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LETTER DECISION

File OF-Fac-IPL-1175-2015-01-03
25 August 2022

Patrick Duffy
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Toronto, ON M5L 1B9
Email pduffy@stikeman.com

Dear Patrick Duffy:

**ITC Lake Erie Connector LLC (ITC)
ITC Lake Erie Connector International Power Line (Project)
2021 Variance Request to Conditions 2 and 5 of Certificate of Public
Convenience and Necessity EC-056 (2021 Variance Application)
Decision Letter and Order**

**Before: M. Chartier, Presiding Commissioner; W. Jacknife, Commissioner;
S. Luciuk, Commissioner**

On 29 September 2021, ITC filed the 2021 Variance Application requesting the Commission of the Canada Energy Regulator (**Commission**) to vary Conditions 2 and 5 of the Certificate of Public Convenience and Necessity EC-056 (**Certificate**). Specifically, ITC request that two conditions be amended as follows:

1. Vary Condition 2 to extend the time for the commencement of construction of the Project to 26 June 2024; and
2. Vary Condition 5 to replace ITC Lake Erie LLC with LEC GP Inc. on behalf of Lake Erie LP as the owner and operator of the Project ([C15152](#)).¹

The Commission has reviewed the 2021 Variance Application and all subsequent filings on the record. The Commission approves the 2021 Variance Application for the reasons below.

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¹ In the original 2021 Variance Application, ITC sought to conditionally vary Condition 5 to replace ITC Lake Erie LLC with Lake Erie LP, while steps to form the new ownership structure were being finalized. In response to Commission Information Request (**IR**) No. 1, ITC amended its 2021 Variance Application to request that Condition 5 of the Certificate be varied to replace ITC Lake Erie LLC with *LEC GP Inc. on behalf of Lake Erie LP* as the owner and operator of the Project ([C19685](#)). ITC also confirmed that Lake Erie LP had been created and the general partner LEC GP Inc. had been incorporated so there was no longer a need for conditional approval.

The reasons are divided as follows:

- A. Background;
 - Project;
 - 2019 Variance Application;
 - 2021 Variance Application;
 - Condition 2
 - Condition 5
 - Temporary Extension of Condition 2
 - ITC Letter Suspending Work on the Project
- B. Commission Analysis and Findings
 - Scope of the Commission's Assessment;
 - Notice and Opportunity to Provide Comments
 - Engagement and Consultation with Indigenous Peoples;
 - Mississaugas of the Credit First Nation (**MCFN**)
 - Haudenosaunee Development Institute (**HDI**)
 - Assessment Pursuant to subsection 280(1) of the CER Act
- C. Conclusion

A. Background

Project

A brief summary of the original Project assessment process is provided for context only and not for the purposes of reviewing the National Energy Board (**NEB**) decision regarding the Project.

In 2015, ITC applied for a certificate with the NEB to construct and operate an approximately 117 kilometre 1,000 megawatt ±320 kilovolt high-voltage direct current bi-directional electric transmission interconnection, plus associated facilities, to transfer electricity between Nanticoke, Haldimand County, Ontario and Erie County, Pennsylvania, United States of America, crossing Lake Erie. A public hearing was held pursuant to Hearing Order EH-001-2015, during which the NEB heard from ITC and all interested parties.

Interested parties were provided multiple opportunities to participate in the Certificate hearing. The Crown, through Natural Resources Canada (**NRCan**), provided a letter to each potentially impacted Indigenous community on the Crown List², informing them of the federal Crown's consultation process for the Project and that the Crown was relying on the NEB's public hearing process, to the extent possible, to fulfil its duty to consult. The Haudenosaunee Confederacy Chiefs Council (**HCCC**)³ was the only Indigenous community to apply to participate in the Certificate hearing. HCCC sought and were granted intervenor status. However, they did not participate in the hearing process, including opportunities to provide oral Indigenous knowledge, file evidence, or file final arguments.

The NEB considered the potential impacts of the Project on Indigenous peoples' rights and interests, including the HCCC's interests based on the consultation evidence filed by ITC during the hearing process. The NEB was satisfied that with ITC's commitments, its

² Created for the Project Certificate proceedings, it lists the Indigenous communities potentially affected by the Project, as identified by ITC, the NEB, and NRCan.

³ Haudenosaunee Development Institute was the entity carrying out engagement activities on behalf of HCCC regarding the Project.

proposed mitigation measures, and the NEB's conditions, the effects on the interests of potentially affected Indigenous peoples could be effectively minimized.

The NEB found that the Project is in the public interest, and it is and will be required by the present and future public convenience and necessity. The NEB recommended that the Certificate be issued for the Project, subject to Governor-in-Council approval.

Following the Certificate hearing and after the NEB Reasons for Decision was issued, the Crown, through NRCan, carried out a post-NEB recommendation consultation phase. The Crown contacted each potentially impacted Indigenous community on the Crown List for the Project, which included HCCC and Haudenosaunee Development Institute (**HDI**), carried out direct consultations, and found that the Crown's duty to consult has been met.

On 20 June 2017, the Governor in Council accepted the NEB's recommendation that a Certificate should be issued given that the Project will be, if the terms and conditions set out in Appendix III of the NEB's Reasons for Decision are complied with and all commitments made by ITC during the hearing process, required by the present and future public convenience and necessity under the *National Energy Board Act* and will not likely cause significant adverse environmental effects under that Act. The Governor in Council considered the *Federal Consultation and Accommodation Report for the Lake Erie International Power Line Project* dated 3 May 2017 and was satisfied that the consultation process undertaken was consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated.

On 26 June 2017, the NEB issued Certificate EC-056 in respect of the Project. The Certificate was issued subject to forty-two conditions. Conditions 2, 5, and 6 of the Certificate are relevant to this application and state:

2. Certificate Expiration Clause

Unless the [NEB] otherwise directs prior to [three years from the date of the grant of the Certificate], this Certificate shall expire on [same date as noted before in this condition] unless construction in respect of the Project has commenced by that date.

5. Ownership and Operator

The international power line and its associated facilities to be constructed and operated pursuant to this Certificate (the Power Line) shall be owned and operated by ITC Lake Erie LLC.

6. Change of Ownership or Operator

ITC Lake Erie shall not sell, convey, lease or otherwise transfer the Power Line to any person, in whole or in part, without leave of the Board.

The Certificate had an original expiry date of 26 June 2020.

2019 Variance Application

On 4 October 2019, ITC applied to extend the expiration clause in Condition 2 of the Certificate by two years, from 26 June 2020 to 26 June 2022 (**2019 Variance Application**) ([C02065](#)). In response to a letter of direction from the Commission, ITC provided notice of the 2019 Variance Application to all potentially affected Indigenous communities identified on

the Crown List for the Project, including HCCC and HDI. This notice also provided an opportunity for recipients to provide comments. MCFN was the only party that filed comments.

On 5 March 2021, the Commission approved the 2019 Variance Application and issued Amending Order A0-001-EC-056 ([C11820](#)). Condition 2 of the Certificate was varied such that the new expiry date is 26 June 2022.

2021 Variance Application

On 29 September 2021, ITC filed this application to extend the expiration clause in Condition 2 of the Certificate by two years to 26 June 2024 and to vary Condition 5 of the Certificate to name LEC GP Inc. on behalf of Lake Erie LP as the owner and operator of the Project ([C15152](#)).

Condition 2

In the 2021 Variance Application, ITC stated that it will not be able to commence construction by 26 June 2022 and identified 15 June 2023 as its revised start date for construction. While ITC confirms its intention to commence construction as per the revised Project schedule, ITC requests a two-year extension to provide flexibility if the necessary arrangements are not in place by the 2023 construction season.

ITC highlighted significant developments related to its commercial arrangements for financing and transmission service agreements, including: an agreement in principle with the Canada Infrastructure Bank; a request from the Ontario Minister of Energy, Northern Development and Mines asking the Independent Electricity System Operator (**IESO**) to enter into negotiations with ITC for a transmission procurement agreement; and an executed term sheet between ITC and MCFN.

ITC emphasized that the timely issuance of a Commission decision would provide certainty needed to negotiate the terms for a transmission procurement agreement with the IESO and finalize an economic participation agreement with the MCFN and potentially other Indigenous communities.

The 2021 Variance Application included letters from IESO and MCFN ([C15152-5](#)). IESO's letter provides context regarding IESO's involvement with the Project and the construction timelines under consideration. In its letter, MCFN stated that the MCFN Council approved a negotiated term sheet with ITC that provides MCFN with options for economic participation in the Project and substantial community benefits. MCFN stated it supports ITC's request for an extension for the start of construction of the Project to 26 June 2024.

Condition 5

ITC requested that Condition 5 of the Certificate be varied to replace ITC Lake Erie LLC with LEC GP Inc. on behalf of Lake Erie LP. ITC stated that a corporate reorganization of the owner and operator of the Project is desirable to facilitate project financing, to allow for participation by MCFN and potentially other Indigenous communities, and to optimize tax efficiency.

Temporary Extension of Condition 2

On 19 April 2022, ITC filed a letter requesting an expedited decision on the 2021 Variance Application by 13 May 2022 or as soon thereafter as possible ([C18649](#)), with letters from the Canada Infrastructure Bank ([C19015](#)) and the IESO ([C19101](#)) supporting ITC's request. On 19 May 2022, the Commission determined that it could not issue an expedited decision in the timeframe ITC had requested as the Commission required sufficient time for further process to complete its assessment of the 2021 Variance Application – specifically, the adequacy of consultation and accommodation with Indigenous peoples and HDI's request for an opportunity to reply to ITC's submissions to HDI's filings ([C19199](#)). Accordingly, the Commission temporarily extended the expiration date set out in Condition 2 of the Certificate from 26 June 2022 to 26 August 2022.

ITC Letter Suspending Work on the Project

On 28 July 2022, ITC filed a letter advising that ITC has decided to suspend development activities and commercial negotiations on the Project as there is no viable path to conclude certain key commercial negotiations and other requirements within the required timeframes ([C20291](#)). While work on the Project is suspended, ITC requested the Commission continue to process the 2021 Variance Application and issue a decision as soon as reasonably possible.

B. Commission Analysis and Findings

The Commission approves the 2021 Variance Application and grants the variances to Conditions 2 and 5 requested by ITC for the reasons below. The Commission also approves the transfer of the Certificate, as required under subsection 280(1) of the *Canadian Energy Regulator Act (CER Act)* and Condition 6 of the Certificate.

The Commission finds that the Crown's duty to consult with Indigenous peoples regarding the 2021 Variance Application was met and that there were opportunities for meaningful engagement throughout the Commission's assessment process. The Commission approves the 2021 Variance Application based on the rationale provided by ITC for its requests. Further, the Commission finds that granting the variances would be in the public interest. In addition, there was no evidence filed to suggest the requested variances would change the Project and the conditions attached to the Certificate as amended, remain in effect.

Scope of the Commission's Assessment

Subsection 280(1) of the CER Act provides that “[t]he Commission may, on application or on its own initiative, vary a certificate issued under this Part and may, on application, transfer a certificate issued under this Part [Part 4 International and Interprovincial Power Lines]”, subject to the Minister's discretion to direct the Commission.

With respect to the 2021 Variance Application, the scope of the Commission's assessment is limited to the impact of the requested variances of Condition 2 and Condition 5. The 2021 Variance Application is not an opportunity to revisit matters related to the Project that were previously decided.

Notice and Opportunity to Provide Comments

The Commission finds that all potentially impacted parties, including Indigenous peoples, have been notified of the 2021 Variance Application and had a fair and meaningful

opportunity to provide any comments in respect of the 2021 Variance Application. The Commission highlights the following activities that were carried out and the outcomes:

- On 24 November 2021, the Commission issued a Letter of Direction directing ITC to provide formal written notification of the 2021 Variance Application (**Notice**) to all potentially affected Indigenous peoples, landowners and stakeholders; this included all parties ITC notified of its 2019 Variance Application, and any additional potentially affected Indigenous communities, landowners, and stakeholders that ITC has identified or been in discussions with since the issuance of Certificate EC-056 ([C16280](#)).
- In January 2022, ITC confirmed that it had provided notification of the 2021 Variance Application, as directed by the Commission, by emailing or mailing a copy of the Notice and a copy of the Commission's Letter of Direction ([C17209](#)). The Notice invited recipients who have questions or comments related to the 2021 Variance Application to contact the company; and company contact information was provided.
- On 31 January 2022, ITC filed a summary of comments received in response to the Notice ([C17509](#)). ITC stated that no comments were received from landowners, and that comments from agencies and non-agency organisations were related to changes in contact information, conflicting construction schedules and traffic control. Certain Indigenous communities confirmed they had no objection, while in other cases ITC noted it would continue to follow-up with specific communities in response to the concerns raised.
- In response to Commission IR No. 3, on 19 April 2022, ITC confirmed that, with the exception of HDI, no Indigenous community has expressed concerns with respect to the 2021 Variance Application ([C18646](#)).

Engagement and Consultation with Indigenous Peoples

The Commission finds that the Crown's duty to consult Indigenous peoples, including MCFN and HDI⁴, was met. As part of its analysis, the Commission relies on information provided by ITC obtained through its engagement with Indigenous peoples to understand what concerns, including any potential impacts to Indigenous and Treaty Rights, that may arise from granting the application. Additionally, the Commission received submissions directly from Indigenous peoples. Consultation in respect of this application included engagement activities conducted by ITC, the Commission's decision-making process for this application, and activities undertaken by the CER's Crown Consultation Coordinator.

Indigenous peoples potentially affected by the 2021 Variance Application were provided notice of the 2021 Variance Application and opportunities to bring forward their concerns to ITC and to the Commission. The Commission took steps to inform itself of any concerns by asking information requests of ITC regarding its engagement with Indigenous peoples, including MCFN and HDI. With the exception of HDI, no Indigenous community expressed concerns with respect to the 2021 Variance Application. Six Nations of the Grand River Development Corporation stated that it is supportive of the variance requests in the 2021

⁴ In its submissions on this record for the 2021 Variance application, HDI stated that HCCC has delegated engagement on the ITC Lake Erie Connector International Power Line Project to HDI and has tasked HDI with advancing and protecting Haudenosaunee rights and interests. For the purpose of this decision, references to HDI include HCCC unless otherwise specified.

Variance Application.⁵ Additional consultation occurred with MCFN and HDI, as outlined below.

Consultation with MCFN

The Commission finds that the Crown's duty to consult with MCFN was met. The Commission notes:

- In accordance with the Consultation Protocol Agreement⁶, the CER's Crown Consultation Coordinator notified MCFN regarding ITC's 2021 Variance Application and advised that the application is being assessed by the Commission, as confirmed by the letter filed by the CER's Crown Consultation Coordinator on REGDOCS dated 18 October 2021 ([C15504](#)).
- On 8 June 2022, MCFN filed a letter stating that it has devoted significant time and effort over many years in reviewing the proposed Project and negotiating meaningful participation in the Project to secure long-term benefits for the MCFN ([C19463](#)). MCFN submitted that it has likewise devoted time and effort to responsibly participating in the Commission regulatory process to fulfil its stewardship role and to ensure that its rights and interests relating to the Project have been meaningfully considered. MCFN requested a timely issuance of a final order by the Commission approving the 2021 Variance Application.
- On 6 July 2022, the CER's Crown Consultation Coordinator filed a letter stating that it has received confirmation that MCFN has no concerns or comments to share with the CER's Crown Consultation Coordinator in relation to the requested changes to Conditions 2 and 5 of the Certificate EC-056 and that the matter is of "low concern" under Section 4.6 of the Consultation Protocol Agreement ([C20001](#)).

Consultation with HDI

The Commission finds that the Crown's duty to consult with HDI was met. The Commission set out process steps ensuring meaningful consultation with opportunities for HDI to make submissions and raise concerns about the 2021 Variance Application. The process was robust and exceeded the consultation commonly carried out for routine variance applications where no physical change to a project is sought. HDI failed to establish or identify any potential adverse impacts on Indigenous or Treaty rights flowing from the current decision under consideration, the 2021 Variance Application. Key highlights of these consultation steps, a summary of HDI's submissions and ITC's responses, and an assessment of consultation with HDI follow.

HDI's filings in response to Notice and responses

After receiving ITC's notification of the Application, on 7 January and 27 January 2022, HDI filed comments and requested certain information:

⁵ See ITC's response to Commission IR No. 2, 25 March 2022, Attachment 3 at pdf p 71 of 71 ([C18297](#)) and filing by CER's Crown Consultation Coordinator on REGDOCS, 6 July 2022 ([C20001](#)).

⁶ As part of the 2019 Variance Application process, MCFN filed a copy of the Consultation Protocol Agreement signed by the Mississaugas of the New Credit First Nation (now MCFN) and Canada, dated September 2018. This agreement specifies the process for undertaking consultation and accommodation discussions.

- whether the federal Crown has delegated any procedural aspects of the duty to engage on this Project to the proponent;
- what steps the federal Crown has taken to meet the procedural and substantive aspects of the duty to engage the Haudenosaunee on this Project and which entity – the Crown or the proponent – carried out any of these steps;
- a meaningful opportunity to respond to any reply submissions made by ITC; and
- a meeting with the CER Indigenous Advisory Committee (**IAC**).

In its 31 January 2022 filing, ITC responded to HDI's filings, noting that:

- ITC had convened a discussion with legal counsel for the HDI on 27 January 2022 and confirmed it would consult with the HDI as required through other Crown processes, including the Province of Ontario's process to obtain tenure to the Lake Erie lakebed.
- HDI's filings did not include specifics about potential impacts arising from the 2021 Variance Application.
- potential impacts of the Project on Indigenous communities, including the HCCC, were addressed in the NEB's Reasons for Decision with respect to the Certificate hearing for the Project.

On 11 March and 19 April 2022, the Commission asked information requests to ITC, to provide specific details about all engagement activities that took place between ITC and HDI leading up to and regarding the 2021 Variance Application and a further update on engagement between ITC and HDI. In response, ITC:

- provided a table detailing engagement activities between ITC and HDI throughout the development of the Project, commencing in 2013 and up to 27 January 2022. There was some communication between the parties regarding the 2021 Variance Application ([C18297](#)). The last step shows a virtual call between ITC and HDI, noting a "discussion related to HDI's email and brief dated January 27, 2022".
- took the position that no further action was required to address HDI's letter of 27 January 2022, on the basis that HDI did not identify any specific potential impacts on its asserted rights that could result from granting the requested variances, and the potential impacts of the Project itself fell outside the limited scope of the 2021 Variance Application ([C18646](#)).
- confirmed that it remains committed to continuing good faith discussions on the content and finalization of agreements and exploring options for participation, including with HDI ([C18646-3](#)).

On 19 May 2022, the Commission responded to HDI's questions ([C19199](#)) confirming that:

- the Commission is the final decision maker for this application, pursuant to subsection 280(1) of the CER Act;
- the Commission intends to fulfill the federal Crown's duty to consult through its decision-making process;
- further process steps would be established, including an opportunity for HDI to file written submissions; and
- the Commission informed the IAC of HDI's request for a meeting.⁷

⁷ The Commission also provided HDI with information about the IAC's Terms of Reference which state that the IAC does not provide any advice on specific adjudication matters before the Commission and contact information for any further questions regarding the IAC's role.

Further Opportunity to Make Submissions

In May 2022, having reviewed HDI submissions and related responses by ITC, and with the benefit of ITC's responses to the Commission's information requests, the Commission provided HDI with an additional opportunity to provide written comments, focused on HDI's concerns related to the 2021 Variance Application and ITC's submissions regarding engagement with HDI.⁸ On 16 June 2022, HDI filed written submissions ([C19583](#)). Key points are summarized below.

Additional filings by HDI outside of Commission-established process

On 29 June 2022, HDI submitted a letter in response to ITC's final written submission dated 23 June 2022 ([C19855](#)). On 26 July 2022, HDI submitted a letter in response to the CER's Crown Consultation Coordinator filing dated 6 July 2022 ([C20250](#)).

HDI's submissions are outside of the process set out by the Commission, however ITC did not raise any concerns with the additional filings and the Commission has considered the additional submissions.

Summary of HDI's key submissions and ITC's responses

Key HDI submissions included that:

- the Project will seriously impair the exercise of established and existing rights agreed to and recorded by the Haudenosaunee and the Crown, including in the Nanfan Treaty of 1701.
- three reasons for why the 2021 Variance Application should not be approved: 1) failure of the Crown and ITC to obtain consent of the Haudenosaunee, as a requirement of the United Nations Declaration on the Rights of Indigenous Peoples (**UN Declaration**); 2) failure of the Crown and ITC to meaningfully engage with the Haudenosaunee with respect to the 2021 Variance Application and the Project as a whole; and 3) negative, real and lasting impact on Haudenosaunee rights and treaty lands, as a result of approving the 2021 Variance Application and allowing the Project to proceed in the absence of consent and meaningful engagement
- With respect to Condition 2, approving the 2021 Variance Application will have the direct impact of eroding the Haudenosaunee's treaty rights, which are comprised of procedural rights (e.g., the ability to provide—or withhold—free, prior and informed consent and to be meaningfully engaged in respect of a project), and substantive rights (e.g., hunting, fishing, trapping, and harvesting rights). With respect to the latter, the Project stands to directly impact the Haudenosaunee's substantive rights to the waters, beds of waters, and foreshore in their territory – including the lakebed of Lake Erie.
- With respect to Condition 5, where there are overlapping rights, the Crown has an obligation to deal with the affected Indigenous communities in an even-handed manner. ITC has favoured the asserted rights of MCFN to the exclusion of the

⁸ On 3 June 2022, HDI filed a letter requesting a two week extension to file HDI's written submissions. ITC filed a response opposing HDI's request. On 8 June 2022, the Commission issued its decision and granted HDI a one-week extension and similarly extended ITC's deadline ([C19466](#)).

established treaty rights and interests of the Haudenosaunee. As well, the involvement of the Six Nations Elected Council to the exclusion of the HCCC is troubling as they do not represent the rights and interests of the Haudenosaunee Confederacy. There has been no communication with HDI regarding how ITC has any legal authority to enter into commercial arrangements with MCFN or other Indigenous communities.

- HDI stated that if circumstances change, the legal landscape evolves, or new facts arise, the Crown must be prepared to revisit past decisions to ensure that it complies with its sacred treaty promises and with the Indigenous rights recognized and affirmed in section 35 of the *Constitution Act, 1982*. HDI stated that the CER, as an administrative body of the Crown, is bound by the *United Nations Declaration on the Rights of Indigenous Peoples Act*. HDI submitted that the Project was never assessed through the lens of compliance with the UN Declaration and that the CER must do so now.
- HDI also stated that ITC had failed to comply with Condition 3 of the Certificate, which requires ITC to implement all commitments. In particular, HDI stated that by failing to engage with HDI about the economic benefits and participation opportunities extended to other Indigenous groups, ITC violated Condition 3 and that such a serious violation should not be rewarded with a variance.

HDI stated that it takes issue with the 6 July 2022 filing by the CER's Crown Consultation Coordinator, submitting that it is effectively late-stage evidence. HDI states that given the execution of the Consultation Protocol Agreement between MCFN and Canada, and the absence of a similar agreement with HDI or the HCCC, the inference is that the Crown has failed to fulfill its engagement obligations and Canada has violated the Charter rights of the Haudenosaunee.

On 23 June 2022, ITC responded to HDI's principal arguments with three main submissions ([C19685](#)):

- First, the scope of the CER's assessment is limited to the impact of the specific variances being requested in the application, and that the variance request is not an opportunity to reconsider (or indirectly appeal) the NEB or CER's past decisions. While ITC acknowledged there is a continuing obligation to consult with respect to the Project, it submitted that this does not alter or expand the proper scope of the 2021 Variance Application.
- Second, HDI has registered no relevant objections to the proposed variances. HDI's concerns regarding the granting of a variance to Condition 2 are not novel adverse impacts arising from the proposed variance, but rather concerns that pertain to the Project as a whole or issues considered by previous decisions. Regarding Condition 5, ITC submitted that HDI has not identified any concerns with Lake Erie LP as the owner and operator of the Project, nor has it led any evidence that demonstrates Lake Erie LP would be an unsuitable owner and operator of the Project or unable to satisfy the conditions in the Certificate.
- Third, HDI does not have a right to veto the requested variances. ITC does not agree that HDI has been precluded from a meaningful opportunity to engage with the Crown in respect of the Project as a whole, and submitted that the evidentiary record demonstrates that HDI has been afforded numerous opportunities to engage with

ITC, the NEB/CER and NRCan⁹ at appropriate points throughout the development of the Project.

Overall, ITC submitted that HDI did not provide any explanation or evidence as to how the 2021 Variance Application would have an appreciable impact on its asserted rights or interests in the Haldimand Tract or under the Nanfan Treaty of 1701, a failure previously highlighted by ITC in its response to Commission IR No. 3. Based on the absence of any identified novel adverse impacts on HDI's rights or interests, as well as the lack of opposition from any other party and the support of other key stakeholders, ITC asked the Commission to grant the requested variances.

ITC stated that the participation of MCFN and Six Nations of the Grand River in the Project was not mandated by the Crown nor is it being done by ITC to satisfy any Crown obligation to accommodate MCFN or Six Nations of the Grand Rivers' interests. ITC stated that these are commercial matters that fall outside of the scope of this proceeding. ITC submitted that it is under no obligation to offer HDI an opportunity to participate in the Project.

Assessing consultation with HDI

The Commission considered the process undertaken and the record developed over the course of the 2021 Variance Application when assessing the adequacy of consultation with HDI. The Commission established a process that was robust, particularly so given the routine nature of the variances ITC seeks to have approved and where no physical change to the Project is sought. The only changes proposed are extending when the Project may commence construction by two years and replacing ITC with LEC GP Inc. on behalf of Lake Erie LP as the owner and operator of the Project. HDI was provided sufficient opportunities to raise concerns and provide specific information on potential impacts on its rights in respect of the 2021 Variance Application, both through ITC's engagement and with the Commission directly in its process.

HDI is required to show a causal relationship between the proposed conduct and a potential for adverse impacts on Indigenous or Treaty rights. In this case, the subject of the consultation is limited to the adverse impacts flowing from the current decision under consideration, the 2021 Variance Application.¹⁰ The Commission finds that HDI failed to identify or establish such potential impacts arising from the proposed changes to Conditions 2 and 5 despite being given multiple opportunities to do so between December 2021 and June 2022.

The Commission acknowledges that HDI raised a number of potential Project-related impacts to their Treaty rights generally, for example the loss of the opportunity to make use of their treaty land. However, the Commission is of the view that these impacts do not arise as a result of the current decision before the Commission. These potential impacts were not specifically linked to the question of varying ownership or the expiry date. Therefore, those asserted impacts are not within the scope of the 2021 Variance Application before the Commission.

HDI had opportunities to identify and articulate concerns related to the Project in prior proceedings before the NEB or as part of NRCan's consultation process. The Commission's assessment of this application is not an opportunity to revisit matters related to the Project

⁹ NRCan's Lake Erie Connector International Power Line Project [Federal Consultation and Accommodation Report](#).

¹⁰ *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, at paras 45 and 53.

which were previously decided following an extensive public hearing process. If HDI was not satisfied with the approval of the Project, it had an opportunity to pursue remedies against that decision.

As noted by ITC, the participation of MCFN and Six Nations of the Grand River in the Project is not mandated by the Crown nor is it being done to satisfy any Crown obligation for accommodation. The Commission agrees with ITC that these are commercial matters and outside the scope of the Commission's assessment in these circumstances. While the requested variance to Condition 5 may assist ITC commercially, including with respect to its cooperation with Indigenous peoples, neither the original Condition 5 nor the requested variance are principally focused on consultation or engagement matters. HDI did not identify any specific impacts arising from the proposed change to Condition 5.

In response to HDI's submissions regarding ITC's alleged non-compliance with Condition 3 of the Certificate, during the Certificate process, ITC committed to continue to engage with Indigenous communities throughout the Project, depending on the interests of potentially impacted Indigenous communities and their respective consultation protocol requirements. ITC has offered to engage with HDI since 2013, although the parties have not entered into an engagement agreement. ITC also stated it remains committed to continuing to explore options for participation in the project, including with HDI. While there is no specific commitment requiring ITC to engage with HDI about the economic benefits and participation opportunities for the Project, the Commission expects ITC will continue to fulfill its commitments and engage with impacted parties, including Indigenous peoples, throughout the construction and operation of the Project. This decision does not change these expectations.

HDI also made extensive submissions on the applicability of the UN Declaration, including specific articles. The Commission's process was informed by the UN Declaration and the CER's commitment to advancing Reconciliation¹¹. However, HDI did not provide any authority in support of the proposition that the UN Declaration applies retroactively to permit reassessing prior decisions. The Commission is of the view that the UN Declaration does not permit the Commission to reassess the original Project approval in this application. Given that no potential adverse impacts on Indigenous or Treaty rights were identified arising from the 2021 Variance Application, the Commission does not find it necessary to comment further on the parties' arguments regarding the applicability of the specific articles of the UN Declaration.

In response to HDI's submissions regarding the Consultation Protocol Agreement between Canada and MCFN, the Commission notes that consultation protocol agreements are entered into by the Government of Canada, not the Commission. Further, consultation protocols create a process to follow when consulting¹², but their existence is not itself proof of consultation for any particular decision. While HDI does not have a consultation protocol with Canada, the Commission is of the view that HDI was adequately consulted for the purposes of this application, as detailed above.

For all of these reasons, the Commission finds that the Crown's duty to consult with HDI was met.

¹¹ [Strategic Plan](#), Reconciliation Strategic Priority.

¹² For further information see the Government of Canada's webpage "[Government of Canada and the duty to consult](#)".

Assessment Pursuant to subsection 280(1) of the CER Act

Having determined the consultation was adequate, the Commission finds that the requested variances are in the public interest and approves the 2021 Variance Application, pursuant to subsection 280(1) of the CER Act. ITC has provided detailed reasons for the requested variances. The Commission also considered the submissions filed by MCFN, Six Nations of the Grand River Development Corporation, and Canada Infrastructure Bank, attesting to the benefits associated with and the need for the variances and the importance of a timely decision in this matter.

The Commission approves the extension of Condition 2. In particular, the Commission accepts, and notes no party challenged, that additional time is needed by ITC to conclude the necessary pre-construction agreements. The Commission accepts that while ITC has currently decided to suspend work on the Project, ITC still requires the requested variances in the event the work recommences in the future ([C20291](#)). The Commission notes that ITC's application sought a two-year extension to allow for the possibility that arrangements might not be in place for the anticipated 2023 construction season.

The Commission also approves the variance of Condition 5. ITC submitted that the corporate reorganization is desirable to facilitate project financing, to allow for participation by the MFCN and potentially other Indigenous communities, and to optimize tax efficiency. Multiple letters of support confirming the benefits of this variance have been received by the Commission and were not challenged directly. ITC confirmed that Lake Erie LP has been created, and that the general partner LEC GP Inc. was incorporated under the *Business Corporations Act* (Ontario).

There was no evidence filed to suggest that the variance of Condition 2 or Condition 5 would change the Project. The existing Certificate, as amended, contains 44 conditions covering a wide range of matters, including protection of the environment; socio-economic matters; emergency preparedness and response during the lifecycle of the Project; and reliability and safety of the Project. The original conditions attached to the Certificate and the amended and added conditions in Amending Order AO-001-EC-056 remain and will require the Project to be designed, constructed and operated in a manner which would be safe and protect people and the environment. The conditions in place have also been designed to help to avoid, mitigate or otherwise accommodate for adverse Project impacts on the rights of Indigenous peoples.

The Commission is of the view that the Certificate is being transferred such that the Commission's approval of the transfer is required under subsection 280(1) of the CER Act and under Condition 6 of the Certificate. The Commission's approval of the 2021 Variance Application includes approval of the transfer.

C. Conclusion

For the reasons above, the Commission approves the 2021 Variance Application and issues Amending Order AO-002-EC-056.

With respect to Condition 2, unless the Commission otherwise directs prior to 26 June 2024, this Certificate shall expire on 26 June 2024 unless construction in respect of the Project has commenced by that date.

With respect to Condition 5, the Commission approves the transfer of the Certificate and variance of Condition 5 of the Certificate to replace ITC with LEC GP Inc. on behalf of Lake

Erie LP. The Certificate's conditions will remain and be the responsibility of LEC GP Inc. on behalf of Lake Erie LP.

The Commission directs ITC to serve a copy of this letter and the Amending Order on all interested parties.

Yours sincerely,

Signed by K. McAllister for

Ramona Sladic
Secretary of the Commission

Attachment

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