ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act,* 1998, S.O. 1997, c. 15, Sch. , as amended (the "OEB Act");

AND IN THE MATTER of an application by Grand Renewable Wind LP (the "Applicant") for an order under section 92 and subsection 96(2) of the OEB Act granting leave to construct an electricity transmission line and related facilities

SUBMISSIONS OF SIX NATIONS COUNCIL
(In Response to Procedural Order No. 3)

INTRODUCTION

1. By Order dated July 12, 2011, the Ontario Energy Board granted party status to Six Nations Council and other proposed parties, permitting it and other parties to respond to the application by Grand Renewable Wind LP.

2. Pursuant to Procedural Order No. 3, these are the submissions of Six Nations Council in response to the submissions of the Applicant made Friday, September 16, 2011. The Six Nations Council is the elected government of the Six Nations of the Grand River.

The Purpose of the Application by Grand Renewable Wind to the OEB

3. According to its submission dated September 16, 2011, the Applicant, Grand Renewable Wind LP ("GRWLP"), has applied to the Board for leave to construct an electricity transmission facility. The purpose of the transmission facility is to connect a proposed wind powered generating facility to be owned by the Applicant (the "Wind Project") and a proposed solar photovoltaic generating facility (the "Solar Project") to be owned by a different entity called Grand Renewable Solar LP ("GR Solar LP"). The proposed transmission facility would be used to transmit electricity generated from both the Wind Project and the Solar Project owned by GR Solar LP, to the IESO-controlled grid.[1]

4. Both the Wind Project and the Solar Project require a renewable energy approval ("REA") from the Ontario Ministry of the Environment. To date, no REA has been provided by the Applicant. Without a REA for both the Wind Project and the Solar Project, the underlying basis for the application to the Board and premise upon which leave to construct is being requested would be entirely removed. The GRWLP application to the Board for leave to construct is premised on the assumption that a REA will be provided by the Ministry of the Environment as a matter of routine for both GRWLP's Wind Project and Solar LP's Solar Project.

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[1] Applicant's Argument in Chief, paras. 1-3.

SUMMARY OVERVIEW OF SIX NATIONS COUNCIL'S SUBMISSIONS

5. A consideration of GRWLP's application by the Board at this time would be and is premature. The Board should therefore defer its consideration of this application until after the following occur:

(1) First, that the associated REA has been issued by the Ministry of the Environment and is final; and

(2) Second, either:

(a) that the Board has been fully satisfied that the Ontario Crown has properly consulted and accommodated the Six Nations of the Grand River on matters affecting Six Nations' treaty or aboriginal rights, with respect to any aspect of the project associated with the leave to construct transmission facilities for GRWLP's Wind Project and GR Solar LP's Solar Project; or

(b) alternatively, that the Board has stated a case to the Divisional Court for an opinion as to whether the Board is required to undertake the inquiry requested in subparagraph (a) above.

6. In the alternative, the Board should as a minimum impose the following conditions to any approval the Board might issue before a REA has been issued by the Ontario Ministry of the Environment:

(1) Any approval for leave to construct should be conditional only and be effective only when and from the date the Board has stated that it is fully satisfied that all of the conditions to the approval have been completed.

(2) The REA for the entire project (being the Wind Project, the Solar Project and the Transmission Facility) has been issued by the Ministry of the Environment and is final.

(3) The Ontario Crown has properly consulted and accommodated the Six Nations of the Grand River with respect to the effects of the entire project on Six Nations' treaty or aboriginal rights.

(4) The Board should invite evidence and submissions from the Applicant, the Ontario Crown (including the Ministry of Infrastructure, the Ministry of Energy, the Ministry of Environment), and the parties to this proceeding (including Six Nations Council) as to whether the above and other conditions to any approval have been fulfilled, before the approval is made final and effective.

7. The reasons in support of the above submissions are set out below.

8. This submission will also respond to the Applicant's arguments on the subjects of "Project Need", "Environmental Assessments", and "Public Consultations".

REASONS FOR SUBMISSIONS

The GRWLP Argument about Project Need is Premature

9. It is clear from the Applicant's materials in support of or in connection with its application, and paragraphs 1 to 3 of its Argument, that the sole intended purpose of the proposed electricity transmission facility (the "Transmission Line") is to connect the proposed Wind Project and Solar Project to the IESO-controlled electricity grid.

10. By definition, there is no Project Need for the Transmission Line if both the proposed Wind Project and Solar Project are not permitted to be built.

11. Neither the contemplated Wind Project nor the contemplated Solar Project have received the required REA from the Ontario Ministry of the Environment.

12. In the REA materials that GRWLP filed as part of this application to the Board, GRWLP describes the Project as including the Transmission Line. GRWLP is not entitled to start constructing the Project without obtaining the

REA (*Environmental Protection Act, s. 47.3(1)7 and Ontario Reg. 359/09,* s. 10).

13. By letter to the Board dated August 10, 2011, GRWLP advised that it had posted the draft documents required for a REA application at its website. GRWLP presumably did so intending to make those part of the materials which the Board should review in connection with this application. The draft Project Schedule which GRWLP posted indicates that construction of the Transmission Line is slated to begin at the same time as the construction of the generation facilities (i.e. the Wind Project and the Solar Project). According to the Project Schedule delivery of the construction materials and site preparation and installation of the Transmission Line are both scheduled to begin in March 2012. (see: Construction Plan Report, at http: http://www.samsungrenewableenergy.ca/sites/default/files/pdf/haldimand/Construction-Plan-Report_Main-Body.pdf, page 2.25.)

14. It is clear that GRWLP's application to the Board for leave to construct is premised entirely on the presumption, belief or assurance that a REA will definitely be issued by the Ontario Ministry of the Environment. For example, in answer to HCHI Interrogatory 5(d), GRWLP advised that it "intends to submit the final REA [i.e. the application for the REA] to the MOE by October 2011 and anticipates receiving the REA approval within the six month approval timeframe prescribed by O.Reg. 359/09".

15. GRWLP has not, however, filed in this proceeding any evidence supporting the presumption mentioned in paragraph 15 above.

16. GRWLP has not attempted and cannot establish Project Need for the Transmission Line at this time but could only do so after and when a REA is granted by the Ministry of the Environment.

17. Therefore, the Board should defer consideration of this application until that time.

The Board's Consideration of the Environmental Assessments is Premature

18. On page 10, paragraph 1.1 of its Argument in Chief, GRWLP confirms the following:

    (a) a second public open house required by the REA process had not yet been held-- it is scheduled for September 22, 2011;

    (b) the application for the REA has not yet been submitted (the REA package of required supporting documents, the completed form and security are yet to be sent to the Ministry of the Environment).

19. At paragraph 33 of its Argument, GRWLP confirms that the Transmission Line subject to this application is also subject to an environmental assessment under the REA (the application for which has not yet been submitted).

20. At paragraph 34 of its Argument, GRWLP undertakes that it "will adhere to all recommendations established in the Draft Documents and by the Ministry of the Environment". The Draft Documents are the draft REA documents and are specifically referenced on page 10 of the Argument.

21. GRWLP's undertaking, referred to immediately above, should be elevated into a formal condition of any Board approval.

22. While this type of condition should be made, it is premature for the Board to consider this application and the exact language for this condition until it knows how the Draft Documents might be modified after the public open house, after true consultation has taken place with the Six Nations Council and after the Ministry of the Environment and other public agencies have completed a technical review and comment of the REA application yet to be submitted.

GRWLP Has Not Yet Finalized Land Rights from the Crown

23. GRWLP confirms on page 9 of its Argument that the proposed Transmission Line is proposed, in part, across Ontario government held lands (the "MOI Lands" or "ORC Lands"). It is understood that these lands are managed on behalf of the Ontario Crown by the Ministry of Infrastructure/Ontario Realty Corporation, an Ontario Crown corporation.

24. At paragraph 32 of its Argument, GRWLP states that with respect to the ORC Lands, the terms of option agreements are currently still being negotiated.

25. What GRWLP fails to mention, and apparently fails to recognize, is that the Ontario Crown has a constitutional duty to consult and accommodate Six Nations with respect to a disposition in any way of these lands for the purposes of the project including the Transmission Line portion. The reason the Ontario Crown is required to do so is because the "Honour of the Crown" is engaged and the Six Nations have constitutionally protected rights which are potentially infringed or affected by the project and the disposition, if the Six Nations' interests have not been adequately accommodated.

26. The Board's consideration of this application is premature until the proposed land agreements have been filed and considered by the Board and there has been a satisfaction of the Ontario Crown's duty referred to in paragraph 25 above.

GRWLP 's Comments on Alleged Aboriginal Consultation are Misleading

27. At paragraphs 35 to 37 of its Argument, GRWLP leaves the misleading and therefore erroneous impression that Six Nations have been properly consulted concerning the Transmission Line and the rest of the Project. GRWLP alleges that it has met all prescribed consultation requirements under the REA Regulation. It also refers to its letter of July 12, 2011 addressed to Six Nations Lands and Resources Department filed with the Board as support. In that letter, GRWLP's consultant (Stantec) claims that it is engaged Six Nations in accordance with the Six Nations Land Use Consultation and Accommodation Policy. (For convenience, this policy shall be referred to as the "Six Nations Council Consultation Policy"). The GRWLP Argument makes no mention of the responding July 28, 2011 letter delivered

by Six Nations Lands and Resources, also filed with the Board in this proceeding.

28. Six Nations' letter of July 28, 2011 is attached for convenience as Schedule A to this submission. As outlined in that letter, consultation with the Six Nations concerning the project, including the Transmission Line, has not yet commenced. While Six Nations made GRWLP aware of Six Nations Council Consultation Policy in 2010 and while GRWLP claims to have adhered to it, that is in fact not the case. A copy of that policy is attached as Schedule B to this submission.

29. Not only has GRWLP not complied with the terms, process and spirit of the Six Nations Council Consultation Policy, it has not negotiated with the Six Nations Council an acceptable alternative consultation protocol for the Six Nations community. Instead, it has sought to provide minimal notice of the project to the Six Nations community and to require that the community simply appear at public open houses held away from the Six Nations Reserve, intended principally if not exclusively for the non-aboriginal community. This is being done in circumstances where Six Nations' constitutionally protected rights are being affected by the project.

30. The Draft Aboriginal Consultation Guide for preparing a Renewable Energy Approval (REA) Application, issued by the Ministry of the Environment (Spring 2011) (the "MOE Aboriginal Consultation Guide") is attached for convenience as Schedule C. The Guide states that "if a proposed REA facility is located on land controlled by the Ministry of Natural Resources or the Ministry of Infrastructure permissions from these ministries to use the land are required. These processes may include additional Aboriginal notification or consultations that are not replaced by REA consultation requirements." (p. 4) That guidance applies to this case, yet the Applicant has not attempted to address consultation beyond the REA Regulation.

31. The MOE Aboriginal Consultation Guide further states (at p. 6):

> "Due to the volume of consultation requests received and the possible limits on their human and financial resources, some Aboriginal communities find it challenging to participate in consultation. Some

> communities may request additional resources or other financial assistance to facilitate their involvement in the consultation process. Applicants will generally be expected to cover the reasonable costs associated with those aspects of the consultation process that have been delegated to it through the REA regulation and processes outlined in this guide."

No capacity funding has been made available by GRWLP, GR Solar LP or anyone else to enable the Six Nations to fully and effectively participate in the consultation process for this Project. This is in spite of the guidance in the Ministry of the Environment's Draft Aboriginal Consultation Guide ("the MOE Aboriginal Consultation Guide") and the specific requirement to that effect in the Six Nation Council Consultation Policy (see section 3.1), which in turn is based on principles established by the United Nations Declaration on the Rights of Indigenous Peoples.

32. The MOE Aboriginal Consultation Guide (at p. 11, s. 2.7) mandates that "applicants are required to:

- Make available paper copies of all the draft documents that are to form part of the application in any Aboriginal community of the Aboriginal consultation list, if the community agrees; and
- Distribute these documents to each Aboriginal community that was provided the project notice."

The Guide also advises:

> "Applicants are encouraged to consider the Aboriginal community's capacity in order to allow sufficient time for Aboriginal communities to comment."

In other words, additional time should be provided for review, discussion and comment before a final public meeting beyond the minimum provided in the REA Regulation. GRWLP has not abided by the directives on distributing paper copies of the draft documents for the REA within the Six Nations' Community nor on providing significant time for review beyond the bare regulatory minimum. A protocol for consultation to take account of Six Nations' circumstances has already been fully developed by the Six Nations Council through the Six Nations Consultation Policy. The Applicant has not

initiated and engaged in consultation with Six Nations as provided for under that policy. That policy requires adequate time for review and consultation on a project.

33. While the GRWLP's argument makes reference to a "final public meeting", for September 22, 2011 concerning the request for a REA, to the best of Six Nations' knowledge, that public meeting was not advertised in either of the two Six Nations based weekly newspapers circulating on the Six Nations Reserve.

34. The MOE Aboriginal Consultation Guide (p. 13, s.3.1) further recommends that an applicant for a REA work with the Ministry to develop an Aboriginal Consultation Plan and undertake additional consultation requirements beyond the minimum required by the REA Regulation. The Guide indicates that these additional steps are most likely to be required "for projects that have the potential to have a significant adverse impact on the exercise of an Aboriginal or Treaty right and are proposed to be located where rights are known to be exercised by Aboriginal communities. Examples may include, but are not limited to:

- large scale wind facilities that are expected to have significant environmental impacts, and are proposed to be located on Crown land where one or more Aboriginal communities are known to exercise treaty rights to hunt."

The Applicant has filed no evidence that it ever developed a Six Nations specific Aboriginal Consultation Plan relating to the project, approved by the Ministry of Environment and

35. The circumstances mentioned above are applicable to the present situation. The project, comprising the Wind Project, the Solar Project and the Transmission Line are proposed for location, in part, on Crown owned land. Members of the Six Nations regularly engage in deer hunting and other treaty protected activities such as gathering plants for traditional medicines on lands south of the Six Nations Reserve, including the Crown owned lands contemplated to be used for the Project.

36. These activities exercised by members of the Six Nations are protected by the *Nanfan Treaty* of 1701, referred to in the Six Nations Consultation Policy. Those treaty rights are constitutionally recognized and protected under section 35 of the *Constitution Act, 1982*.

37. Page 3.12 of Stantec's draft Natural Heritage Assessment and Environmental Impact Study, filed as part of the Applicant's draft REA materials, states that "Deer yards are areas of key winter habitat for white-tailed deer. They usually consist of a coniferous forest, which provides shelter from snow and wind, adjacent to an area of deciduous forest or other foraging habitat (MNR, 2000). MNR has identified the majority of woodlands within the Study Area as deer yards."[2]

38. As part of that Environmental Impact Study, Stantec reported that at least 15 different woodlands that are key winter habitat deer yards are within 120 meters or less of various Project components of either the Wind Project (e.g. one or more wind turbines) or the Solar Project (e.g. one or more solar panels).

39. Virtually nothing is known about what impact the wind turbines and solar panels will have on the deer that up until now have lived in these deer yards. In the Environmental Impact Study, Stantec admitted that "Since wind power is a relatively new method of producing electricity, there is little literature on the direct effects of wind turbine sound on wildlife" (at p. 6.7).

40. The Environmental Impact Study says that the Applicant will carry out post-construction monitoring for disturbance and mortality effects on wildlife (e.g. see pages 6.18 and 6.20), but after the fact monitoring will be of little benefit to the Six Nations if the Project drives away the deer that the Six Nations have hunted for generations. There has been no consultation with the Six Nations about how their hunting rights may be impacted by the disturbance that will be caused to these deer yards by the construction, monitoring and operation of the Project.

41. The Applicant's materials also fail to recognize and address the impacts on the Six Nations claims, under the *Haldimand Proclamation* of 1784, to the Crown owned land proposed to be used for the Project.

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[2] According to the Stantec draft Natural Heritage Assessment and Environmental Impact Study, at pages 6.17 to 6.153, the following 15 Natural Features containing woodlands with deer yards are within 120 metres of a Project component: 7, 9, 15, 30, 31, 32, 34, 37, 38, 39a, 39b, 40, 47, 54, 55)

The Board's Consideration of the Application for Leave to Construct is Premature

42. Six Nations is aware that the Board has a limited express statutory mandate when considering a leave to construct application for an electricity transmission facility.

43. Therefore, Six Nations Council submits as follows:

(1) The Board should recognize that, in the present circumstances, the "Crown's duty to consult lies upstream of the statutory mandate of decision makers".

(2) Statutory decision makers, such as the Board, are required to respect both legal and constitutional limits on the exercise of their authority or jurisdiction. This includes limits imposed by the Crown's constitutional duty and power to consult which lie upstream of the specific statutory mandate or limits on tribunals such as the Board.

(3) Therefore, the Board should not and may not exercise its jurisdiction to consider and decide the GRWLP application for leave to construct the Transmission line unless and until the Crown's duty to consult and accommodate the Six Nations in respect of the overall project has been fulfilled.

(4) In other words, the Board's consideration of and decision upon the application at this time is premature, and should be deferred. As the Board's statutory jurisdiction is limited by the Crown's constitutional duty, (which lies "upstream"), the Board does not have jurisdiction to rule at this time on GRWLP's application to the Board.

44. As support for the submissions in paragraph 43, Six Nations Council refers the Board to the decision released on May 25, 2011 by the British Columbia Court of Appeal in *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*: 2011 BCCA 247, [2011] B.C.J. No. 942 (particularly at para. 106). That decision was decided after and took into account the decision in 2010 of the Supreme Court of Canada in *Rio*

Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 -- a case which commented on the Crown duty to consult where a tribunal is exercising a statutory power of decision. As stated by the Chief Justice of British Columbia in the *West Moberly* case:

> "It is a well established principle that statutory decision makers are required to respect legal and constitutional limits. The Crown's duty to consult lies upstream of the statutory mandate of decision makers: see *Beckman* at para. 48 and *Halfway River First Nation v. British Columbia*, 1999 BCCA 470, 64 B.C.L.R. (3d) 206 at para. 177." (para. 106)

45. Without prejudice to the above submissions concerning the need to defer the Board's exercise of its jurisdiction, it is submitted in the alternative, that the Board should include, as conditions for any approval it might grant, the conditions set out in paragraph 6 of this submission.

46. The Six Nations Council understands that the Board regularly grants approvals with conditions, without later providing parties and interveners to a proceeding the opportunity to make submissions as to whether the conditions have been fulfilled to make the approval fully effective. It is submitted that the Board's regular process in that regard, where the fulfillment of aboriginal consultation and accommodation is not a live issue, is not appropriate where that is a live and continuing issue.

47. For example, GRWLP states in its application dated February 28, 2011 to the Board (Exhibits B, Tab 8, Schedule 1, Page 1 of 2) at paragraph 97: "A copy of the Consultation Report [for the REA application yet to be submitted] will be filed with the Board upon completion of Exhibit B-8-3." First, this statement is confirmation that GRWLP's application to the Board is not complete. Second, if Six Nations is not afforded an opportunity to make submissions to the Board on the accuracy of such report after it is prepared and filed with the Board, it is unfair for the Applicant to be permitted to file this report for the Board's consideration.

48. As a result, the Board in this case should impose a condition along the lines set out in subparagraph 6(4) of this submission. This is particularly the case where, as is the case here, the Applicant pretends that adequate aboriginal

consultation has already occurred and the Six Nations Council is of the view that it has not yet even commenced for the Project.

CONCLUSION

49. For the reasons set out in this submission, the Six Nations Council request that the Board defer consideration of the GRWLP application as requested in paragraph 5 of its submission. Six Nations Council requests in the alternative that the Board include conditions on any approval as set out in paragraph 6 of this submission and provide the opportunity to make further submissions as to whether all of those conditions have been fulfilled before making any approval final and effective.

September 23, 2011 **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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