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August 13, 2009

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

WITHOUT PREJUDICE

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

I have been retained in this matter by the Wabun Tribal Council, which acts on behalf of the Mattagami, Flying Post and Wahgoshig First Nations. I write in respect of Procedural Order No. 1 of July 24, 2009, and refer also to your letter to Mr. Jason Batise of August 6, 2009.

I enclose, in two copies, a brief in which the Council respectfully makes two requests:

1. That the Board reconsider its decision to decline to consider Aboriginal consultation issues in relation to the application; and
2. That the Board exercise its discretion to hold an oral hearing in this matter, preferably in Timmins, at which the Council or the First Nations could present oral evidence of Chiefs and certain elders respecting potential adverse effects on their treaty rights entailed by approval of the application.

On the former point, you will see that the Council's position, in essence, is that there exists an obligation on the Board, as the final decision maker, to ensure that the constitutional duty to consult and, as appropriate, accommodate is met.

On the latter point, the Council is encouraged by the possibility of an oral hearing in this matter, as mentioned in your August 6 letter.

Yours truly,

John Edmond

c.c. Mr. Jason Batise, Wabun Tribal Council

Mr. Scott Hossie, Canadian Hydro Developers, Inc.

Ms. Sharon Wong, Blake, Cassels & Graydon LLP

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 an Order granting leave to construct a transmission line connecting a 16 megawatt waterpower project to transmission system of Hydro One Networks Inc.;

AND IN THE MATTER OF

ONTARIO ENERGY BOARD PROCEDURAL ORDER NO. 1

(July 24, 2009)

SUBMISSION TO THE ONTARIO ENERGY BOARD OF THE WABUN TRIBAL COUNCIL ON BEHALF OF THE MATTAGAMI, FLYING POST AND WAHGOSHIG FIRST NATIONS

The Wabun Tribal Council respectfully requests,

1. That the Ontario Energy Board reconsider its decision to decline to consider Aboriginal consultation issues in relation to the Yellow Falls leave to construct application (the Application);

2. That the Ontario Energy Board exercise its discretion to hold an oral hearing in reasonable proximity to the three First Nation communities herein represented.

CONSULTATION:

1. The First Nations comprising the Council are signatories to and beneficiaries of Treaty No. 9, under which pursuit of "the usual vocations of hunting, trapping and fishing" is protected, subject to "taking up" for various purposes.

2. The Application is a case of taking up, and as such is subject to the constitutional duty to consult the First Nations whose treaty rights are subject to adverse effect and appropriately accommodate their interests.

   Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69; [2005] 3 S.C.R. 388.

3. The Application is an application under s. 92 of the *Ontario Energy Board Act, 1998* (the Act).

4. The Board adverts to its jurisdiction in such applications as given by s. 96(2) of the Act:

   > In an application under s. 92, the Board shall only consider the interests of consumers with respect to prices and the reliability of and quality of electricity service when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection is in the public interest.

5. The Board relies on this provision for the proposition that this is a limitation on its jurisdiction to determine whether consultation has been sufficient: "This limitation means that, generally speaking, the Board does not have the jurisdiction to explore issues related to the EA [Final Environmental Assessment Report] approval." Procedural Order No. 1 goes on to explain, as the Council understands it, that the Application will be approved provided, (1) All necessary permits and authorizations have been acquired, and (2) The EA has been completed. In other words, with respect, approval will be essentially a mechanical exercise conditional on acquisition of permits and authorizations and completion of the EA, without any consideration of whether the constitutional duty to consult arguably affected Aboriginal communities has been discharged.

6. The Wabun Tribal Council ("the Council") does not put in issue whether the public interest would be served by approval of the Application. The Council asks only that the three First Nations be consulted adequately with respect to accommodation of their treaty rights, and that appropriate accommodation be made before approval occurs. Thus, in the submission of the Council, in dealing with the consultation requirement the Board is not

addressing whether the construction and interconnection are in the public interest, but rather is required to ensure that a constitutional duty is discharged.

7. Section 96(2) of the Act is therefore not engaged; rather, what is engaged is the constitutional duty of the Crown to consult and, as apprprite, accomodate affected Aboriginal communities. As a constitutional duty, the duty to consult, where applicable, overlies statutory provisions and informs their construction.

8. In any case, the public interest should not be so limited where a constitutional duty is at stake. In that regard, the following passages from the decision of the British Columbia Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* are apposite:

> 42 Section 71 of the *Utilities Commission Act* focuses on whether the EPA is in the public interest. I think the respondents advance too narrow a construction of public interest when they define it solely in economic terms. How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry. In saying that, I do not lose sight of the fact that the regulatory scheme revolves around the economics of energy: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4; [2006] 1 S.C.R. 140 (S.C.C.), and that Aboriginal law is not in the steady diet of the Commission. But there is no other forum more appropriate to decide consultation issues in a timely and effective manner.
>
> 51 Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.
>
> 53 If First Nations are entitled to early consultation, it logically follows that the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation.
>
> 2009 BCCA 67

9. While the context of that case is not identical to that of the Application, it is submitted that the general propositions are valid, namely, (1) that the public interest requires discharge of a constitutional duty, and (2) that the Board, as the Crown entity with final authority over the matter, has the obligation to ensure that this duty is discharged.

10. Quite apart from this free-standing constitutional duty, administrative tribunals like the Board, in the words of the Supreme Court in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, contrast with the courts in the following way: Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. 2001 SCC 52 at para. 24

11. It is clear that Ontario government policy is to expressly take steps to recognize the duty to consult. The recently-enacted *Green Energy Act, 2009*, contains the following interpretive provision:

> **1(2) Interpretation**
> This Act shall be interpreted in a manner that is consistent with section 35 of the Constitution Act, 1982 and with the duty to consult aboriginal peoples.

Similar provisions are to be found in Bill 173, *Mining Amendment Act, 2009*, at s. 2, and Bill 191, *Far North Act, 2009*, at s. 3, currently in the legislative process.

12. It is therefore respectfully submitted that the Board should amend its Order to provide that, upon determination that all necessary permits and authorizations have been acquired and the EA completed, it will determine whether the constitutional duty to consult and, as appropriate, accommodate has been met. Indeed, it is submitted that the Board has a duty to so determine.

ORAL HEARING:

13. In Procedural Order No 1 of July 24, 2009, the Board states, "The Board has considered WTC's request for an oral hearing, but has determined that a written hearing is appropriate in this case."

14. Ms. Kristin Walli, Board Secretary, subsequently wrote to Mr. Jason Batise, Technical Services Advisor, Wabun Tribal Council. In her letter of August 6, 2009, Ms. Walli advised, "the Board may make provision for an oral hearing after reviewing WTC's written evidence, if it determines that this is warranted."

15. The importance of oral evidence in the resolution of Aboriginal issues is well-established in the case law.

R. v. Van der Peet, [1996] 2 S.C.R. 507;
Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

16. The Council and the First Nations therefore welcome the openness of the Board to the possibility of oral evidence.

17. Should the Board convene an oral hearing, the Council will call the Chiefs of the three First Nations: Chief Walter Naveau of the Mattagami First Nation; Chief Murray Ray of the Flying Post First Nation, and Chief David Babin of the Wahgashig First Nation. These witnesses would speak to the current use of the treaty No. 9 lands. The Council would also propose to call one or two elders from each of the First Nations, to speak to the cultural importance of the area in question as a part of the traditional lands of the Wabun First Nations within Treaty No. 9.

18. It is self-evident that this important evidence, especially that of elders, cannot be received by the Board without an oral hearing in the vicinity of the communities, presumably in Timmins as the most central larger community in the area.

19. The purpose of the proposed evidence would be to demonstrate the interest of the First Nation communities in the area covered by the Application.

20. The Wabun Tribal Council therefore respectfully requests that the Board convene an oral hearing in respect of the Application.

All of which is respectfully submitted on behalf of the Wabun Tribal Council,

John B.H. Edmond
Counsel to the Wabun Tribal Council

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