



EB-2012-0082

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 Hydro One
Networks Inc. for an Order granting leave to construct to
upgrade existing transmission line facilities.

PROCEDURAL ORDER NO. 2
June 15, 2012

Hydro One Networks Inc. ("Hydro One") filed an application with the Ontario Energy Board dated March 28, 2012 under section 92 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B. Hydro One applied for an order of the Board granting leave to construct to upgrade 70 km of transmission line facilities between Lambton TS and Longwood TS (the "Project") in the west of London area.

Background

The Board issued a Notice of Application and Written Hearing on April 19, 2012.

In Procedural Order No. 1 intervenor status was granted to the Independent Electricity System Operator and to the Ontario Power Authority. The Power Workers' Union ("PWU"), Chippewas of the Thames First Nation ("COTTFN") and Dan Boyington and Amanda Hoof were granted observer status. The Board also established dates for submission of interrogatories and responses and argument.

By way of letter dated June 13, 2012 COTTFN formally requested intervenor status and cost eligibility and proposed a revised schedule for the proceeding. COTTFN indicates that it has an interest in all aspects of this proceeding. It seeks to intervene on two issues: (1) whether the proposed upgrades to the 70 km of transmission line facilities between the Lambton and Longwood Transformer Stations are in the public interest;

and (2) whether the Ontario Crown has discharged its duty to consult and, where required, accommodate COTTFN in respect of the proposed Project.

The Board has determined that COTTFN will be granted intervenor status subject to Hydro One's right of reply within 5 days of the date of this procedural order. Cost eligibility will also be granted to COTTFN but will be restricted to matters directly within the scope of this proceeding. As discussed below, the Board's jurisdiction with respect to the second issue raised by COTTFN is very limited.

Further information on activities that are eligible for an award of costs is outlined in the Board's *Practice Direction on Cost Awards* on the Board's website. Please note that cost claims are to be filed at the end of this proceeding unless the Board specifies otherwise. Cost claims will be subject to the Hydro One's right to object.

A revised list of intervenors is attached as Appendix A to this Procedural Order.

The Board's Jurisdiction in a Section 92 Leave to Construct Application

The Board's jurisdiction to consider issues in a section 92 leave to construct case is limited by section 96(2) of the OEB Act which states:

(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. 2009, c. 12, Sched. D, s. 16.

The Board does not have the jurisdiction to consider any issues other than those identified in section 96(2). The Board notes that as a general matter, the following issues are not within the scope of a section 92 leave to construct application: environmental issues, any issues relating to the sources of renewable energy, the Ontario Power Authority's feed in tariff program, nor social policy issues. While the Government's policies in respect of renewable energy form part of the criteria in section

96(2), the Board does not have the power to enquire into the appropriateness of that policy.

The Board has in prior decisions addressed the extent of the Board's jurisdiction to consider the issue of the adequacy of Aboriginal consultation. For example, in a case involving Yellow Falls Power Limited Partnership, the Board found:

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.

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 above¹.

In that decision, the Board went on to describe the relevant scope for issues related to Aboriginal consultation and accommodation:

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

¹ Yellow Falls Power Limited Partnership, *Decision on Questions of Jurisdiction and Procedural Order 4*, EB-2009-0210, November 18, 2009. See also, Northgate Minerals, *Procedural Order 2*, EB-2010-0150, July 29, 2010.

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 same approach will be adopted for the current proceeding. Only Aboriginal consultation and accommodation issues which fall within the specific criteria of section 96(2) will be considered within the scope of this proceeding

Given that the Board does not have the jurisdiction to determine issues related to environmental and social concerns outside of the scope of section 96(2), it is important to note that the Project is subject to a separate Environmental Approval ("EA") process. Generally speaking, environmental issues are considered in that process, and parties with an interest in environmental issues are encouraged to participate in the EA process. Although the Board has no role in the EA process, any approval of the leave to construct application would ordinarily be conditional on all necessary permits and authorizations being acquired, including a completed EA.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. The Chippewas of the Thames First Nation shall request information from Hydro One that is in addition to the evidence pre-filed with the Board and that is relevant to the hearing by means of written interrogatories filed with the Board and delivered to Hydro One on or before **June 20, 2012**. All interrogatories and responses must include a reference to the section of the application which identifies the specific evidence on which the interrogatory is based.
2. Hydro One shall, no later than **June 29, 2012** file with the Board and deliver to all intervenors, a complete response to each of the interrogatories.
3. Hydro One shall file with the Board and copy to all intervenors its written submission by **July 6, 2012**.

4. Intervenors and Board staff may file with the Board and copy to all other intervenors their written submissions on all matters by **July 16, 2012**.
5. Hydro One shall file its reply submission with the Board and copy to all intervenors by **July 23, 2012**.

All filings to the Board must quote file number EB-2012-0082, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca.

If the web portal is not available, parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, June 15, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO

PROCEDURAL ORDER NO. 2

Applicant and List of Intervenors

Board File No: EB-2012-0082

JUNE 15, 2012

Hydro One Networks Inc.

EB-2012-0082

APPLICANT & LIST OF INTERVENORS

June 15, 2012

APPLICANT

Rep. and Address for Service

Hydro One Networks Inc.

Susan Frank

VP and Chief Regulatory Officer
Hydro One Networks Inc.
483 Bay Street, 8th Floor, South Tower
Toronto, ON M5G 2P5

Tel: 416-345-5700

Fax: 416-345-5870

Regulatory@hydroone.com

Hydro One Networks Inc.

Rep. and Address for Service

Pasquale Catalano

Regulatory Coordinator
Hydro One Networks Inc.

483 Bay Street

8th Floor - South Tower

Toronto ON M5G 2P5

Tel: 416-345-5405

Fax: 416-345-5866

regulatory@HydroOne.com

APPLICANT COUNSEL

Michael Engelberg

Assistant General Counsel
Hydro One Networks Inc.

483 Bay Street

15th Floor - North Tower

Toronto ON M5G 2P5

Tel: 416-345-6305

Fax: 416-345-6972

mengelberg@hydroone.com

INTERVENORS

Rep. and Address for Service

Hydro One Networks Inc.

EB-2012-0082

APPLICANT & LIST OF INTERVENORS

- 2 -

June 15, 2012

**Chippewas of the Thames
First Nation**

Rolanda Elijah

Director
Chippewas of the Thames First Nation
4 Anishinaabeg Drive
Muncey ON N0L 1Y0
Tel: 519-289-2662
Fax: Not Provided
reljah@cottfn.com

Scott Smith

Gowling Lafleur Henderson LLP
1 First Canadian Place
100 King S. W. Suite 1600
Toronto ON M5X 1G5
Tel: 416-369-7210
Fax: 416-862-7661
scott.smith@gowlings.com

**Independent Electricity
System Operator**

Maia Chase

Senior Regulatory Analyst
Independent Electricity System Operator
655 Bay Street
Suite 410, P.O. Box 1
Toronto ON M2G 2K4
Tel: 905-403-6906
Fax: 905-855-6372
maia.chase@ieso.ca

Ontario Power Authority

Miriam Heinz

Regulatory Coordinator, Corporate Affairs/Legal
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto ON M5H 1T1
Tel: 416-969-6045
Fax: 416-967-1947
Miriam.Heinz@powerauthority.on.ca