

FRENCH RIVER DELTA ASSOCIATION  
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RR 2 Site 10 Comp 4  
Alban, Ontario P0M 1A0

November 30, 2012

Mr. Colin Andersen, CEO  
Ontario Power Authority  
120 Adelaide Street West  
Suite 1600  
Toronto, Ontario  
M5H 1T1

Dear Mr. Andersen:

**Re: Conditional Contract – Xeneca Power Development Inc., Allen & Struthers Wanapitei River site**

We are writing to ask that you terminate Xeneca Power Development Inc. (“Xeneca”)’s Feed-In Tariff (FIT) contract for the proposed Allen & Struthers hydro electric generating project (the “Proposed Project”). In our view, you have the power to do so, and should do so because:

1. The Proposed Project will not provide the promised amount of power;
2. The Proposed Project would cause significant harm to the natural environment and a provincial park;
3. Xeneca is in violation of the terms of its FIT contract, including multiple failures to obtain necessary permits on time;
4. Xeneca is not likely to obtain the necessary permits, given:
  - a. the staunch opposition of the local community, the municipality, and the First Nations;
  - b. its failure to consult the key local Band;
  - c. the presence of an aboriginal burial ground; and
  - d. the impact on endangered species; and
5. Xeneca may be using improperly obtained funding for the project.

**About us**

The French River Delta Association consists of the cottagers and local business owners who depend on the French River ecosystem, and who would be harmed by the proposed Project. We are committed to ensuring that this ecosystem is sustained for future generations.

For many years, we have had a cordial work relationship with the local Ministry of Natural Resources (MNR) and Ministry of the Environment (MOE) staff, and have worked together on fishery improvement and water quality issues.

## **Strong opposition to Proposed Project**

The Proposed Project faces strong opposition from the Municipality of Killarney, the Municipality of French River, local stakeholders and Henvey Inlet First Nation.

In August 2012, Municipality of Killarney Council passed Resolution #12-292 opposing the Proposed Project. The Resolution sets out many of the negative impacts the Proposed Project and Xeneca's proposed operating strategy would have on the ecosystem.<sup>1</sup>

## **Xeneca in breach of terms of its FIT contract**

On April 29 2010, Ontario Power Authority awarded Xeneca a FIT contract for the Proposed Project.<sup>2</sup> This letter assumes that the Proposed Project continues to be governed by FIT contract version 1.3 (March 9, 2010), which was in place when the contract was awarded.<sup>3</sup> (If not, please may we have a copy of the correct contract?)

The FIT contract states in Article 2.9(a): "The OPA and the supplier shall each comply, in all material respects, with all Laws and Regulations required to perform or comply with their respective obligations under this Agreement...."<sup>4</sup>

Below we provide examples of Xeneca's breaches of this obligation, which (in our view) authorize the OPA to terminate the contract, in accordance with Article 9. We ask that you do so.

### **1. Xeneca breached applicable laws by surveying the site without applicable permits, approval and/or site release**

During our May 31 2012 meeting with MNR representatives,<sup>5</sup> we discussed several issues concerning the Proposed Project, including the requirement for permits and site release in order to proceed with any activity (e.g., a survey) on Crown land.<sup>6</sup> It is our understanding that Xeneca

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<sup>1</sup> Attached is a copy of a letter from the Municipality of Killarney (August 9 2012) enclosing a copy of Council Resolution #12-292 passed on August 8 2012

<sup>2</sup> Xeneca: Project Description – Allen & Struthers (Wanapitei River) Hydroelectric Generating Station. Section 1.1.2 – at <http://www.xeneca.com/files/OE8626%20Final%20Project%20Description%20Wanapitei%20River%20Allen%20and%20Struthers%20OEL%20Nov%202010.pdf>

<sup>3</sup> at [http://fit.powerauthority.on.ca/Storage/11098\\_FIT\\_Contract\\_Version\\_1.3.pdf](http://fit.powerauthority.on.ca/Storage/11098_FIT_Contract_Version_1.3.pdf). More recent versions of the FIT contract (1.3.1, 1.3.2, 1.4, 1.5) set out at <http://fit.powerauthority.on.ca/program-archives> have identical provisions to those discussed in this letter. As well, the OPA has indicated that existing FIT contract holders will be managed under existing terms of their current FIT contracts: OPA. FAQ for existing contract holders. At <http://fit.powerauthority.on.ca/faqs/faqs-existing-contract-holders>

<sup>4</sup> FIT Contract, Schedule 1, General Terms and Conditions, Version 1.3.2, page 12

<sup>5</sup> with Ginette Brindle the MNR Northeast Regional Manager, Pierre Corbeil (MNR Land Use Planner) and Priya Tandon of the MNR; our legal counsel Dianne Saxe; and Chief Wayne McQuabbie (participating via teleconference)

<sup>6</sup> Waterpower Site Release and Development Review – Policy PL 4.10.05, issued November 10 2004, at <http://www.ontla.on.ca/library/repository/mon/9000/248547.pdf>. Waterpower Site Release and Development Review Procedure PL 4.10.05, issued May 21 2007 at <http://www.ontla.on.ca/library/repository/mon/17000/272946.pdf>. An earlier version of this latter document was to be read in conjunction with "Policy Directive PL 4.10.05, "Waterpower New Site Release and Development Review". I did not find a copy of this "new" directive, other than in draft form. See also Waterpower Site Release – Crown Land (Procedure PL 4.10.05, issued April 16 2010), which provides procedural direction to implement

did *not* have a proper permit, approval and/or receive site release when it surveyed the site for the Proposed Project.

## **2. During the survey, it staked a provincial park and caused damage**

Within the boundaries of the French River Provincial Park, Xeneca used wooden and metal survey stakes, and painted rocks with orange spray paint. These items remain in the park. Attached are photos.

The General Regulation to Ontario's *Provincial Parks and Conservation Reserves Act, 2006* prohibits persons from damaging or defacing any Crown property or natural object in a provincial park.<sup>7</sup> We believe that Xeneca's actions in the Park constitute damaging (staking) and defacing (painting) natural objects in the Park.

Attached is a copy of a letter from Ontario Parks authorizing research to be conducted in the French River and Wanapitei River watersheds.<sup>8</sup> While this related to archeological assessments, it illustrates the care required when conducting activities within a provincial park. In particular, materials are not permitted to be left on site and any impacts to natural values must be avoided (condition 14). Field markers must be removed at the end of the project and use of paint is prohibited (condition 15).

And except with written authorization of the Park superintendent, it is not permissible to harm any plant, tree or natural object in a provincial park or to conduct research in a provincial park.<sup>9</sup> It is our position that Xeneca's activities damaged natural objects in the Park (rock, soil) and we do not believe it had permission from the Park Superintendent to do so. The term "research" is not defined in the Regulation or its governing statute, but would likely include survey activities; again, we believe these activities were carried out without permission of the Superintendent.

## **3. Xeneca breached applicable laws by failing to consult First Nations**

The Sturgeon Chutes area is a First Nations archaeological site, registered as an archaeological site by Ontario's Ministry of Tourism and Culture. Chief Wayne McQuabbie of the Henvey Inlet First Nation wrote to Ontario's Minister of Natural Resources in April 2012, noting that his Band had not been consulted. The Proposed Project would be situated within his Band's traditional territory.<sup>10</sup> Attached is a copy of that letter. This failure to consult has not been remedied.

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Policy PL 4.10.05 Waterpower Site Release on Crown Land (at <http://www.mnr.gov.on.ca/stdprodconsume/groups/tr/@mnr/@renewable/documents/document/290575.pdf> )

<sup>7</sup> Ontario Regulation 347/07 at s. 2(1)(a), (b). At [http://www.e-laws.gov.on.ca/html/reg/english/elaws\\_regs\\_070347\\_e.htm#BK10](http://www.e-laws.gov.on.ca/html/reg/english/elaws_regs_070347_e.htm#BK10)

<sup>8</sup> Letter from Ross Hart, Zone Manager, Ontario Parks, Northeast to William Allen (Heritage One) dated April 20 2012: Letter of authorization to conduct research in a provincial park or conservation reserve.

<sup>9</sup> O.Reg. 347/07 at s. 2(2)(a), (f)

<sup>10</sup>, dated April 10 2012. We also attach copies of letters from Xeneca to Chief McQuabbie dated September 23 2011 and April 23 2012

#### **4. Xeneca's proposed peaking operation will cause irreversible damage to a provincial park and to endangered species**

In July 2011, N.A.R. Environmental Consultants, which we retained to review the Proposed Project from a technical and scientific perspective, wrote to Xeneca.<sup>11</sup> In that letter, N.A.R. warns that tailwater effects associated with the Proposed Project would extend into the French River Provincial Park and that downstream hydrology would be significantly affected, impacting habitat critical for fish, birds, reptiles and amphibians, some of which are species protected by federal and/or provincial species at risk statutes.

#### **5. Xeneca cannot meet the FIT contract standard of 75% of generation contracted**

Xeneca's FIT contract was for a generating capacity of 2.8 MW.<sup>12</sup> The FIT contract permits a Supplier (on a single occasion only) to elect to reduce the contract capacity to an amount that is not less than 75% of the original contract capacity.<sup>13</sup>

In a report prepared by AECOM, and funded by the Ministry of Natural Resources, it is clearly stated that the capacity for this project is 1.53 MW, which is 54.6% of contracted capacity.<sup>14</sup>

#### **6. The Supplier lobbied for, applied for and received funding in the amount of \$832,000 for projects from Northern Ontario Heritage Fund Corporation which it was not entitled to**

Arnold Chan, Xeneca's Vice-President, Legal Affairs, is also a registered lobbyist in Ontario. Mr. Chan's Lobbyist Registration Form notes that Xeneca received at least \$832,000 as two separate grants from the Northern Ontario Heritage Fund Corporation ("NOHFC"). However, from our review of the NOHFC eligibility requirements, Xeneca should not have qualified for any funding at all, as funding is only available to Eligible Northern Organizations and Businesses. Xeneca is not a Northern Organization or Business. As well, certain costs are generally not eligible for funding, including FIT projects, according to the NOHFC website.<sup>15</sup> *Please confirm that our understanding that it was improper for Xeneca to receive NOHFC funding for this project.*

#### **7. Xeneca's approach in its other hydroelectric projects**

Xeneca's approach to its other hydroelectric projects has demonstrated its persistent failure to meet regulatory standards, which is also of concern for the Proposed Project.

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<sup>11</sup> We attach a copy of that July 29 2011 letter, to Mark Holmes of Xeneca

<sup>12</sup> Xeneca: Project Description – Allen & Struthers (Wanapitei River) Hydroelectric Generating Station. Section 1.1.2 – at <http://www.xeneca.com/files/OE8626%20Final%20Project%20Description%20Wanapitei%20River%20Allen%20and%20Struthers%20OEL%20Nov%202010.pdf>

<sup>13</sup> FIT contract version 1.3 at s. 2.1(c)

<sup>14</sup> Ontario Ministry of Natural Resources: Economic Impact of Waterpower Projects on Crown Lands in Ontario. Prepared by AECOM. April 2012 at [http://owa.ca/assets/files/stdprod\\_098659.pdf](http://owa.ca/assets/files/stdprod_098659.pdf). See pp. 4, 12-13. In Table 15 (item 30, Allen & Struthers Project), AECOM assumes a 55% operating efficiency, i.e., name plate MW capacity 2.80, MW output 1.54. See also Appendix E of that report.

<sup>15</sup> NOHFC. Northern Energy. At <http://nohfc.ca/en/programs/northern-energy>

For these projects, as for the Proposed Project, Xeneca is required to obtain and maintain licences, permits, authorizations and approvals (among other things) under the FIT contract.<sup>16</sup> However, the MOE noted in a recent letter to Xeneca in relation to its Ivanhoe River – The Chute hydroelectric generation project that the company had failed on several fronts to meet the requirements of the Ontario Waterpower Association’s Class Environmental Assessment (EA) for Waterpower Projects. Of particular concern, Xeneca failed to adequately communicate key information about that project (e.g., potential impacts of that project and mitigation measures) to the public and aboriginal communities. The MOE states: “Lastly, I would like to ensure that Xeneca understands that failure to comply with the EAA and more specifically, proceeding with the Project without complying with the provisions of the OWA Class EA are contraventions of the EAA and may result in prosecution under section 38 of the EAA.”<sup>17</sup> A copy of this letter is attached. *We understand that is very rare for the MOE to stop a Class EA.*

Xeneca failed to comply with the obligation to the OPA under the FIT contract, other Governmental Authorities, local stakeholders (ratepayers) and First Nations. For example its failure to meet these obligations was among the many shortcomings that led to the rejection of one of its first three Environmental Assessment Notices of Completion by the MOE, and the voluntary withdrawal of the two others.<sup>18</sup>

## **8. Failure to meet timelines**

Under Section 2.4 (b) of the FIT contract, Xeneca must meet certain timelines, and time is of the essence. For example, Xeneca is obliged to obtain all environmental, site plan, and other necessary approvals and permits within 24 months of the contract date (i.e., by April 29, 2012).<sup>19</sup> This includes the Renewable Energy Approval (REA). From publicly available information that we have accessed, it appears that Xeneca has not obtained any of these approvals. *Please confirm that Xeneca has missed the deadline to obtain its approvals, and that you now have the right, under the FIT contract, to terminate the contract, under s. 2.4(a), 9(1)(c) and other provisions of the FIT contract.*<sup>20</sup>

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<sup>16</sup> Article 2.9(b) of The FIT contract states: “The OPA and the supplier shall each furnish, in a timely manner, information to Governmental Authorities and shall each obtain and maintain in good standing any licence, permit, certificate, registration, authorization, consent or approval of any Governmental Authority required to perform or comply with their respective obligations under this Agreement, including such licencing as is required by the OEB.”

<sup>17</sup> March 2, 2012 letter from Ms. Agatha Garcia-Wright, Director of the MOE’s Environmental Assessment and Approvals Branch to Mr. Patrick Gillette, President and COO of Xeneca.

<sup>18</sup> Xeneca voluntarily withdrew its Notices of Completion for Four Slide Falls – Serpent River; Wanatango Falls – Frederick House River – Ontario Rivers Alliance: Ministry of Environment rejects hydro developer’s environmental report. May 3 2012. As well, its and The Chute- Ivanhoe River <http://ontarioriversalliance.ca/press-release-ministry-of-environment-rejects-hydro-developers-environmental-report-3-ontario-rivers-are-safe-for-now/>

<sup>19</sup> In accordance with Fit Contract, Schedule 1, General Terms and Conditions, Version 1.3, Exhibit A - Technology-Specific Provisions Type 7: Waterpower Facilities at s. 1.2(b). In the Standard Definitions for FIT, the NTP Response Date “means the number of days following the Contract Date that is used to determine the time by which the OPA must respond to a completed NTP Request for a Contract Facility that is not an automatic NTP Facility, as specified in Exhibit A”. See <http://fit.powerauthority.on.ca/sites/default/files/FIT%20Standard%20Definitions%20Version%201.5.1.pdf>

<sup>20</sup> This clause provides that “Until the OPA issues Notice to Proceed to the Supplier, and the Supplier has provided to the OPA the Incremental NTP Security....., the OPA may terminate this Agreement in its sole and absolute discretion by notice to the Supplier...”

For all these reasons, it appears to us that OPA does have the power to terminate this particular contract, and we urge you to do so.

The Supplier may, if it wishes, reapply for a new contract under the new FIT Rules and Regulations. The new FIT 2.0 Rules would prioritize projects in accordance with a point system that is designed to give Municipalities, local ratepayers (stakeholders) and First Nations the opportunity to voice their approval or concerns. We do not believe that Xeneca would qualify for a FIT 2.0 contract.

### **Minimal impact if FIT contract terminated**

It is our position that the cancellation of the Proposed Project would not cause any material damage to the OPA, ratepayers, nor would it impact Ontario's electrical grid.

For example, George Vegh, in the Report of the Chair of the Electricity Market Forum, states:

“...Ontario no longer faces a looming supply shortfall. To the contrary, it now has the luxury of sufficient and even excess supply. Further, although there is a potential “capacity gap” arising around 2018, that gap can be filled if existing infrastructure is re-contracted and reconfigured. The supply side challenge is therefore not driven by the need to procure new generation capacity, but to manage supply to meet the needs of electricity customers.”<sup>21</sup>

The report continues:

“Under the Low Growth scenario – which appears to be higher than where demand is trending - peak demand does not increase by 1,000 MW prior to the end of the Plan term (2030). Thus, while the longer-term implications of current data are not certain, it appears peak demand requirements are not likely to meet forecasted increases for the foreseeable future.”<sup>22</sup>

In fact, termination of the Proposed Project would most likely benefit Ontario's economy. The Fraser Institute, in its recent report “A Sensible Strategy for Renewable Electrical Energy” states:

“First, the huge loss that consumers will take on account of higher electricity costs resulting from the FIT program means that less of their income will be available for spending on other goods and services. This direct loss of income available for discretionary spending will have a substantial impact on employment throughout Ontario. Second, higher electricity costs will impinge on the ability of Ontario manufacturers to compete and some, whose energy costs represent a large portion of production costs, may be forced to shut-down or to relocate to regions such as Quebec and Manitoba, where there are appreciably lower electricity costs.”<sup>23</sup>

Mr. Drummond, in his report to the legislature in February 2012 urged the OPA to mitigate the impact of the FIT program by using the off ramps built into existing FIT contracts.<sup>24</sup> Many

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<sup>21</sup> Reconnecting Supply and Demand, Report of the Chair of the Electricity Market Forum, George Vegh. December 2011. Context: State of the Market, page 3. At [http://www.ieso.ca/imoweb/pubs/consult/Market\\_Forum\\_Report.pdf](http://www.ieso.ca/imoweb/pubs/consult/Market_Forum_Report.pdf)

<sup>22</sup> Reconnecting Supply and Demand, Report of the Chair, George Vegh, Context: State of the Market, page 4

<sup>23</sup> Fraser Institute, A Sensible Strategy for Renewable Electrical Energy, 2012, page 65

<sup>24</sup> Commission on the Reform of Ontario's Public Services. 2012 (“Drummond Report”). At <http://www.fin.gov.on.ca/en/reformcommission/chapters/report.pdf>

interpret this position as suggesting that the OPA consider terminating some existing contracts that have not yet obtained a NTP.

In summary, the Proposed Project is environmentally, ecologically, socially and economically unsustainable. Xeneca as proponent and the FIT contract holder, has been unable to meet its contractual duties and has a poor record in communicating critical information to First Nations and the Ontario public about its proposed hydroelectric projects. Accordingly, we ask the OPA to terminate the current FIT contract and to refuse to issue a new FIT contract to Xeneca or any other proponent for the Allen & Struthers site.

We would appreciate meeting with you at your earliest convenience to discuss these issues in more detail.

Sincerely yours,

Jim Rook  
French River Delta Association

cc: The Honourable Christopher Bentley, Minister of Energy  
Xeneca Power Inc  
Chief Wayne McQuabbie, Henvey Inlet First Nation  
Ontario Rivers Alliance