



EB-2009-0120

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S. O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an application by Yellow Falls
Power Limited Partnership for and Order granting leave to
construct a transmission line connecting a 16 megawatt
waterpower project to transmission system of Hydro One
Networks Inc.

PROCEDURAL ORDER NO. 3

Yellow Falls Power Limited Partnership (the "Applicant" or "YFP") has filed an application with the Ontario Energy Board (the "Board") dated April 27, 2009 under section 92 of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B. The Applicant has applied for an order of the Board granting leave to construct transmission facilities (the "Project") connecting a 16 megawatt run-of-the river waterpower generation station located at Yellow Falls to the transmission system owned by Hydro One Networks Inc. ("Hydro One").

The Application has been assigned Board File No. EB-2009-0120.

On July 24, 2009, the Board issued Procedural Order No.1, in which the Board granted the Wabun Tribal Council ("WTC") intervention status as well as its request for cost eligibility, subject to various restrictions described in that Order. On August 5, 2009 the Board received a letter from the WTC questioning the limits imposed by the Board on the scope of the proceeding, and asked that the Board reconsider its decision to proceed by way of a written hearing. WTC also indicated that it wishes to present both written and oral evidence in this proceeding.

On August 17, 2009 the Board issued Procedural Order No. 2 setting out the procedural steps for submission and examination by parties of WTC's written evidence. The Board indicated that it would make a determination on the necessity of oral evidence at a later date.

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On August 20, 2009 the Board issued a letter to all parties to address issues raised by WTC in two letters dated August 13, 2009 and August 18, 2008, and the Applicant in a letter dated August 19, 2009. The main issue raised by WTC concerned its view of Board's role in assessing the Crown's duty to consult Aboriginal peoples (specifically the WTC) for the Project. The Board directed that parties could make argument on this issue at the conclusion of the evidentiary portion of the proceeding. In this respect, WTC would be permitted to file any evidence which it wished to rely upon for purposes of its argument on this issue. The Board also confirmed that the filing deadlines established in Procedural Order No. 2 remained in effect.

The submission of evidence by WTC, filing of interrogatories by the Applicant and Board staff, and responses by WTC was completed on September 11, 2009.

On September 21, 2009 the Board received a letter from Mr. Merv McLeod on behalf of the Taykwa Tagamou Nation ("TTN"), requesting an opportunity to prepare detailed written response to the evidence submitted by WTC with regard to the respective interests in the lands potentially affected by the Project. TTN requested two weeks to prepare the submission.

The Board will grant TTN intervenor status so it can participate in this proceeding going forward.

As outlined in its letters to the Board and in its interrogatory responses, WTC's concern regarding the Project is that the Crown's duty to consult with the WTC has not yet been satisfied. WTC asks that the Board decline to approve the Project until such consultations (and possibly accommodations) have been completed with respect to all approvals (including the environmental assessment) for the Project. All of WTC's evidence has been focused on this issue. None of its evidence addressed the effects of the Project on the price, reliability, or quality of electrical service. Similarly, given that the TTN wishes only to respond to the evidence of WTC, its interest is also focused exclusively on the adequacy of the consultation undertaken by the relevant Crown agencies.

The Board has concluded that it should not make provision for additional procedural steps relating to additional evidence on this issue (whether it be the oral hearing requested by the WTC or the request by the TTN to file a response to the WTC's written evidence) without first determining the extent of its jurisdiction to consider such issues.

The Board has therefore decided that it will seek submissions from the parties, including Board staff, on the following legal questions:

1. What is the scope of the Board's jurisdiction to consider issues relating to the duty to consult in a section 92 leave to construct application?
2. Is the Board's jurisdiction to consider the adequacy of the consultation, and possible accommodation, limited to the public interest criteria governing the Board's assessment of a leave to construct application (price, reliability and quality of electrical service)?
3. Does the Board have the jurisdiction to consider the adequacy of the consultation, and possible accommodation, in relation to approvals and processes beyond the leave to construct proceeding, including the environmental assessment, the various permitting processes of the Ministry of Natural Resources, and any other activity or approval undertaken by a Crown entity in connection with the Project? If the Board does have the requisite jurisdiction, how should it be exercised and how should it be aligned with the other related approval and permitting processes, for example the environmental assessment process?

These questions relate to the Board's jurisdiction, and are purely legal in nature. After the Board rules on these questions, it will determine what additional procedural steps may be required. If the Board decides that issues relating to the adequacy of consultation in the environmental assessment and other permit and approval processes are within the scope of this proceeding, it may make provision for the filing of evidence from TTN and perhaps an oral component to the proceeding to hear evidence from WTC. Otherwise, the Board may move directly to the final submissions stage of the hearing. A procedural order will follow the decision to establish the appropriate procedural steps.

THE BOARD ORDERS THAT:

1. Board staff will file its submission in regard to the questions listed above, and deliver copies to all parties on or before **Friday, October 9, 2009**.

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2. Intervenor who wish to make submissions on the questions, may do so by filing such submissions with the Board, and deliver copies to Applicant and other parties on or before **Tuesday, October 13, 2009**.
3. Applicant may reply to the parties' submissions on the questions, by filing such reply submissions with the Board, and deliver copies to all parties on or before **Tuesday, October 20, 2009**.
4. All filings to the Board noted in this Procedural Order must be in the form of 2 hard copies and **must be received by the Board by 4:45 p.m. on the stated dates**. An electronic copy of the filing must also be provided. If you already have a user ID, the electronic copy of your filing should be submitted through the Board's web portal at www.errr.oeb.gov.on.ca. If you do not have a user ID, please visit the "e-Filing Services" page on the Board's website at www.oeb.gov.on.ca and fill out a user ID password request. For instructions on how to submit and naming conventions, please refer to the RESS Document Guidelines also found on the "e-Filing Services" webpage. If the Board's web portal is not available, the electronic copy of your filing may be submitted by e-mail at Boardsec@oeb.gov.on.ca. Those who do not have internet access are required to submit the electronic copy of their filing on a CD or diskette in PDF format.

ISSUED at Toronto on September 29, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Appendix 'A'
to
Procedural Order No. 3
Addresses of Applicant and Intervenor
EB-2009-0120

September 29, 2009

Appendix "A"

**YELLOW FALLS POWER LIMITED PARTNERSHIP
LEAVE TO CONSTRUCT
EB-2009-0120**

LIST OF APPLICANT AND INTERVENOR

September 29, 2009

Applicant	Rep. and Address for Service
Yellow Falls Power Limited Partnership	Yellow Falls Power Limited Partnership c/o Scott Hossie Ontario Manager-Environmental Canadian Developers, Inc. 34 Harvard Road Guelph ON N1G 4V8 Tel: 519-826-4645 Fax: 519-826-4745 Email: shossie@canhydro.com
AND APPLICANT'S COUNSEL	Sharon Wong Blake, Cassels & Graydon LLP Barristers & Solicitors Box 25, Commerce Court West 199 Bay Street, Suite 2800 Toronto ON M5L 1A9 Tel: 416-863-4178 Fax: 416-863-2653 Email: sw@blakes.com
Intervenor	Rep. and Address for Service
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AND

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