Ontario Energy Board

Commission de l'energie de l'Ontario

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 a review 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 the transmission system of Hydro One Networks Inc.

BEFORE: Cynthia Chaplin
Presiding Member

Ken Quesnelle
Member

Paul Summerville
Member

DECISION AND ORDER

Application and Proceeding

Yellow Falls Power Limited Partnership (the "Applicant" or "YFP") 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 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 Project consists of 25 kilometres of 115 kilovolt ("kV") overhead transmission line, a customer transformer station stepping up voltage from 13.8 kV to 115 kV, and a customer switching station at the point of interconnection with Hydro One's transmission system.

The Application was 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") intervenor status and found it to be eligible for a cost award, subject to various restrictions described in that Order. Procedural Order No. 1 also set out procedural steps for interrogatories on the Applicant's pre-filed evidence and for WTC to indicate by August 7, 2009 if it intended to file evidence.

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 wished to present both written and oral evidence.

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

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, 2009, and the Applicant in a letter dated August 19, 2009. In that August 20, 2009 letter, the Board also confirmed that the filing deadlines established in Procedural Order No. 2 remained in effect. Board staff submitted interrogatories on the application, and YFP provided responses. WTC submitted evidence and responded to interrogatories from YFP and Board staff.

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 a 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 granted TTN intervenor status.

The Board recognized that the interest of WTC and TTN focused exclusively on the adequacy of the Aboriginal consultation undertaken by the relevant Crown agencies and the related land interests. The Board concluded that it should not make provision for additional procedural steps relating to additional evidence on these issues without first determining the extent of its jurisdiction to consider such issues.

On September 29, 2009, the Board issued Procedural Order No.3 which solicited submissions from the parties with respect to three questions related to the Board's

jurisdiction with respect to Aboriginal consultation. The Applicant, WTC, and Board staff made submissions on these questions.

On November 18, 2009 the Board issued its Decision on Questions of Jurisdiction and Procedural Order No. 4 (the "Jurisdiction Decision"). A copy is attached at Appendix A. In summary, the Board found that it did not have jurisdiction to consider the Aboriginal consultation issues raised by WTC. The Board also determined that it did not need to hear oral evidence from WTC, and similarly, that there was no requirement for responding evidence from TTN.

Procedural Order No. 4 also made provision for the filing of submissions on the application itself. The Board indicated that TTN could file a submission if it chose, and that it would be eligible for an award of costs to the extent its submission was within the scope of the Board's proceeding, namely the criteria established in section 96(2) of the Act.

Board Findings

Section 96(2) of the Act provides that for an application under section 92 of the Act, when determining if a proposed work is in the public interest, the Board shall only consider the interests of consumers with respect to prices and reliability and quality of electricity service, and where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. In the context of this Application, the Board has considered the following matters:

- Project need
- The System Impact Assessment and the Customer Impact Assessment reports
- Impact on ratepayers
- Land matters and Environmental Assessment

Project need

YFP indicated in its application that it had originally intended to construct a 20 MW generating station at Island Falls, some 3 km from the site of construction for the current application. In response to Board staff Interrogatory no. 1, YFP advised that, "the Island

Falls Project was awarded an RES II contract by the Ontario Power Authority ("OPA"), but that the RES II contract is valid only for projects greater than or equal to 20 MW …". YFP also indicated in its original application that it intended to contract the sale of electricity from the current project through the OPA's proposed Feed-in-Tariff ("FIT") procurement program.

Board staff noted that YFP had not provided evidence to indicate that a FIT contract has been executed, or if an application has even been submitted. Based on this information, Board staff submitted that since the application has included neither a RES II contract nor a FIT contract, and the Applicant has provided no evidence of authority to access the Grid for the power from the proposed generating station. In Board staff's view, these documents must be filed so as to demonstrate project need for the associated transmission facilities before the Board can make a final determination on this application.

YFP responded:

> *OPA has advised YFP that OPA prefers contracting through amendments of the existing RES II contract to reflect the revised project characteristics. YFP and OPA are in the midst of finalizing the amendments to the YFP's RES II contract. YFP is willing to agree to file with the Board confirmation of the signing of a contract with OPA as condition of leave to construct. YFP submits that there is no need for YFP to file a complete copy of the contract with the Board as it will contain sensitive information (such as pricing) which is not relevant to any issues before the Board.* [1]

The presence of a contract for sale of power to the OPA is a pre-requisite to ensure the transmission facilities are in fact required. The Board will accept YFP's proposed condition of approval regarding the provision of confirmation that a contract has been executed with the OPA for the associated generation, and will require YFP to file the contract if the Board so directs.

[1] Applicant Reply Submission dated December 1, 2009, page 2, item 3

System Impact Assessment ("SIA") and Customer Impact Assessment ("CIA")

The Board's filing requirements for transmission and distribution applications[2] specify that the Applicant is required to file a System Impact Assessment ("SIA") performed by the IESO and a Customer Impact Assessment ("CIA") performed by the relevant licensed transmitter, in this case Hydro One Networks Inc.

YFP filed an SIA, from the Independent Electricity System Operator ("IESO"), which was prepared for the "Island Falls Project" which YFP had originally planned to construct. However, the current Project is at a different location and has been reduced in size from 20 MW to 16 MW. YFP also provided a CIA report[3] which is also based on the "Island Falls Project".

Board staff noted that YFP's response to Board staff Interrogatory No. 1 did not clearly indicate when the SIA and CIA documents for the Project would be completed and provided to the Board. Board staff submitted that approval of the Project should be conditional on the Board receiving the final SIA and CIA reports for the Yellow Falls project. Board staff was also of the view that given the importance of the SIA and CIA to a section 92 application, it might be necessary for the intervenors or Board staff to review or otherwise make submissions on the CIA and SIA once they are filed.

With respect to the SIA, YFP's responded as follows:

> *The Independent Electricity System Operator ("IESO") issued a SIA Report July 6, 2006, a copy of which is provided at Tab 13 of the Pre-filed evidence. That SIA report was issued based on the previous design with the dam and power house at Island Falls, rather than the present location at Yellow Falls. However, although the dam was relocated, there is no material changes to the design of the project that affected the SIA. The generator and associated parameters will remain the same as the generator manufacturer is proposing the same model of generator for updated design. IESO has confirmed that the July 6, 2006 SIA is still valid in these circumstances (see attached email chain between IESO and Canadian Hydro).* [4]

[2] Filing Requirements for Transmission and Distribution Applications, November 14, 2006, Section 4.3.8 (System Impact Assessment), and Section 4.3.9 (Customer Impact Assessment
[3] Applicant's Pre-filed evidence, dated October 6, 2009, Tab 14, CIA, Revision 1 Report by Hydro One Networks Inc.
[4] Applicant Reply Submission dated December 1, 2009, page 2, item 4

YFP also submitted that if circumstances change and the IESO decides that a revision to the SIA is needed, YFP is willing to file with the Board any revised SIA as a condition of approval for the application. YFP also indicated that the requirements contained in the SIA will be met in the construction of the facilities.

The Board will require YFP, as a condition of approval, to file an updated SIA report reflecting the new location or a letter from the IESO confirming that the July 6, 2006 SIA is still valid.

With respect to the CIA, YFP responded:

> Changes may be needed to the CIA as a result of the reduction in generation capacity from the earlier Island Falls proposal to the Yellow Falls Project. YFP has contacted Hydro One to determine what changes may be needed. It is expected that if changes are needed those changes would make it easier for YFP to comply because Yellow Falls Project has lower generating capacity than the earlier proposal. The requirements contained in the updated CIA will be adhered to in the construction of the proposed facilities."[5]

The Board will require YFP, as a condition of approval, to file updated CIA report reflecting the new location or a letter from the Hydro One Networks Inc. confirming that the October 6, 2006 CIA is still valid.

Impact on Ratepayers

The Application indicates that the proposed facilities will be paid for and owned by the Applicant and the project will therefore have no impact on transmission rates in Ontario. The Board accepts this evidence.

Land Matters and Environmental Assessment

The evidence shows that Notice was properly served on all parties as directed by the Board, including four landowners whose properties are in the vicinity of the proposed project, TTN, and WTC representing three Aboriginal Communities.

[5] Applicant Reply Submission dated December 1, 2009, page 2, item 8

YFP's evidence indicated that the proposed transmission facilities are located on Crown Lands and that the four landowners[6] are either abutting the right of way, or near the right of way, but are not directly affected by it, and therefore no Easement Agreements are needed.

The final Environmental Assessment Report[7] ("EAR") was released on February 18, 2009, and the Notice of Completion review and comment period ended on March 20, 2009. Opposition to the final EAR and a "Bump-Up" request, to conduct an individual environmental assessment,[8] was made on March 13, 2009 to the Ministry of Environment by the WTC on behalf of three First Nation Communities.[9]

The Board notes that construction of the transmission line and related facilities cannot begin until the process stipulated in the *Environmental Assessment Act* is completed. Accordingly, the Conditions of Approval will include a requirement to file with Board evidence that the process stipulated by the *Environmental Assessment Act* is completed.

Conclusion

Having considered all of the evidence related to the application, the Board finds YFP's proposed transmission line project to be in the public interest in accordance with the criteria established in section 96(2) of the Act.

YFP requested that its leave to construct be granted for a period of at least 12 months, due to the uncertainty regarding the completion of the Environmental Screening Process. The Board will grant the request.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of Act, Yellow Falls Power Limited Partnership is granted leave to construct electricity transmission facilities, as described in the first paragraph of this Decision and Order, connecting the 16 MW waterpower Project at Yellow Falls to the transmission System owned by Hydro One Networks Inc. near

[6] Applicant's Pre-filed evidence, dated April 27, 2009, Tab 1, Schedule B & Tab 4 (Map showing the 4 private lands near the interconnection point)
[7] Applicant's Pre-filed evidence, dated April 27, 2009, Tab 2, pages 25- 26
[8] Applicant's Pre-filed evidence, dated April 27, 2009, Tab 12
[9] First Nations of Mattagami, Flying Post and Wahgoshig are listed in the March 13, 2009 letter from WTC to the Ministry of Environment requesting "Bump-Up", individual environmental assessment, for the proposed Project.

the Town of Smooth Rock Falls, subject to the Conditions of Approval attached as Appendix B to this Order.

2. Wabun Tribal Council and Taykwa Tagamou Nation may file with the Board by Tuesday, December 29 2009 their respective cost claims, subject to the restrictions which have been placed upon their cost eligibility, and in accordance with the Board's Practice Direction on Cost Awards. A copy of each cost claim shall be sent to Yellow Falls Power Limited Partnership.
3. Yellow Falls Power Limited Partnership may object to either cost claim no later than **Friday, January 8, 2010**, by filing its submission with the Board and delivering a copy to the intervenor in relation to whose cost claim the objection is made.
4. If an objection to an intervenor's cost claim is filed, that intervenor will have until **Tuesday, January 19, 2010** to make a reply submission to the Board, with a copy to Yellow Falls Power Limited Partnership as to why its cost claim should be allowed.
5. Yellow Falls Power Limited Partnership shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.
6. All filings to the Board noted in this Decision and 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 December 16, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

DECISION ON QUESTIONS OF JURISDICTION
AND PROCEDURAL ORDER NO. 4 -
[Issued November 18, 2009]

Yellow Falls Power Limited Partnership
Transmission Line and Associated Transmission Facilities (the "Project")
EB-2009-0120

DATED: December 16, 2009

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

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 a review 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 the transmission system of Hydro One Networks Inc.

DECISION ON QUESTIONS OF JURISDICTION AND PROCEDURAL ORDER NO. 4

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 was assigned Board File No. EB-2009-0120.

Introduction

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. The Procedural Order called for interrogatories on the pre-filed Applicant evidence to be submitted by August

7, 2009, and for WTC to indicate by August 7, 2009 if it is their intention to file evidence. The Applicant was ordered to file responses to interrogatories by August 17, 2009.

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. WTC was ordered to file evidence by August 28, 2009, and interrogatories on that evidence were ordered filed by Friday September 4, 2009. Responses from WTC were to be received by September 11, 2009.

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 in these letters concerned its view of the 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.

Board staff submitted interrogatories on the application. YFP provided responses to the interrogatories by August 17, 2009. WTC submitted evidence on August 27, 2009. YFP and Board staff submitted interrogatories to WTC. WTC provided responses to the interrogatories by 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 a 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 granted TTN intervenor status to participate in this proceeding going forward.

The interest of WTC and TTN focused exclusively on the adequacy of the Aboriginal consultation undertaken by the relevant Crown agencies and the related land interests. The Board 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.

On September 29, 2009, the Board issued Procedural Order No.3 which solicited submissions from the parties with respect to three 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 be exercised and how should it be aligned with the other related approval and permitting processes, for example the environmental assessment process.

The applicant, Yellow Falls Limited Partnership, the intervenor Wabun Tribal Council ("WTC"), and Board staff made submissions on these questions.

This decision and order contains the Board's findings on these issues and makes provision for the next procedural steps in this application.

Background

The Yellow Falls Limited Partnership proposes to build transmission facilities associated with a hydroelectric generation project to be located on the Mattagami River in northern Ontario. Section 92 of the *Ontario Energy Board Act* (the "Act") requires proponents of

such projects to procure an order of the Board authorizing construction of such transmission facilities.

The statute also contains the criteria that the Board is required to consider in making its determination. Put simply, the Board is directed by the statute to limit its consideration of the public interest associated with the project to issues directly related to the price of electricity, and the quality and reliability of the electricity system, and whether the application is consistent with government policy in the area of renewable energy sources.

The sole focus of all of the materials filed in this case by WTC is the assertion that the proponent and the relevant provincial agencies have to date failed in their respective obligations to consult with and possibly accommodate WTC. WTC cites decisions of the Supreme Court of Canada creating obligations to consult and accommodate Aboriginals where Aboriginal or treaty rights may be impacted by projects.

None of the materials filed by WTC address the issues stipulated by section 96(2) of the Ontario Energy Board act referred to above, that is the price, reliability or quality of electrical service, and whether the application is consistent with government policy in the area of renewable energy sources.

Given this circumstance, the Board decided to consider, as a preliminary matter, the scope of its jurisdiction to address Aboriginal consultation issues in this proceeding, which is the sole issue of interest to WTC.

The evidence filed by the applicant in support of its application reveals the following information. The applicant has filed a final environmental assessment for stakeholder, Aboriginal, and Ministry of Environment review. This final version of the Environmental Assessment incorporated a number of changes that had been adopted by the applicant in response to community and government agency comments and concerns.

The final environmental assessment was subject to a review and comment period. During that comment period the WTC requested that the Ministry of the Environment not approve the project and requested that the assessment be elevated or “bumped up” for

a more searching and detailed review. The grounds for the WTC request related exclusively to WTC's view that the company and the province had failed in their respective obligations to consult and accommodate Aboriginals in a manner consistent with the guidance provided by the Supreme Court of Canada.

It is to be noted that the proponent, Yellow Falls Limited Partnership has entered into an arrangement, described as a "business to business agreement" with the Taykwa Tagamou Nation ("TTN"), also an intervenor. TTN is another Aboriginal organization asserting rights associated with the lands upon which the transmission facilities will be built. From the materials filed it can be said that WTC and TTN each assert that their traditional lands include lands impacted by the application.

Positions of the Parties

Board staff's submission is that the Board lacks jurisdiction to consider matters relating to the adequacy of consultation and accommodation beyond those related to the criteria in section 96(2) of the Act. This view is rooted in the interpretation of the relevant statutes and the direction provided by the Supreme Court of Canada.

Section 92 of the Ontario Energy Board Act provides as follows:

> ***92. (1)*** *No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.*

The criteria which the Board may consider in its consideration of leave to construct applications are described in section 96:

> **96. (1)** If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

Applications under s. 92

> **(2)** In an application under section 92, the Board shall only consider the following 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:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

Section 19 of the Act provides that the Board is empowered to determine questions of fact and law within its jurisdiction.

In providing its direction the Supreme Court of Canada indicated that, where the tribunal has been endowed with the power to determine questions of law it has an innate jurisdiction to consider constitutional issues, such as the adequacy of consultation, even though its enabling statute does not bestow any specific authorization for the exercise of such jurisdiction. In Board staff's view, the authority of a tribunal to determine questions of law serves as kind of essential qualification for the exercise of the innate jurisdiction to determine constitutional issues.

It is Board staff's view that because the legislature has so closely prescribed the matters which may be considered in its disposition of a leave to construct application, all other factors fall outside of its jurisdiction. Board staff submits that the power to determine questions of law therefore does not apply to any matter outside of the criteria enumerated under section 96(2) of the Act. In Board's staff's view this has the effect of removing the Board's authority to determine questions of law with respect to any other matter, and it has no innate authority, in cases subject to this limitation, to address any constitutional issues, such as the adequacy of consultation with Aboriginals in any area outside of the enumerated criteria.

As to Question 3, Board staff argues that the Board has no jurisdiction to supervise the actions of Crown agencies, nor would it be efficient for it to do so.

WTC rejects Board staff's argument. WTC's position can perhaps best be represented by a brief quotation from its submission:

> *Irrespective of the strict statutory interpretation issue, it is submitted that, as a constitutional duty, the duty to consult, where applicable, overlies statutory provisions and informs their construction.*

In other words, WTC asserts that the limits placed on the Board's jurisdiction with respect to leave to construct cases have no effect on the Board's obligation to address disputes related to the duty of Crown agencies to consult and possibly accommodate Aboriginals. In its view, the duty to assess the adequacy of consultation stands alone, unaffected by limitations imposed on the Board's consideration of the public interest. As a corollary to this point of view WTC asserts that the assessment of the adequacy of consultation and accommodation of Aboriginals does not form part of the Board's consideration of the public interest.

It is important to note that WTC considers that it is the Board's duty to assess the adequacy of consultation and accommodation because, in its view, the Board is the "final Crown decision maker". Elsewhere in its submissions WTC refers to the Board as conducting a "comprehensive final review" of the various authorizations required to complete the project, and identifies it as "the Crown agency with final responsibility for approval."

WTC suggests that in order to exercise its jurisdiction to assess the adequacy of consultation the Board should, at some point in the future, when the various authorizations and permits have been approved by various agencies of government, including the finalization of the environmental assessment, inquire from the parties as to whether adequate consultation has been accomplished. If there is a dispute on this issue at that time the Board should re-convene to hear evidence and adjudicate the matter.

Any other approach, WTC suggests, would lead to a "checkerboard of authorizations made without adequate consultation…"

Yellow Falls takes the position that the Board has no jurisdiction to consider issues related to the adequacy of Aboriginal consultation, not even within the confines of the criteria enumerated in section 96(2). The applicant points to the mandatory nature of

the provisions in sections 92 and 96(2) and concludes that the Board may consider no other factors or questions of law, including Aboriginal consultation, when considering applications under section 92. The applicant states:

> *In a hypothetical case, if an Aboriginal group raised a concern relating to one of the Governing Criteria the Board would certainly have the jurisdiction and the duty to consider the substance of that concern and make a determination as to whether the proposed transmission line was in the public interest with respect to the Governing Criteria at issue. However, the Board would not have the jurisdiction to refuse the application on the basis that there was insufficient consultation with the Aboriginal Group with respect to the Governing Criteria at issue. Nothing in the Act give the Board jurisdiction to consider the sufficiency of Aboriginal Consultation as it relates to section 92 applications.*

Yellow Falls also submits that the Board lacks jurisdiction to consider the adequacy of consultation because the proponent in this case is a private enterprise, and not a Crown agency, or an agent of the Crown. In its view, the Supreme Court in creating the duty to consult with Aboriginal peoples in *Haida Nation v. British Columbia (Minister of Forests)*[10] strictly limited the duty to consult to the Crown and its agents. Insofar as the instant application is an application by a private enterprise, questions relating to the duty to consult are inherently beyond the Board's jurisdiction in the Applicant's view.

Board Findings

It is a well-established principle of administrative law that administrative tribunals have only the powers bestowed upon them explicitly by their enabling statutes, or those which arise by necessary implication. This principle has been applied by supervising courts in numerous cases so as to prevent creeping, unintended jurisdiction in such tribunals. An exception to that principle has been introduced by the Supreme Court with respect to constitutional and constitution-like issues. Specifically, the Supreme Court of Canada has decided that tribunals that have been endowed with the express power to determine questions of law, have a residual or presumed jurisdiction to resolve constitutional issues that come before them in the normal course of their work.[11]

[10] [2004] S.C.R. 511
[11] *Paul v. British Columbia (Forest Appeals Commission),* [2003] S.C.J. 34, *Nova Scotia (Workers' Compensation Board) v. Martin,* [2003] S.C.J. 54.

The issue here is the extent to which the Legislature has endowed the Board with the power to determine questions of law with respect to leave to construct applications. Because the Board's power to determine questions of law is specifically limited in section 19 to areas within its jurisdiction, the Board finds that it has no authority to determine constitutional issues, such as the adequacy of consultation with Aboriginals, in relation to any matters beyond the criteria in section 96(2). This is consistent with case law referenced above.

In the Board's view this finding is sufficient to dispose of this issue in this case because none of the issues raised by WTC relate to the criteria in section 96(2). The Board finds however that there is another reason, also related to its jurisdiction, which supports its determination that it ought not consider the adequacy of consultation.

In its submissions WTC relied heavily on the proposition that the Board was in some senses the central or final decision-maker with respect to this project.

That proposition is simply not true. With respect to applications under section 92 the Board does not make, and is not empowered to make, any decisions with respect to Crown land rights of way, environmental protection and assessment, protection of species, community or worker safety, socio-economic effects, or any one of a significant number of approvals and permits required by the proponent with respect to such projects. Board approval is but one milestone on the path to project completion.

Each of the approvals and assessments has its own drivers and requires distinct expertise. In our review of the materials filed with this application, it became clear that issues respecting accommodation and consultation with Aboriginal peoples have typically been considered within the rules and protocols associated with the environmental assessment. In this case, it appears to be common ground that the environmental assessment is the appropriate context for the consideration of Aboriginal treaty and land rights. WTC specifically indicated in the evidence that it filed that it considered such matters to fall within the scope of the environmental assessment.

In accordance with the rules and procedures governing the environmental assessment process the Minister of Environment will make a decision. The Board has no mandate or jurisdiction of any kind to suggest that it is empowered to review, assess, or adjudicate upon the adequacy of the Minister's consultation and accommodation of Aboriginal peoples. If WTC continues to have concerns respecting the adequacy of

such consultation with the environmental assessment process the appropriate measure for it to take is to challenge the Minister, and if necessary, invoke the supervision of the courts. The same is true for each of the other permitting and approvals processes undertaken by various government agencies with respect to this project.

To assume such jurisdiction over other government agencies, would, in the Board's view, be insupportable from a legal point of view, and also grossly inefficient and unsatisfactory from a practical point of view.

In its submissions WTC argues that if the Board does not conduct "…a comprehensive final review of all of the authorizations needed for the project there is a danger that the project would have been approved in the absence of adequate consultation, leaving affected First Nations with little recourse but litigation, conducted only after the project was underway, at which point some issues may become moot." With respect, the Board finds that the various existing approval processes are sufficiently interdependent so as to avoid the scenario depicted by WTC.

Board approvals of leave to construct applications invariably include conditions which require the proponent to procure all of the necessary permits and approvals associated with the project. This means that the Board's approval is strictly conditional on the successful completion of the various permitting and assessment processes. Under this architecture there is no danger that the project will somehow begin without all of the necessary regulatory steps mandated by various agencies of government being completed. This is as true of the Ministry of Natural Resources permits, as it is of the environmental assessment process itself. In fact, the statute enabling the environmental assessment process prohibits any approval by any authority that is not conditional on the prior completion of the environmental assessment process.

In fact, in the Board's view, the only way to ensure that the appropriate measure of consultation and accommodation occurs with respect to any of the requisite permits, approvals, and assessments of the relevant government agencies is to follow the Board's typical process to make its approval of the leave to construct conditional upon completion of those processes and procurement of those permits. It is clear to the Board that the assessment of the adequacy of consultation and accommodation is best conducted by the various government agencies sponsoring those processes, informed as it is with intimate knowledge of the context, with the possibility or threat of supervision by the courts if deficiencies are thought to exist. For the Board to engage in

an ex post facto review of the adequacy of consultation by any of these government agencies would be inefficient, ineffective, and insupportable.

Finally, in the Board's view, if it does have any jurisdiction at all to consider matters relating to the adequacy of consultation with Aboriginal peoples, section 96(2) operates to expressly constrain the Board's discretion, and limits its jurisdiction to the determination of matters of law arising exclusively in connection with the prescribed criteria, namely price, quality, reliability, and the government's policies with respect to renewable energy projects. The Board finds that the Legislature's unequivocal intention was to limit the scope of such proceedings to the enumerated criteria, and to preclude any other considerations of whatever kind, from influencing its determination of the public interest. The Board's authority to determine questions of law is not open-ended, but rather has been strictly prescribed by section 96(2).

The Board has already determined that the issues related to the adequacy of the Crown consultation with Aboriginal peoples in this application are beyond the scope of the section 96(2) criteria and therefore clearly beyond the Board's jurisdiction. The Board therefore does not need to address the arguments of Yellow Falls which are that the Board has no jurisdiction to consider the adequacy of Aboriginal consultation with respect to the criteria in section 96(2) and no jurisdiction to consider adequacy of Crown consultation in cases where the applicant is not a Crown corporation. Yellow Falls acknowledged this in its submissions.

Having made this finding, the Board has determined that it does not need to hear oral evidence from WTC. Similarly, there is no requirement for responding evidence from TTN. The Board will now make provision for the filing of submissions on the application itself. TTN may file a submission if it chooses, and it will be eligible for an award of costs to the extent its submission goes to the issues which are within the scope of the Board's proceeding, namely the criteria established in section 96(2).

THE BOARD ORDERS THAT:

1. Board staff and Intervenors shall file with the Board and deliver to the Applicant a copy of its final submission on any matters outstanding in this proceeding on or before Tuesday November 24, 2009.

2. The Applicant shall file with the Board and deliver to all parties its reply submission by December 1, 2009.

3. 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 November 16, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX B

Conditions of Approval
For
Yellow Falls Power Limited Partnership
Transmission Line and Associated Transmission Facilities (the "Project")
EB-2009-0120

DATED: December 16, 2009

Conditions of Approval for
Yellow Falls Power Limited Partnership
Transmission Line and Associated Transmission Facilities (the "Project")
EB-2009-0120

1. General Requirements and Necessary Approvals

1.1 Yellow Falls Limited Partnership ("YFP") shall construct the Project and restore the Project land in accordance with its Leave to Construct application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate January 31, 2011, unless construction of the Project has commenced prior to that date.

1.3 YFP shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

1.4 YFP shall advise the Board's designated representative of any proposed material change in the Project, including but not limited to material changes in the proposed route, construction techniques, construction schedule, restoration procedures, or any other material impacts of construction. YFP shall not make a material change without prior approval of the Board or its designated representative. In the event of an emergency the Board shall be informed immediately after the fact.

2. Contract for Sale of Power with Ontario Power Authority

2.1 YFP shall file with Board confirmation that a contract between YFP and OPA has been executed with respect to the subject generation and will file the contract with the Board should the Board so direct.

3. Environmental Assessment Approval

3.1 YFP shall comply with any and all requirements of the *Environmental Assessment Act* , and file with the Board evidence that the process stipulated in the *Environmental Assessment Act* is completed including a decision by the Ministry of Environment on the "RTE" for individual environmental assessment.

4. System Impact Assessment ("SIA")

4.1 YFP shall file with the Board either an updated SIA report by the Independent Electricity System Operator ("IESO") reflecting the impact attributed to the new location of the project on the system or a letter from the IESO confirming that the July 6, 2006 SIA is still valid.

4.2 YFP shall satisfy the Independent Electricity System Operator (“IESO”) requirements and recommendations as reflected either in its Final System Impact Assessment report.

5. Customer Impact Assessment (“CIA”)

5.1 YFP shall file with the Board either with an updated CIA report reflecting the impact attributed to the new location of the project on the customers of Hydro One Networks Inc.(“HONI”), or a letter from the HONI confirming that the October 6, 2006 CIA is still valid.

5.2 YFP shall satisfy the Hydro One Networks Inc. (“HONI”) requirements as reflected in the Final Customer Impact Assessment report.

6. Project and Communications Requirements

6.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Electricity Facilities & Infrastructure.

6.2 YFP shall designate a person as Project engineer and shall provide the name of the individual to the Board's designated representative. The Project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. YFP shall provide a copy of the Order and Conditions of Approval to the Project engineer, within ten (10) days of the Board's Order being issued.

6.3 YFP shall develop, as soon as possible and prior to the start of construction, a detailed construction plan. The detailed construction plan shall cover all material construction activities. YFP shall submit five (5) copies of the construction plan to the Board’s designated representative at least ten (10) days prior to the commencement of construction. YFP shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

6.4 YFP shall furnish the Board's designated representative with all reasonable assistance needed to ascertain whether the work is being or has been performed in accordance with the Board's Order.

6.5 YFP shall, in conjunction with HONI and the IESO, develop an outage plan which shall detail how proposed outages will be managed. YFP shall provide five (5) copies of the outage plan to the Board’s designated representative at least ten (10) days prior to the first outage. YFP shall give the Board's designated representative ten (10) days written notice in advance of the commencement of outages.

6.6 YFP shall furnish the Board's designated representative with five (5) copies of written confirmation of the completion of Project construction. This written confirmation shall be provided within one month of the completion of construction.

7. Monitoring and Reporting Requirements

7.1 Both during and for a period of twelve (12) months after the completion of construction of the Project, YFP shall monitor the impacts of construction, and shall file five (5) copies of a monitoring report with the Board within fifteen (15) months of the completion of construction of the Project. YFP shall attach to the monitoring report a log of all comments and complaints related to construction of the Project that have been received. The log shall record the person making the comment or complaint, the time the comment or complaint was received, the substance of each comment or complaint, the actions taken in response to each if any, and the reasons underlying such actions.

7.2 The monitoring report shall confirm YFP's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Project and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Project. This report shall describe any outstanding concerns identified during construction of the Project and the condition of the rehabilitated Project land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

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