

**Re: Yellow Falls Power Limited Partnership  
Application for Leave to Construct a Transmission Line  
Board File No. EB-2009-0120**

**Replies of Wabun Tribal Council to Interrogatory of Board Staff on its Evidence in this proceeding (September 3, 2009):**

**Interrogatory #1:**

**Reference:** Evidence package filed by the Wabun Tribal Council (“WTC”).

**Preamble:** The evidence filed by WTC largely focuses on the extent of the traditional territories of the member First Nations of the WTC. The maps provided with the evidence show that the transmission line that is the subject of the leave to construct application before the Board (the “Project”) is within this territory. The covering letter indicates that, at least for the Mattagami First Nation, this territory may be taken to include territory used for hunting, fishing and trapping.

**Question:**

1. What, if any, specific actual or potential adverse impacts to WTC member First Nations’ Aboriginal or treaty rights, or interests in land, does the WTC foresee arising from the Project itself (i.e. the subject of the leave to construct application currently before the Board)? Please specify the potential impacts resulting directly from the Project on hunting, fishing, trapping, gathering, or any other proven or asserted Aboriginal or treaty right?

**Reply:**

Replying to this question necessarily involves some speculation as the nature and extent of the potential adverse effects, should the application be approved, on the rights under Treaty No. 9 of the Mattagami First Nation and other First Nations of the Wabun Tribal Council. In the case of the application to construct a transmission line and conduct ancillary work, these effects can be expected to be primarily on hunting rights. The effects on game of fairly significant changes to the environment are necessarily difficult to predict.

The application requests approval of not only 25 km of transmission line, but also construction of a Customer Transformer Station at the facility and a Customer Switching Station at the interconnection with Hydro One. The project will entail, if approved, construction of approximately 10 km of new road with two new bridges. An existing bridge is to be replaced. All of this will occur within the traditional territory of the Mattagami First Nation. It can be expected to have significant and unpredictable impacts on the population and habits of game over a tract much wider than the right of way for the line and accompanying access road. The effects will include, but may not be limited to, reduction or elimination of game population in the vicinity of the proposed line due to line clearing and subsequent line construction, construction of the two structures, construction of the new road and, and inspection and maintenance trips by road or air after construction. The effects of the construction alone may well be long-lasting or

even permanent, and it is obvious that the ongoing effects on game of an open swath for the line and new road, as well as operation and inspection of the line, will be permanent.

Treaty No. 9 provides that the First Nation signatories to the treaty, which includes the members of the Wabun Tribal Council, “shall have the right to pursue their usual vocations of hunting trapping and fishing throughout the tract surrendered,” subject to “taking up” for various purposes. The Supreme Court of Canada, in decisions of 2004 and 2005, has decreed that the taking up of “tracts” shall occur only following direct consultation and accommodation with affected First Nations. In general, any taking up reduces the area over which the treaty rights may be exercised, and is therefore a loss of rights that must be mitigated by either project modification or compensation for the loss. In this case, it is difficult to envisage project modification that could address these losses.

The question of adverse effect on the rights of the members of the Wabun Tribal Council is a matter to be addressed by the direct consultation and accommodation process that has been set out by the Supreme Court. This has yet to occur at the requisite level of detail. Adverse effects would be disclosed in greater detail under the requisite consultation process.

As previously submitted, consultation is primarily the responsibility of the Crown in the form of the government of Ontario. It continues to be the respectful position of the Wabun Tribal Council that this application should not be granted by the Board absent assurance from each agency involved in the approval of relevant permits, etc., that adequate consultation has occurred, and that the Wabun Tribal Council concurs.

It is appropriate to conclude with the following passage from a recent decision of the Superior Court of Ontario. Finding that the Kitchenuhmaykoosib Inninuwug First Nation had met the test for irreparable harm in its injunction application against exploration by Platinex Inc., Mr. Justice G. P. Smith wrote as follows:

It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, the relationship that Aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.

*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2006),  
272 D.L.R. (4<sup>th</sup>) 727 at para. 80.