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April 14, 2011

VIA E-MAIL and RESS

Board Secretary
Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
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Attention: Ms. Kirsten Walli

Dear Ms. Walli:

Re: ACH Limited Partnership (ACH"), Application for Licence Amendment, EB-2011-0065; and AbiBow Canada Inc. ("AbiBow"), Application for Licence Amendment, EB-2011-0068

This letter is written on behalf of both Applicants in these proceedings in response to a request filed on April 5, 2001 on behalf of a number of First Nations to be granted intervenor status and that the applications proceed by way of an oral hearing. They base this argument on the allegation that the decision in these applications may have an adverse effect on an established aboriginal right, namely by suggesting the possibility that, in the future, ACH may "increase flooding or the adverse effects of flooding of the First Nations reserves". The First Nations also seek their costs in these proceedings.

In the Applicants' submission, all of these requests should be denied.

With respect to intervention status, the First Nations must demonstrate that they have a "substantial interest" in the outcome of the proceeding as required by Rule 23.02 of the Board's Rule of Procedure.

As will be addressed in greater detail below, the only results of this proceeding would be (i) to allow the Applicant ACH to have its existing generation licence for facilities that it owns amended to reflect that such facilities' operations are being brought "in-house", and (ii) to amend the Applicant Abibow's existing generation licence to acknowledge that it is not an operator of such facilities. It is impossible to

imagine how these specific decisions, that the Applicants believe are administrative in nature, could have any adverse impact on an Aboriginal right; as a result, the First Nations have not demonstrated that they have a substantial interest in the outcome of the proceedings.

Furthermore, the lack of a substantial interest suggests that, not only is there not a need for an oral hearing, but that it is arguable that the Board may dispose of this matter without a hearing *at all*. Indeed, Section 21(4) of the *Ontario Energy Board Act, 1998* (the "**OEB Act**") permits the Board to dispose of a matter without a hearing if it determines that no person other than the applicant "will be adversely affected in a material way by the outcome of the proceeding."

In the alternative, if the Board does grant the First Nations standing as intervenors, there is no reason to hold an oral hearing. The request for an oral hearing is made to provide "the First Nations the opportunity to present oral evidence establishing that they have not been consulted at all about how the sale transaction that motivates these applications has the potential to adversely affect their established rights." Thus, the request relates to the desire to present evidence about an alleged lack of consultation. However, this evidence begs the question. The consultation requirement is only triggered if there is a decision that has a potential impact on an Aboriginal right. If the licence amendments are administrative, neither amendment of the language of the generation licences can have an impact on an Aboriginal right. If, in the alternative, the amendments are more than administrative, it is only if ACH's exercise of operational control of the facilities could impact an Aboriginal right that evidence of the extent of consultation is relevant. However, ACH's exercise of operational control does not have an adverse effect any more than AbiBow's current operation does. As a result, the evidence sought to be addressed is not relevant and the Board does not need to proceed by way of an oral hearing.

These points are addressed in greater detail below.

A. The First Nations do not qualify as Intervenors

In order to render a decision on the First Nations' request to be granted standing as intervenors, in accordance with Rule 23.02 of the Board's Rules of Practice and Procedure, the Board must decide whether the First Nations have demonstrated that they have a "substantial interest" in the outcome of the proceedings. In order for the Board to make this determination, it is first necessary to ascertain the matter at issue in this proceeding, and how its outcome may affect the First Nations.

The First Nations argue that the duty to consult arises in this case, based on the premise that an Aboriginal interest is at stake. Based on this premise, they argue that because the duty to consult arises, it necessarily follows that the First Nations have a substantial interest in the outcome of the proceedings, which interest is grounded in the duty to consult. The Applicants submit that it is not so, and that this reasoning is flawed, as set out below.

ACH already holds a licence to generate electricity in accordance with Section 57(c) of the OEB Act. The issue in this case is whether the Board should allow an amendment to Schedule 1 of the ACH generation licence so that it is identified as the "operator" of facilities listed in that Schedule in addition to its current status as owner of the facilities. Thus, if the applications are granted, the impact will be to change the description of the facilities in Schedule 1 of the ACH Licence from facilities that are "owned by ACH" to facilities that are "owned and operated" by ACH. These facilities will be deleted from Schedule 1 of the AbiBow generation licence. ACH's licence obligations respecting the facilities will not be impacted by the change in description. As the owner of the facilities, it is currently required to meet all of the provisions of the licence; those provisions, and ACH's obligations to meet them, will continue to be in place. If the Board reflects in the licence that it is ACH that will operate the facilities, the Board's regulation of the facilities will continue in the same manner after the Board's decision as it did before the Board's decision.

The Alleged Impacts of the Decision

The First Nations have not provided any indication or made any allegations as to how they would be impacted by allowing ACH to amend its licence to identify it as an operator of facilities that it already owns instead of AbiBow. The Intervention request lists a number of "facts" upon which its intervention is "grounded". But these "facts", even if assumed to be true (which is certainly not acknowledged), would not demonstrate that the First Nations would be substantially impacted *by a decision in this proceeding.*

All of their alleged "facts" are quoted from and responded to below:

Allegation 1:

> "the facilities governed by these licences generate electricity from renewable energy sources."

Response:

> This will not be impacted by the decision.

Allegation 2:

> "the renewable energy source is natural water flow that has been and continues to be diverted, resulting in the flooding of lands located on the First Nations' reserves. This flooding is illegal because the lands flooded have never been surrendered by the First Nations and are not subject to any flowage easement."

Response:

> The facilities are located on various rivers in Northern Ontario. The water levels of those rivers are all regulated by either Ontario or Federal authorities. As holder of a generation licence for the facilities, ACH is and will be required to manage the facilities in a manner that complies with the water levels stipulated by the applicable regulatory authority, being the International Rainy Lake Control Board (Fort Frances GS), the Lake of the Woods Control Board (Kenora GS, Norman GS), the Seine River Water Management Plan (Sturgeon Falls GS, Calm Lake GS) and the Abitibi River Water Management Plan (Iroquois Falls GS, Island Falls GS and Twin Falls GS), respectively. Further, the flooding at issue occurred many years ago. The facilities in question have been in operation for many decades, the newest facility having been constructed in the 1920s.
>
> Even assuming the allegations are true, the First Nations are not impacted by the decision because the OEB generation licencing system does not regulate this matter and, even if it did, the change in the licences does not have an impact on this.

Allegation 3:

> "the applications are motivated by the intention of the current owners of ACH to sell their interests to Bluearth Renewables Inc., Infra H2O GP Partners Inc. and Infra H2O LP Partners Inc. (the Purchasers). Whereas generating hydro power has never been the core business of the current owner and operator – they merely sell off excess capacity – the Purchasers intend to expand operations and may do so in ways which increase flooding or the adverse effects of flooding of the First Nations reserves."

Response:

> There is no basis for this assertion. In any event, the motivation for operating generating facilities is not relevant to whether a licence is granted or amended. If it were, the Board would have to hold a

> proceeding every time a generator's (or indeed any licence holder's) motivation changed. Further, as indicated, the water levels of all affected rivers are regulated by either Ontario or Federal authorities.

Allegation 4:

> "it is the policy of the Government of Ontario to respect its duty to consult and, if appropriate, to accommodate First Nations in accordance with its legal obligations as enunciated by the Supreme Court of Canada."

Response:

In the context of Aboriginal Consultation, the issue is to specify the decision that is being made by the Board and how that decision may adversely affect an Aboriginal right. Thus, in the *Bruce – Milton* leave to construct application, the Board stated that:

> "Based on the evidence and argument before it, the Board is unable to identify any adverse affect on an Aboriginal or treaty right that would occur as a result of the Board's granting leave to construct."[1]

The relevant question before the Board is whether the First Nations have a substantial interest in the outcome of the applications, so as to be granted standing as intervenors. As set out above, the applications will not have any impact on the First Nations. It necessarily follows that the decision will not affect an aboriginal right and, accordingly, the issue of duty to consult does not arise.

The Supreme Court of Canada recently ruled in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650, that alterations to resources that took place in the past do not give rise to a present duty to consult:

> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the current government conduct or decision in question. **Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right**. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.
>
> …
>
> [83] **In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult.** As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. **Such a**

[1] EB-2007-0050 at p. 70 (emphasis added).

> **conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource**. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past.
>
> (emphasis added)

The pending sale transaction by AbiBow of its interests in ACH and the amendments will not have any incremental impact on any of the First Nations since operations are going to continue after the sale transaction in the same manner as they have for many years. The same lands will remain flooded both before and after the sale transaction closes, regardless of whether the operator of the facilities is AbiBow or ACH.

As a result, it is submitted that the First Nations have not demonstrated that they have a "substantial interest" in the outcome of the proceedings (to meet the requirements for intervenor status under Rule 23.02).

In fact, it is arguable that their claims do not even merit a hearing because they have not provided any indication or made any allegations that they "will be adversely affected in a material way by the outcome of the proceeding" (to meet the requirements of an entitlement to a hearing under s. 21(4) of the OEB Act).

For these reasons, it is submitted that the Board should not grant the First Nations intervenor status and may proceed without a hearing.

The request for an Oral Hearing

In the alternative to both of these submissions, if the Board does proceed with a hearing, and if the First Nations are granted intervenor status, then the Applicants submit that the Board should proceed with a written hearing. There are no facts in dispute that would require the presentation of oral evidence and cross-examination.

In this regard, the First Nations indicate in their letter that they seek to conduct cross-examinations so that they can ask "Questions about the structural changes at issue in this case, and about how they set the stage for decisions having a direct impact on the First Nations' land and resources". They argue that this issue is relevant in light of the statement in the *Rio Tinto* decision that "structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no 'immediate impact on the lands and resources.'"

However, the First Nations' submission edited the quotation from that decision so that it did not contain the concluding sentence, which reads:

> "For example, **a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown**. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see Haida Nation, at paras. 72-73." [at paragraph 47]

Thus, in considering whether a change in a resource's management may have a material adverse impact on an Aboriginal right, it is necessary to demonstrate *how* that change may affect a right. While changing control from the Crown to a private company may have such a result, changing control between two private companies, which is proposed in this case, clearly does not.

Further, if the Board does proceed with a hearing, it may do so in an expeditious manner in light of the fact that the issues raised by the First Nations are outside of the scope of this proceeding. In this way, this proceeding is similar to the way in which the Board proceeded in the *Greater Sudbury Hydro* case. In that case, the Board made a preliminary determination on whether the issues sought to be argued in a combined application for approval of a MAADs application were in or out of scope. Having determined that they were out of scope, the Board limited written submissions to matters that were truly in scope and had an expeditious determination of the remaining issues in that proceeding.[2]

All of which is respectfully submitted.

Signed in the original

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Signed in the original

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[2] Thus, in the *Greater Sudbury Hydro Inc.* case, after ruling that issues which based an intervention were out of scope, the Board held a conference call to see if the parties sought to address any issues that remained in scope. After finding that there were none, the Board proceeded to make a decision: see Decision with Reasons, *Greater Sudbury Hydro Inc.* September 16, 2005, at pp. 7-8 (EB-2005-0234)