(4) states that “[t]he Minister shall, before issuing any LTEP, consult with ... aboriginal peoples”, and “the Minister shall consider the results of such consultation in developing any [LTEP]” and section 25.29(6) states that the Minister shall take steps to promote the participation of such aboriginal peoples in such consultation. Sections 25.32 (7) and (8) in respect of procurement of electricity that may result from LTEP, state that “[t]he Minister may direct the IESO to implement procedures for consulting aboriginal peoples ... on the planning, development or procurement of electricity supply, capacity, transmission systems or distribution systems”, and “[t]he Minister may direct the IESO to establish programs or funding to facilitate the participation and engagement in the electricity sector of aboriginal peoples...”.

As such, the Honour of the Crown is engaged in regard to any proposed changes to LTEP and application of the relevant provisions of the *Electricity Act*. In addition, the Duty to Consult and

## **GWAYAKOCCHIGEWIN LIMITED PARTNERSHIP (GLP)**

Eagle Lake First Nation • Fort William First Nation • Lac La Croix First Nation • Lac Seul First Nation • Nigigoonsiminikaaning First Nation • Seine River First Nation • Wabigoon Lake Ojibway Nation • Ojibway Nation of Saugeen

Accommodate indigenous peoples is invoked for any decisions that may result in removal of triggers to consult and accommodate, such as revocation of s. 25.29(2)(f).<sup>2</sup>

The Honour of the Crown is at stake in dealings with indigenous peoples in respect of interpreting and applying statutory provisions that speak to the unique relationship with or obligations to them. The Honour of the Crown arises as a feature of Canadian law, from the assertion of the sovereignty of the Crown in what has become Canada. This assertion was made over nations and peoples that were governing themselves and lands and resources here and that did not agree to be colonized but nonetheless were forced to bear the ravages of colonialism. Recognizing the centuries of harm, the Crown constitutionalized the Honour of the Crown in 1982, essentially elevating the obligations of the Crown to indigenous peoples.<sup>3</sup>

A formal engagement about LTEP changes should be established with GLP, through a mutually agreed process with funding from ENDM sufficient for GLP to participate in a fully informed way, from the early stages.

Whether or not the Minister absolves himself from LTEP responsibility, as appears to be proposed, and instead places more responsibility onto IESO, OEB or other entities, in any case the Duty to Consult and Accommodate indigenous peoples must be required as a condition precedent to the approval of any LTEP or change to LTEP decision-making regime, and the applicable planning body(ies) must include meaningful representation from indigenous peoples in Ontario.

This submission is to put ENDM on notice of this threshold. For ENDM to proceed in any more unilateral way would be inconsistent with the Honour of the Crown and the outcome legally invalid as a result.

In the ERO posting and the accompanying letter from the Minister, it states:

A desired outcome of the new planning framework would be to empower expert technical planners, such as the IESO, to plan the most reliable and cost-effective

---

<sup>2</sup> *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018 SCC 40 \(CanLII\)](#) at [para 46](#).

<sup>3</sup> *Manitoba Métis Federation v. Canada (Attorney General)*, [2013 SCC 14 \(CanLII\)](#) at [paras 66-69](#); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005 SCC 69 \(CanLII\)](#) at para 57.

## GWAYAKOCCHIGEWIN LIMITED PARTNERSHIP (GLP)

Eagle Lake First Nation • Fort William First Nation • Lac La Croix First Nation • Lac Seul First Nation • Nigigoonsiminikaaning First Nation • Seine River First Nation • Wabigoon Lake Ojibway Nation • Ojibway Nation of Saugeen

system. To achieve this objective, the ministry is considering revoking the provisions of the *Electricity Act, 1998* related to long term energy plans, implementation directives and implementation plans.

ENDM is also considering whether the IESO and the OEB have the appropriate mandates and authorities to undertake an expanded planning and resource acquisition role. This could include the development of a new approval or review process for certain types of government policy-decisions.<sup>4</sup>

The OEB has a limited role in electricity sector planning, but has the power to develop “regulatory policy to meet emerging energy trends and challenges.”<sup>5</sup> What this means is that while the OEB does not explicitly serve a planning function, it may make policy that would effectively shape the electricity sector on a more granular level.<sup>6</sup> This may be done either at the behest of the Minister or under the OEB’s own initiative.<sup>7</sup>

The OEB also requires planning by local distribution companies and transmitters and reviews this planning as part of its regulation and licensing of distribution and transmission.<sup>8</sup> This requirement is evaluated in reference to a “Regulatory Framework for Regional Planning”.<sup>9</sup> Overall, this creates a system where, while the OEB does not directly engage in planning, it does establish guiding standards for how regional planning must occur and is ultimately able to determine whether regional planning by distributors and transmitters complies with those standards.

---

<sup>4</sup> ERO Posting at p 4.

<sup>5</sup> Ontario Energy Board, “Mission and Mandate”, online: *Ontario Energy Board* <https://www.oeb.ca/about-us/mission-and-mandate>.; Ontario Energy Board, “Energy Sector Regulation”, online: *Ontario Energy Board* [https://www.oeb.ca/oeb/Documents/Documents/Energy\\_Sector\\_Regulation-Overview.pdf](https://www.oeb.ca/oeb/Documents/Documents/Energy_Sector_Regulation-Overview.pdf).

<sup>6</sup> Richard J King, “Electricity Regulation: Canada” in Daniel Hagan and Kirsti Massie, *Energy Regulation*, (London: Law Business Research 2017) online: [https://ca.practicallaw.thomsonreuters.com/5-632-4326?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/5-632-4326?transitionType=Default&contextData=(sc.Default)&firstPage=true), at 32.

<sup>7</sup> *Ibid.*

<sup>8</sup> Ontario Energy Board, “Information on regional infrastructure planning”, online: <https://www.oeb.ca/industry/tools-resources-and-links/information-regional-infrastructure-planning>.

<sup>9</sup> Ontario Energy Board, “Regional Planning for Electricity Infrastructure”, online: <https://www.oeb.ca/industry/policy-initiatives-and-consultations/regional-planning-electricity-infrastructure>.

## GWAYAKOCCHIGEWIN LIMITED PARTNERSHIP (GLP)

Eagle Lake First Nation • Fort William First Nation • Lac La Croix First Nation • Lac Seul First Nation • Nigigoonsiminikaaning First Nation • Seine River First Nation • Wabigoon Lake Ojibway Nation • Ojibway Nation of Saugeen

The IESO counts long-term planning for the electricity sector among its core responsibilities. As part of this mandate, the IESO publishes a reliability outlook every annual quarter, with half of these reports (March and September) looking 18 months ahead and half looking 5 years ahead (June and December). The IESO reports that “this report is used by market participants and industry stakeholders to inform their business decisions and to help plan equipment outages to ensure the reliability of Ontario's electricity system, and coordination of maintenance plans for generation and transmission equipment.”<sup>10</sup> The IESO also “forecasts energy demand and identifies sustainable electricity solutions” within the 18-month to 20-year timeframe on a provincial, regional, and local level, with the provincial ‘planning outlook’ being issued annually.<sup>11</sup>

Further to this independent planning role, s.25.29(3) of the *Electricity Act* requires that the Minister, before issuing a long-term energy plan, consider a technical report prepared by the IESO and publicly post the report. The technical report is required to include “the adequacy and reliability of electricity resources with respect to anticipated electricity supply, capacity, storage, reliability and demand and on any other related matters the Minister may specify.”<sup>12</sup> Thus the IESO is responsible for continuous planning related to the electricity market, as well occasionally contributing to long-term planning by the Minister.

The consequence of the OEB and IESO taking on an expanded planning and resource acquisition role is not clear. If the plan is simply for these entities to assume roles previously assigned to the Minister, the extent to which the OEB and IESO are able to perform those tasks would be the main concern. Additionally, it is possible that as a crown corporation and regulatory body, (ie. not elected officials), the OEB and IESO would be both less susceptible to public accountability and scrutiny.

If the plan is to create entirely new responsibilities for each entity, then consequences become more unpredictable. As noted above, both the OEB and IESO have less public exposure than

---

<sup>10</sup> IESO, “Planning and Forecasting”, online: *Ontario’s Power System* <https://www.ieso.ca/en/Learn/Ontario-Power-System/Planning-and-Forecasting>.

<sup>11</sup> IESO, “Overview”, online: *Planning and Forecasting* <https://www.ieso.ca/en/Sector-Participants/Planning-and-Forecasting/Overview>.

<sup>12</sup> *Electricity Act*, s. 25.29(3).

## **GWAYAKOCCHIGEWIN LIMITED PARTNERSHIP (GLP)**

Eagle Lake First Nation • Fort William First Nation • Lac La Croix First Nation • Lac Seul First Nation • Nigigoonsiminikaaning First Nation • Seine River First Nation • Wabigoon Lake Ojibway Nation • Ojibway Nation of Saugeen

an elected official and the IESO's corporate structure might influence how responsibilities are implemented.

**But the issue is not so much which entity undertakes which work in terms of LTEP but the removal of the Minister's responsibility and accountability for them, and the removal of the entire LTEP regime from the *Electricity Act*. Should this occur, then there would be no requirement in law for any LTEP and no ability to hold the Ontario Government accountable for failures of long term energy planning. Such planning is increasingly critical given global climate change and the need to move to net-zero emissions. The energy sector is a major player in this. If the intention of the ENDM Minister is to remove scrutiny over energy and climate change, this would be the epitome of malfeasance.**

The consequence of completely revoking the provisions of the *Electricity Act* related to LTEPs, implementation directives, and implementation plans are considered below.

The ERO posting and accompanying letter also referred to the revocation of O.Reg 355/17. This regulation required ENDM to issue a new LTEP every three years. This is pursuant to s.25.29(1) of the *Electricity Act*, which states that the period during which the minister shall issue an LTEP shall be prescribed by regulation. O.Reg 355/17 only came into force on September 1, 2017, so the 2017 LTEP is the only plan that has been released under the regulation. Since the enactment of the *Electricity Act*, Ontario has only issued three LTEPs, the first two being from 2010 and 2013.<sup>13</sup>

The revocation of O.Reg 355/17 seems to be a first step towards ending the issuance of LTEPs. The requirement that an LTEP be issued every three years was established by this regulation and so its revocation effectively removes the Minister's responsibility to issue an LTEP on any particular timeline.

Revoking provisions of the *Electricity Act* pertaining to LTEP would essentially eliminate the only junction at which the Minister (rather than the IESO or OEB) is required to reflect and report on

---

<sup>13</sup> "Ontario's Long-Term Energy Plan", online: <https://www.ontario.ca/page/ontarios-long-term-energy-plan>.

## **GWAYAKOCCHIGEWIN LIMITED PARTNERSHIP (GLP)**

Eagle Lake First Nation • Fort William First Nation • Lac La Croix First Nation • Lac Seul First Nation • Nigoonsiminikaaning First Nation • Seine River First Nation • Wabigoon Lake Ojibway Nation • Ojibway Nation of Saugeen

the functioning of Ontario's electricity sector. An LTEP is required to include goals and objectives respecting:

- “(a) the cost-effectiveness of energy supply and capacity, transmission and distribution;
- (b) the reliability of energy supply and capacity, transmission and distribution, including resiliency to the effects of climate change;
- (c) the prioritization of measures related to the conservation of energy or the management of energy demand;
- (d) the use of cleaner energy sources and innovative and emerging technologies;
- (e) air emissions from the energy sector, taking into account any projections respecting the emission of greenhouse gases developed with the assistance of the IESO;
- (f) consultation with aboriginal peoples and their participation in the energy sector, and the engagement of interested persons, groups and communities in the energy sector; and
- (g) any other related matter the Minister determines should be addressed.”<sup>14</sup>

Removing the requirement for the Minister to issue an LTEP would remove the responsibility for an elected official to provide definitive government positions on these issues.

Further, s.25.29 (4) requires consultation with indigenous peoples and s.25.29(6) requires their participation in the formulation of the LTEP. If these provisions are not replicated in powers delegated to the OEB and IESO, then a revocation would greatly limit the possibility for meaningful engagement and free, prior and informed consent.

The auditor general of Ontario's 2015 report on electricity power system planning<sup>15</sup> found that the “planning process (had) essentially broken down”, that there was extensive use of ministerial discretion and directives, problems with energy

---

<sup>14</sup> *Electricity Act*, s.25.29(2).

<sup>15</sup> Ontario, Office of the Auditor General, *Electricity Power System Planning*, (2015) online: <https://www.auditor.on.ca/en/content/annualreports/arreports/en15/3.05en15.pdf>.

## GWAYAKOCCHIGEWIN LIMITED PARTNERSHIP (GLP)

Eagle Lake First Nation • Fort William First Nation • Lac La Croix First Nation • Lac Seul First Nation • Nigigoonsiminikaaning First Nation • Seine River First Nation • Wabigoon Lake Ojibway Nation • Ojibway Nation of Saugeen

procurement decisions, ineffective conservation initiatives, and problems with transmission system planning.<sup>16</sup> In short, the report gives the impression that Ontario's long-term energy planning is unclear and resultantly ineffective at almost every stage of energy regulation and planning. This concern is born out in multiple papers calling for more effective and extensive environmental assessment in relation to electricity planning.<sup>17</sup> Further, reactions to Ontario's most recent LTEP in 2017 commented that the plan was scant on details.<sup>18</sup>

Thus, while it seems true that Ontario's long-term energy planning is in need of improvement, the solution is not abrogation of government responsibility and accountability, especially to the environment and indigenous peoples, but more and clearer accountability and more and stronger indigenous participation. Not only is climate change a fundamental driver of all energy planning in the future – which demands the highest level of accountability from public office -- but the mandate of decolonialization is a driver for regime change. Those closest to the pulse of the environment are those indigenous to it, and those best placed to understand how we can protect it, including and especially through energy planning and development.

---

<sup>16</sup> *Ibid* at 213.

<sup>17</sup> Mark Winfield et al, "Implications of Sustainability Assessment for electricity system design" (2010) 38 Energy Policy 4115; Tania Baynova, "Best Practices for Strategic Environmental Assessment and Application to the Ontario Long-term Energy Plan" (2009) [unpublished, archived at Ryerson University]; Marc Brouillette, "Rethinking Ontario's Long-Term Energy Plan", Commentary, (December 2014); Hamidreza Mirzaesmaeeli, "A Multi-Period Optimization Model for Energy Planning with CO2 Emission Consideration" (2007).

<sup>18</sup> Keith Brooks, "Ontario's Long-Term Energy Plan says all the right things, but leaves many details unresolved" (October 27, 2017), online: *environmental defence* <https://environmentaldefence.ca/2017/10/27/ontarios-long-term-energy-plan-says-all-the-right-things-but-leaves-many-details-unresolved/>; "Pembina reacts to Ontario's new long-term energy plan" (December 2, 2013), online: *PEMBINA Institute* <https://www.pembina.org/media-release/2508>.