Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0065
EB-2011-0068

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 ACH Limited Partnership for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by AbiBow Canada Inc. for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998.*

BEFORE: Paul Sommerville
Presiding Member

Cynthia Chaplin
Vice-Chair

DECISION AND ORDER

I. Background

ACH Limited Partnership ("ACH") filed an application on March 3, 2011 for an amendment to Schedule 1 of its electricity generator licence EG-2006-0124. The requested amendment is to change ACH's status as owner of eight hydroelectric generating stations to owner and operator. The facilities are the following: Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station, Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station.

AbiBow Canada Inc. (“AbiBow”, and, together with ACH, the “Applicants”), formerly Abitibi Consolidated Company of Canada, filed an application on March 7, 2011 for an amendment to its electricity generation licence EG-2003-0204. The requested amendment is to change the name on the licence EG-2003-0204 from Abitibi Consolidated Company of Canada to AbiBow Canada Inc., and to remove eight hydroelectric generating stations listed above, which AbiBow currently operates, from Schedule 1 of its licence.

On March 29, 2011, the Board issued a combined Notice of Application and Hearing for the above mentioned applications (the “Applications”). The Applicants were directed to serve the Notice upon the parties who receive electricity from the facilities that ACH will be operating and Keshen Major Law firm (“Keshen Major”) who had submitted a letter of interest on behalf of twelve First Nations (the “First Nations group”) prior to publication of the Notice.

By Letter dated April 5, 2011, Keshen Major on behalf of the First Nations group filed a request for combined intervenor status, an oral hearing and eligibility for an award of cost. The intervention request revolved around the Crown’s duty to consult.

On April 5, 2011 Davis LLP on behalf of Fort Frances Power Corporation (“FFPC”) requested intervenor status. On April 15, following clarification by ACH of the issues addressed in the FFPC’s letter, FFPC withdrew its request to intervene and replaced it with a request for observer status. FFPC did not object to a written hearing.

On April 14, 2011 counsel for the Applicants filed a joint reply to the intervenor status request and the objections to written hearings. The Applicants submitted that the First Nations group does not qualify as intervenors as they have not demonstrated that they have a “substantial interest” in the outcome of the proceedings as required in accordance with Rule 23.02 of the Board’s *Rules of Practice and Procedure* based on the fact that the issues raised by the First Nations group are outside of the scope of these proceedings and that the operation by ACH of the facilities it currently owns will not have any adverse impact on Aboriginal rights.

On April 17, 2011 the Board received an additional letter from Keshen Major expressing the intention of the First Nations group to exercise its right to respond to the Applicants’ submission under Rule 23.08 of the Board’s *Rules of Practice and Procedure* and requested time to consider and prepare the response proposing May 6, 2011 as a

deadline. The letter further stated that the issues before the Board are in the very preliminary context and may require extensive Affidavit evidence and complete legal argument to support assertions made in the April 5th submission.

On April 18, 2011 the Applicants replied to the First Nations group letter and objected to the request for an extension to the timelines. The Applicants stated that the Board has enough information before it to determine whether intervenor status should be granted.

On April 21, 2011 AbiBow filed a letter, supported by ACH, waiving their objection to the First Nations group's request for intervenor status. However, the Applicants stated they do not believe the First Nations group has a "substantial interest" in these proceedings as required by the Board's *Rules of Practice and Procedure*. The letter also stated that AbiBow will face significant financial harm unless the Board brings this matter to resolution by May 20, 2011.

On April 29, 2011 the Board issued Procedural Order No.1. In Procedural Order No.1 the Board sought further submissions from the parties with respect to the First Nations group's interest in the proceeding.

On May 6, 2011 the First Nations group filed a submission in accordance with Procedural Order No.1. The Applicants replied to the First Nations group submission on May 9, 2011. The First Nations group filed its final submission on May 13, 2011.

II. The Duty to Consult

The issue before the Board

The central principles of the duty to consult, as set out in *Haida Nation v. British Columbia (Minister of Forests) ("Haida")*[1], are well known: the duty arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. The duty applies even where Aboriginal rights have been asserted but not yet proven. In some cases, the duty to consult will require the Crown to accommodate. The nature of this accommodation will vary depending on the strength of the Aboriginal claim and the extent of the potential infringement.

[1] [2004] SCC 73.

The issue in this case is whether the action being contemplated by the Board (the approval of the requested license amendments) could give rise to an adverse impact which would trigger the duty to consult. The First Nations group identifies a number of circumstances in which First Nations' interests have allegedly not been considered. A further issue is therefore what role does the Board have with regard to assessing any duty to consult that arises from the circumstances described by the First Nations group.

The role of tribunals with respect to the duty to consult

The Board accepts that in some circumstances it will be its role to assess whether the Crown has adequately discharged the duty to consult. As initially described in *Paul v. British Columbia (Forest Appeals Commission)*[2] and *Nova Scotia (Workers' Compensation Board) v. Martin*,[3] and later confirmed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[4] where a tribunal has a broad statutory mandate and the ability to consider questions of law, it will have the concomitant power to consider Constitutional questions, including the adequacy of Crown consultation efforts.[5] Section 19 of the *Ontario Energy Board Act, 1998* (the "Act") states: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact." The Board has in fact already recognized in its Yellow Falls decision that the responsibility to consider the duty to consult will lie within its mandate in certain circumstances.[6]

The Board further observes that the courts have been clear that a tribunal itself will not be permitted to undertake "Crown" consultation absent a clear statutory mandate to do so. As the Supreme Court stated in Rio Tinto:

> A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. **The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law.** Consultation itself is not

[2] [2003] S.C.J. 34 ("Paul")
[3] [2003] S.C.J. 54 ("Martin")
[4] [2010] S.C.J. 43 ("Rio Tinto").
[5] Rio Tinto, paras. 55, 66-73; Paul para. 39; Martin paras. 37-39.
[6] EB-2009-0120, Decision on Questions of Jurisdiction and Procedural Order No. 4, issued November 18, 2009 ("Yellow Falls"), pp. 8-11. In Yellow Falls the Board ultimately held it did not have the power to consider the duty to consult on electricity leave to construct applications, as section 96(4) of the Act specifically limits the Board's jurisdiction in these cases. Section 96(4), however, does not apply to the current case.

> a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with consultation. [Emphasis added].[7]

Aside from section 19 of the Act, the Board has no specific legislative mandate with respect to the duty to consult. There is clearly no provision in the Act which provides, either expressly or impliedly, that the Board is empowered to undertake Crown consultation with Aboriginal peoples itself. Indeed, the Board is a quasi-judicial tribunal, and such a role would be incompatible with its responsibility to adjudicate disputes between parties. As the Supreme Court observed in *Quebec (Attorney General) v. Canada (National Energy Board)*:

> The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown … extends to the Board, as an agent of government and creation of Parliament, in the exercise of delegated powers. …
>
> The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty. Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial. While the characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.[8]

The First Nations group does not necessarily argue that the Board itself has a duty to consult, although it reserves the right to make submissions on that issue if and when the question arises.[9] In the Board's view, however, this is still an important point to address

[7] Rio Tinto, para. 60.
[8] [1994] 1 S.C.R. 159, paras. 34-35.
[9] First Nations reply submissions, p. 10.

here. To the extent that the Crown's duty to consult has been triggered, the "Crown" in question is not the Board. The Board's role, if any, would be to assess the adequacy of consultation efforts undertaken by other Crown actors.

The nature of the First Nations group's interest

With this as background, the Board will now turn to the question before it. The First Nations group has sought intervenor status in this proceeding. If accepted as intervenors, it is their intention to explore the adequacy of the Crown's consultation efforts with respect to potential infringements of their Aboriginal rights to harvest wild rice. To the extent that these Crown consultation efforts are found to be wanting, they would presumably ask the Board to not approve the proposed license amendment.

In order to accept the First Nations group as intervenors, the Board must find that they have an interest in these proceedings. In other words, the Board must make a determination that the duty to consult issues identified by the First Nations group are within the scope of the current proceedings. Therefore, for the purposes of this decision, the Board will accept the factual claims made by the First Nations group as correct (or at least potentially correct).

The Board has determined that, even assuming all the factual matters relied upon by the First Nations group are correct, the Board has no responsibility or authority to consider the adequacy of the Crown's consultation efforts in the current proceedings. The First Nations group has identified no other interests in the proceedings. The Board will therefore not accept the First Nations group as intervenors in these proceedings.

In order to reach this determination, the Board has carefully considered the elements of the duty to consult as described in *Haida* and subsequent cases. The duty to consult arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. In the current case, however, the analysis cannot stop there. The further question before the Board is whether the Board has any responsibility or authority to address this issue in the current proceedings in relation to other processes happening separate from the current applications.

It is helpful to break out the elements of the duty to consult as they apply in this case. The First Nations group argues that the Board's consideration of the license

amendment applications triggers the duty to consult. Further, the First Nations group argues that the Crown consultations to date in relation to the facilities have been inadequate. The "Crown" in this case has been identified by the First Nations group as the Ontario Minister of Energy and Infrastructure (the "Minister") and the Ontario Power Authority (the "OPA").[10] The Crown conduct at issue is a directive from the Minister to the OPA encouraging the OPA to procure new generation contracts for hydroelectric facilities, and the OPA's subsequent creation of the Hydroelectric Contract Initiative (the "HCI") which offers attractive long term contracts for hydroelectric power generators, including incentives for upgrades and expansions. The potential impact to Aboriginal rights or title is the possibility that the HCI will result in increased or expanded hydroelectric generation, with attendant possible changes to water levels and flows in various watercourses and wetlands. Any changes to water levels or flows may impact the ability of the First Nations to harvest wild rice, which they assert is an Aboriginal right. Specifically with respect to the applications before the Board, the concern is that the proposed license amendments will facilitate the sale of the existing generating assets to a third party ("Bluearth") that intends to ultimately expand operations to take advantage of an HCI contract already held by ACH.

As noted above, the Board accepts that under certain circumstances it will have a responsibility to assess the adequacy of the Crown's efforts with respect to the duty to consult. However, there must be a clear nexus between the matter before the Board (i.e. the applications the Board is being asked to approve) and the circumstances giving rise to the (possible) duty to consult. In the current case, the alleged deficiencies in the Crown's consultation efforts are not related to the Board's consideration of the requested license amendments.

The Crown conduct in question – i.e. the Minister's directive and the OPA's development of the HCI – is not before the Board and the Board has no approval function with respect to these activities. The Board accepts that strategic, high level decisions that may have an impact on Aboriginal rights can trigger the duty to consult. That does not mean, however, that the Board must assess the adequacy of Crown consultation for these types of decisions where there is little or no connection between the decisions in question and the applications before the Board. The Board does not dispute that the conduct of the Minister and the OPA may have triggered the duty to consult; what it does dispute is that this conduct is directly relevant to the applications before the Board.

[10] First Nations group's response to Applicants' objection to request for intervenor status, p. 15.

The applications before the Board are for a license amendment to allow ACH to operate the facilities it is already licensed to own, and for Abibow's generator license amendment to remove its authority to operate these same facilities. Although these amendments are apparently being undertaken to facilitate a sale to Bluearth, this Board is not being asked to approve this future sale in the current proceedings. Indeed, Bluearth is not even a party to these proceedings.

The potential infringement to Aboriginal rights or title identified by the First Nations group relates to its ability to harvest wild rice. The applications before the Board, if approved, will have no direct impact on water levels or flows, and therefore no direct impact on the First Nations' ability to harvest wild rice. To the extent that there is any potential indirect impact, the connection to the current proceeding is peripheral at best. Section 57 of the Act requires electricity generators to be licensed by the Board. The license itself does little more than authorize the licensee to generate electricity for the Independent Electricity System Operator ("IESO") administered markets, purchase electricity from the IESO administered market, and sell electricity to the IESO administered market.[11] Although the individual generation facilities are identified, the license does not include the generation capacity of the facilities.

The current applications, if approved, would change only the identity of the owner/operator. Although ACH, AbiBow and Bluearth may regard the amendments as a condition precedent to a future sale, the proposed amendments in no way authorize (or even directly contemplate) such a sale. Moreover, the proposed amendments will have no impact whatsoever with regard to the owner and operator's ability to operate the facilities. The proposed amendments to the license relate only to the identity of the owner and operator – there are no other changes. To the extent a sale is ultimately realized, Bluearth will have exactly the same authority to operate the facilities as ACH and AbiBow have today.

More importantly, the proposed license amendments, and indeed the licenses themselves, are not connected to the potential infringement as identified by the First Nations group. The potential infringement may occur only if there are changes to water levels or flows. The license - whether held by ACH, AbiBow, Bluearth, or anyone else - does not in any way manage or control water levels or flows. These are matters governed by the Lake of the Woods Control Board and the International Rainy Lake

[11] A copy of ACH's current generation license is attached as Appendix "A".

Board of Control, and entirely outside the control of the Board and the licensing regime it oversees. To the extent that any parties seek changes, it would be through these agencies and without input from the Board.

The First Nations group submits that a Crown authorized transfer or renewal of a license to private parties can trigger the duty to consult, and that in fact *Haida* involved just such a facts scenario. In *Haida*, however, there was a direct and immediate connection between the license in question (i.e. a tree farming license) and the potential infringement to Aboriginal rights or title (i.e. cutting down cedar trees without consulting or accommodating with the Aboriginals for whom such trees were an intrinsic part of their culture and economy). In Rio Tinto, the Court summarized the potential impact of the license transfer in *Haida* as follows:

> Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, **the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations**. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in Haida Nation, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. **By entering into the contract, the Crown would have reduced its power to control logging of trees, some of the old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required.** The Haida people would have been robbed of their constitutional entitlement.[12] [Emphasis added]

In the current case, the licenses in question have no direct connection to the potential infringement – i.e. changes to water levels or flows that could impact the First Nations ability to harvest wild rice. The proposed amendments to the licenses would not in any way limit the Crown's ability to discharge the duty to consult if and when Bluearth (or any other generator) seeks approval to alter water levels or flows. Nor would it in any way impede the ability of the water control boards to assess the adequacy of any Crown

[12] Rio Tinto, para. 90.

consultation with respect to any previous high level government decisions, such as the development of the HCI.

Although the First Nations group submits that the Board is the central or final decision maker with respect to this project, this is not correct. The Board has no approval authority in relation to the physical operation of the "project".

Conclusion with respect to the First Nations group's request for intervenor status

In sum, the nexus between the Crown conduct and potential infringement of Aboriginal rights on the one hand, and the subject of the Board's proceedings on the other, is not sufficiently strong to provide the Board with the responsibility or authority to assess the adequacy of Crown consultation. The requested approval has no direct connection to the Crown conduct in question, nor to the potential infringement of Aboriginal rights. The Board will therefore not accept the First Nations group as intervenors in these proceedings. To the extent that the Crown conduct to date (the Minister's Directive and the OPA's creation of the HCI) or in the future (with respect to potential future requests by Bluearth or any other entity to alter water levels or flows) has triggered or will trigger the duty to consult, the assessment of whether that duty has been adequately discharged will reside elsewhere.

III. Allegations of an Apprehension of Bias

In its submissions dated May 6, 2011, the First Nations group alleges that the person (or persons) responsible for drafting Procedural Order No. 1 has demonstrated a reasonable apprehension of bias, and should recuse him or herself from considering this matter further. In the First Nations group's view, the statements made in the Procedural Order demonstrate that its author is predisposed to reject the First Nations group's submissions even before reading them.

The First Nations group notes that it is not clear who wrote the Procedural Order, which appears under the signature of the Board Secretary. This proceeding was originally to be decided by Counsel, Special Projects, who is a staff member that had been delegated authority to determine this matter pursuant to section 6 of the Act. The Board's practice is that only routine and non-controversial matters will be decided by a delegated authority pursuant to section 6. Once it became clear that this proceeding would be contested, it was transferred to a panel of the Board pursuant to section 6(7).

It was this panel that authorized Procedural Order No. 1. The same panel has also issued this decision and order.

The test for reasonable apprehension of bias, as originally set out in the dissent in *Committee for Justice and Liberty v. National Energy Board*,[13] and later confirmed in *Baker v. Canada (Minister of Citizenship and Immigration)*,[14] is as follows:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. According to the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically –and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?[15]

The First Nations group alleges that some of the statements in Procedural Order No. 1 demonstrate that its author is predisposed to reject the First Nations group's arguments. In particular, the First Nations group argues that the Board had already determined that there was no Crown involvement in the applications, and that the Board had already essentially determined that there could be no adverse impacts arising from the applications before the Board.

As the Applicants noted in their submissions on this issue, the standard for demonstrating bias is a high one. The Court of Appeal stated:

> The threshold for a finding of real or perceived bias is high. Mere suspicion is insufficient to support an allegation of bias. Rather, a real likelihood or probability of bias must be demonstrated. As stated in *Wewaykum* at para. 76, citing de Grandpre J. in Committee for Justice and Liberty at p. 395, the grounds for the alleged apprehension of bias must be "substantial". [16]

The Court of Appeal has further held that it is not improper for the decision maker to express tentative views on a matter:

---

[13] [1978] 1 S.C.R. 369 ("Committee for Justice and Liberty")
[14] [1999] 2 S.C.R. 817
[15] Committee for Justice and Liberty, p. 394.
[16] *Canadian College of Business and Computers Inc. v. Ontario* , 2010 ONCA 856 (CanLii), para. 24.

> …we do not consider it as inappropriate, at the conclusion of the case for the Crown, for the trial judge to canvas with defence counsel the defence which the accused intends to present and to express his, or her, tentative views concerning the viability of the defence…[17]

With respect to the argument that it had already determined that there was no Crown involvement in the applications, the Board disagrees that it demonstrated any level of bias or predetermination. The statement in the Procedural Order is factually correct – there is no Crown actor directly involved in the applications before the Board, nor the transaction (i.e. the sale) that will apparently follow approvals from the Board. No Crown actor has intervened or otherwise participated in this proceeding, nor (to the Board's knowledge) is any Crown actor a signatory to whatever sale arrangement will follow.

Regardless, the Board has paid careful attention to the First Nations group's submissions with regard to the Crown's involvement with the potential infringement. The First Nations group's letter seeking intervenor status says virtually nothing about the involvement of any Crown actor. It states that the Government of Ontario has a duty to consult, but it provides no information describing how that duty to consult is engaged with respect to the applications. Only in its response to the Procedural Order did the First Nations group describe its views on the connection between the Crown's duty to consult and the applications. As discussed above, the Board has accepted that it is possible that the Crown's conduct has triggered the duty to consult. The Board has ultimately determined that there was not a sufficient connection between the Crown conduct and the Board's proceeding, but this does not indicate that the Board did not have an open mind with respect to the issue of the Crown's involvement.

With respect to the allegation that the Board had already determined that there was no infringement arising from the applications, the Board again disagrees. The very purpose of Procedural Order No. 1 was to receive submissions on this issue. The Board's *Rules of Practice and Procedure* (and the common law) allow only parties that have a legitimate interest in the outcome of a proceeding to intervene. The Board has a responsibility to applicants and the process to ensure that proceeding time and parties' resources are used efficiently, and must therefore ensure that proposed intervenors have a legitimate interest in the outcome of the proceeding.

[17] *R. v. Parker*, 1998 CanLii 4792 (ON CA), para. 2

It was not clear to the Board upon reviewing the First Nations group's letter seeking intervenor status what the exact nature of the potential infringement was or whether the First Nations group had a legitimate interest in the outcome of these proceedings. For example, the Aboriginal right to harvest wild rice, which the Board learned through the submissions following the Procedural Order is the Aboriginal right that might be infringed, is not even mentioned in the initial correspondence. In that light, the Board provided the First Nations group with the opportunity to clarify and elaborate on the exact nature of its interest in the proceedings before the Board. There is nothing at all improper about such an approach; indeed it was necessary for the Board to understand and consider all the information relevant to the intervention request.

For these reasons, the Board rejects the First Nations group's arguments that the panel has demonstrated a reasonable apprehension of bias, and it has therefore not appointed a different panel to consider the submissions arising from Procedural Order No. 1.

IV. Decision with Respect to the Applications

Aside from the issues raised by the First Nations group and dealt with above, there were no further submissions in these proceedings. There are no intervenors.

After considering the Applications, the Board finds it to be in the public interest to grant the requested amendments because no adverse impacts have been identified. The amended licences will be issued when the Board receives confirmation from the Applicants that the commercial transaction has closed and operation of the eight generation stations has been transferred to ACH from AbiBow, and will be effective from the date of closing.

IT IS THEREFORE ORDERED THAT:

1. The name on electricity generation licence EG-2003-0204 is changed to AbiBow Canada Inc.

2. Schedule 1 of the electricity generator licence EG-2003-0204 will be amended to delete Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station,

Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station when the Board receives confirmation from AbiBow Canada Inc. that the commercial transaction has closed.

3. Schedule 1 of the electricity generator licence EG-2006-0124 will be amended to replace “owned” with “owned and operated” for Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station, Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station when the Board receives confirmation from ACH Limited Partnership that the commercial transaction has closed.

DATED at Toronto, May 20, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Attachment A

Electricity Generation Licence EG-2006-0124

ACH Limited Partnership

Electricity Generation Licence

EG-2006-00124

ACH Limited Partnership

Original signed by

_____

Mark C. Garner
Managing Director, Market Operations
Ontario Energy Board
Date of Issuance: March 5, 2007
Effective Date: Date the Commercial Transaction Closes (as defined in section 1 of this licence)

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

Commission de l'Énergie de l'Ontario
C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4

Table of Contents **Page No.**

1 Definitions

In this Licence:

"**Act**" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

"**commercial transaction**" means the transfer of ownership of eight hydroelectric generating stations with total capacity of 136 MW in the vicinities of Kenora, Fort Frances and Iroquois Falls, and associated transmission and distribution lines from Abitibi-Consolidated Company of Canada to ACH Limited Partnership;

"**Electricity Act**" means the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

"**generation facility**" means a facility for generating electricity or providing ancillary services, other than ancillary services provided by a transmitter or distributor through the operation of a transmission or distribution system and includes any structures, equipment or other things used for that purpose;

"**Licensee**" means ACH Limited Partnership;

"**regulation**" means a regulation made under the Act or the Electricity Act;

2 Interpretation

2.1 In this Licence words and phrases shall have the meaning ascribed to them in the Act or the Electricity Act. Words or phrases importing the singular shall include the plural and vice versa. Headings are for convenience only and shall not affect the interpretation of this Licence. Any reference to a document or a provision of a document includes an amendment or supplement to, or a replacement of, that document or that provision of that document. In the computation of time under this Licence where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens. Where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

3 Authorization

3.1 The Licensee is authorized, under Part V of the Act and subject to the terms and conditions set out in this licence:

a) to generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person subject to the conditions set out in this Licence. This Licence authorizes the Licensee only in respect of those facilities set out in Schedule 1;

b) to purchase electricity or ancillary services in the IESO-administered markets or directly from a generator subject to the conditions set out in this Licence; and

c) to sell electricity or ancillary services through the IESO-administered markets or directly to another person, other than a consumer, subject to the conditions set out in this Licence.

4 Obligation to Comply with Legislation, Regulations and Market Rules

4.1 The Licensee shall comply with all applicable provisions of the Act and the Electricity Act, and regulations under these acts, except where the Licensee has been exempted from such compliance by regulation.

4.2 The Licensee shall comply with all applicable Market Rules.

5 Obligation to Maintain System Integrity

5.1 Where the IESO has identified, pursuant to the conditions of its licence and the Market Rules, that it is necessary for purposes of maintaining the reliability and security of the IESO-controlled grid, for the Licensee to provide energy or ancillary services, the IESO may require the Licensee to enter into an agreement for the supply of energy or such services.

5.2 Where an agreement is entered into in accordance with paragraph 5.1, it shall comply with the applicable provisions of the Market Rules or such other conditions as the Board may consider reasonable. The agreement shall be subject to approval by the Board prior to its implementation. Unresolved disputes relating to the terms of the Agreement, the interpretation of the Agreement, or amendment of the Agreement, may be determined by the Board.

6 Restrictions on Certain Business Activities

6.1 Neither the Licensee, nor an affiliate of the Licensee shall acquire an interest in a transmission or distribution system in Ontario, construct a transmission or distribution system in Ontario or purchase shares of a corporation that owns a transmission or distribution system in Ontario except in accordance with section 81 of the Act.

7 Provision of Information to the Board

7.1 The Licensee shall maintain records of and provide, in the manner and form determined by the Board, such information as the Board may require from time to time.

7.2 Without limiting the generality of paragraph 7.1 the Licensee shall notify the Board of any material change in circumstances that adversely affects or is likely to adversely affect the business, operations or assets of the Licensee, as soon as practicable, but in any event no more than twenty (20) days past the date upon which such change occurs.

8 Term of Licence

8.1 Subject to section 8.2, this Licence shall take effect on the date the commercial transaction closes and expire 20 years from that date. The term of this Licence may be extended by the Board.

8.2 In order for this licence to take effect, the commercial transaction must close on or before December 31, 2007.

9 Fees and Assessments

9.1 The Licensee shall pay all fees charged and amounts assessed by the Board.

10 Communication

10.1 The Licensee shall designate a person that will act as a primary contact with the Board on matters related to this Licence. The Licensee shall notify the Board promptly should the contact details change.

10.2 All official communication relating to this Licence shall be in writing.

10.3 All written communication is to be regarded as having been given by the sender and received by the addressee:

a) when delivered in person to the addressee by hand, by registered mail or by courier;

b) ten (10) business days after the date of posting if the communication is sent by regular mail; or

c) when received by facsimile transmission by the addressee, according to the sender's transmission report.

11 Copies of the Licence

11.1 The Licensee shall:

a) make a copy of this Licence available for inspection by members of the public at its head office and regional offices during normal business hours; and

b) provide a copy of this Licence to any person who requests it. The Licensee may impose a fair and reasonable charge for the cost of providing copies.

SCHEDULE 1 LIST OF LICENSED GENERATION FACILITIES

The Licence authorizes the Licensee only in respect to the following:

1. Iroquois Falls Generating Station, owned by the Licensee at Iroquois Falls, Ontario.

2. Twin Falls Generating Station, owned by the Licensee at Teefy Township, Cochrane District, Ontario.

3. Island Falls Generating Station, owned by the Licensee at Menapiat Tolmie Township, Cochrane District, Ontario.

4. Calm Lake Generating Station, owned by the Licensee at Bennet Township, District of Rainy River, Ontario.

5. Sturgeon Falls Generating Station, owned by the Licensee at Bennet Township, District of Rainy River, Ontario.

6. Fort Frances Generating Station, owned by the Licensee at Town of Fort Frances, District of Rainy River, Ontario.

7. Kenora Generating Station, owned by the Licensee at Town of Kenora, District of Kenora, Ontario.

8. Norman Generating Station, owned by the Licensee at Township of Kenora, District of Kenora, Ontario.