EB-2011-0063

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998, S.O. 1998*, c. 15, Sch. B, 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.

APPLICANT'S REPLY TO INTERVENOR SUBMISSIONS

INTRODUCTION

1. These submissions are in reply to the submissions filed by intervenors and Board staff in responses to Grand Renewable Wind LP's (the "Applicant") final submissions.

2. The intervenors filing submissions are the Independent Electricity System Operator ("IESO"), Hydro One Networks Inc. ("Hydro One"), Six Nations Council ("Six Nations"), Haldimand County Hydro Inc. ("HCHI"), Mr. Norm Negus, Mr. Quinn Felker, Mr. and Mrs. Ratcliffe and the Haldimand Federation of Agriculture (collectively, the "Intervenors").[1] These submissions were filed both on the Leave to Construct Issues and the four policy questions posed by the Board in Procedural Order No. 3. Each of these categories of issues will be addressed in turn.

LEAVE TO CONSTRUCT ISSUES

Six Nations Council

Environmental Issues

3. Six Nations' principal argument relates to the environmental impacts of the Transmission Facilities. It suggests that the Board should defer its consideration of the Application until the Board has been fully satisfied that the Ontario Crown has properly consulted and accommodated Six Nations on matters affecting Six Nations' treaty or aboriginal rights with respect to any aspect of the Transmission Facilities.

4. As the Applicant has submitted, the Transmission Facilities form part of, and are considered in, the renewable energy approval ("REA") process prescribed by Ontario Regulation 359/09, *Renewable Energy Approval Process under Part V.0.1 of the Act*, (the "REA Regulation").[2]

5. In EB-2007-0050, the Board examined what consultation and accommodation is required for the purposes of approving a section 92 leave-to-construct application; and what, if any, consultation and accommodation issues are within the Board's authority. The Board found that it does not have the authority to determine whether the Aboriginal consultation has been sufficient in approval processes that are beyond the Board's jurisdiction, such as the environmental assessment process.[3] Indeed, the Board cannot assume authority over matters that are clearly within the legislated jurisdiction of the

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[1] In two instances, intervenors Mr. and Mrs. Ratcliff and Mr. Norm Negus posed additional questions on their reply submissions. The Applicant intends to file responses to these questions separately.

[2] Applicant's Argument in Chief, filed September 16, 2011, at para. 33.

[3] EB-2007-0050, at p. 68.

other regulatory bodies or ministries.[4] Such is the case here regarding the REA, which process is specifically charged with addressing Aboriginal consultation issues relating to the GREP, including the Transmission Facilities, and which will be considered by the Minister of Environment.

6. Based on the foregoing, the Applicant submits that the Board does not have the authority in this application to review issues raised by Six Nations regarding consultation under the REA Regulation, the applicability of the Draft Aboriginal Consultation Guide for Preparing REA Applications or the impact of the Transmission Facilities on deer yards, etc.

7. Six Nations has also requested that the Board impose, as a condition to approval, the requirement that the REA be issued for the entire GREP (i.e. the Wind Project, Solar Project and Transmission Facility). As per the Board's practice, the Applicant anticipates that any decision by the Board regarding the Application will be conditioned on the granting of all other necessary permits and approvals, including the successful completion of the REA process. The Applicant agrees with Six Nations' suggestion and expects that receipt of a REA will be a condition of approval in any order issued by the Board.

Land Rights from the Crown

8. Six Nations also argues that the Board should defer its decision until it has determined that the Ontario Realty Company ("ORC") has appropriately consulted respecting the options agreements it is currently negotiating with the Applicant.

9. The Applicant recognizes that the Crown has a constitutional duty to consult aboriginal communities in instances in which the Crown's actions have the potential to adversely affect aboriginal or treaty rights. Without taking a position on whether the decision to lease the ORC Lands (as defined in the Application) has the potential to adversely affect Six Nations aboriginal or treaty rights, as per the Board's previous finding in EB-2007-0050, the Board cannot assume authority over matters that are clearly within the legislated jurisdiction of the other regulatory bodies or ministries.

10. The disposal of lands by the ORC is overseen by its own processes and guidelines, which process includes Aboriginal consultation.[5] As per the prescribed land disposition process, any decision by the ORC to dispose of its lands must be approved (the "Cabinet Approval") by Cabinet via an Order in Council. Furthermore, the Ministry of

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[4] *Ibid*.

[5] Ontario Realty Corporation Real Estate Sales Policy, as amended February 9, 2009. The Policy applies to any "disposition"' of Crown land held by the ORC, where "disposition" is defined as "a transaction that transfers an interest in real property by sale, transfer or exchange."

Energy (previously the Ministry of Infrastructure and Energy or "MEI") has clearly stated to the Aboriginal communities it identified as potentially having an interest in the GREP, including Six Nations, that consultation will be required both in the context of the REA and with respect to the proposed lease of ORC lands and that the MEI will be the main point of contact for the Crown relating to consultation on ORC lands. The foregoing was established by the Crown in a letter to Six Nations dated August 11, 2010, a copy of which is attached hereto as Schedule 'A'. The ORC Land issue is therefore analogous to consultation under REA process, in the sense that the Board does not have jurisdiction within a leave to construct application to oversee consultation being conducted by the Ministry of Energy.

11. There is no reason why the Board cannot decide upon issues within its authority (e.g., issues that relate to the price, quality and reliability of electricity) prior to Cabinet Approval to dispose of the ORC Lands. In any event, given that the Applicant will not be able to build the Transmission Line prior to the receiving leasehold rights to the ORC Lands, any Board decision in the present Application is effectively conditional upon Cabinet Approval.

Adequacy of consultation

12. Six Nations' submissions categorically reject any meetings, sharing of information, discussions, etc. as constituting "consultation". Regardless of the interpretation of the term with the duty to consult context, the Applicant has carried out extensive consultation with Six Nations on the GREP, including the Transmission Facility. The log of communications with Six Nations is included in the Applicant's Consultation Report, which forms part of the final REA documentation. The Consultation Report has been filed with the Board and demonstrates that meetings between the Applicant and Six Nations started as early as January 2010 and have been ongoing since then.

13. Furthermore, the Applicant has had ongoing discussions with Six Nations regarding partnering to build a 10 MW solar photovoltaic generation facility on Six Nations' reserve lands. While not directly related to the current Application, any joint venture is premised on the development of the GREP.

14. The Applicant further notes that discussions surrounding the REA and the GREP include the Transmission Line the Collector Substation (as defined in the Application). The ORC Lands will be used to host the Collector Substation and a portion of the Transmission Line.

15. Based on the foregoing, the Applicant respectfully submits that Six Nations have been kept well informed of all GREP related developments, beyond what is required under the REA.

Haldimand County Hydro Inc. ("HCHI")

16. HCHI's involvement in this Application has been unusual from the beginning. The concerns raised by HCHI seem to be related to electricity policy rather than issues contemplated within the scope of Section 96(2). A leave to construct for a privately-owned gen-tie is not the forum to carry out regional planning, to "raise issues that are of general importance to the regulatory framework governing the connection of renewable projects"[6] or to "reconcile the overall purpose of the Board" [7] and its applicability to the present Application.

17. HCHI has consistently tried to expand the Board's scope in 96(2)(a), but apparently has not acknowledged the Board's mandate in 96(2)(b), which is equally important: where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

18. Importantly, HCHI has not provided any evidence that approval of the Transmission Facility would be adverse to the public interest, or that price, quality or reliability of electricity would be adversely affected. As Board staff noted with respect to price, "the project appears to have no impact on transmission rates in Ontario."[8] Similarly, with respect to reliability, Board staff states that it is "satisfied that there are no negative reliability impacts on customer delivery points in the vicinity of the connection point of the project to the 230 kV N5M circuit."[9]

19. The evidence on price and reliability and quality of service is clear:

    (i) Price: HCHI rate payers will not be impacted. The Applicant is absorbing the cost of construction and operation of the Transmission Facilities. The Applicant is also on record as stating that it will cover costs related to the relocation (including burial and crossings) of any HCHI infrastructure and arising due to the Transmission Line.[10]

    (ii) Reliability and quality of service: HCHI's distribution infrastructure will not be adversely affected. The Applicant has taken steps to ensure that the Transmission Line is located on the opposite side of the Municipal ROW as much as possible and will absorb the cost of relocating HCHI

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[6] HCHI Submissions ("HCHI Submissions") filed September 23, 2011, at par. 16.

[7] HCHI Submissions, at par. 17.

[8] Board Staff Submissions at p. 9.

[9] Board Staff Submissions at p. 7.

[10] GRW Interrogatory Reponses to HCHI ("**HCHI IRRs**") filed August 15, 2011, IRR# 1(d).

infrastructure to the other side of the Municipal ROW in instances where the Transmission Line is co-located with HCHI infrastructure. The Applicant will meet all applicable codes and standards.

Proposed Route

20. The Transmission Line is to be built in the Municipal ROW, which is owned by Haldimand County. Haldimand County has agreed to allow the Applicant to use the Municipal ROW and has entered into a Community Vibrancy Fund Agreement, which provides a form of road use agreement.[11]

21. For reasons which remain unclear, HCHI is categorically opposed to locating transmission facilities within a municipal right of way.[12]

22. There is no basis for this opposition by reference to price or reliability and quality of service. With respect to the latter, even if HCHI does eventually upgrade its distribution system to a two 27.6 kV three phase system (which seems illogical given that HCHI is projecting a flat to declining load growth over the next 10 years), there is still ample room for the Applicant and HCHI to share the Municipal ROW without impacting reliability or quality of service.

23. HCHI refers to the Kinectrics Report, which it filed in EB-2011-0027, as evidence that the Transmission Line could adversely impact the distribution system.[13] However, the overall conclusion of the Kinectrics Report is that a properly designed 230 kV transmission line would not adversely affect distribution infrastructure.[14] The Kinectrics Report recommended a 10 meter distance between distribution and transmission poles to limit the ground potential rise, however this recommendation was based on a gas-line standard, which was later proven to be inapplicable.[15] Rather an extremely conservative recommended distance between poles was found to be 6 meters.[16] Such separation distances will be easily maintained given that the Applicant proposes to build on the opposite side of the Municipal ROW from HCHI distribution infrastructure for the majority of the route.

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[11] See Applicant's Submissions, filed September 16, 2011 at par. 30.

[12] HCHI Submissions, at par. 37.

[13] HCHI Submissions, at par. 14.

[14] The Kinectrics Report found that (i) voltage unbalance would not be affected, (ii) induced voltage could be mitigated with surge arrestors, (iii) acceptable phase potentials will be maintained in the distribution circuit.

[15] See EB-2011-0027, Summerhaven's Reply Submissions filed July 27, 2011, Schedules C and D, Peak Induction Study and Peak GPR Report, respectively. The Applicant would not normally refer to evidence that has been filed in another proceeding, but feels it has no choice based on the fact that HCHI has referred to such evidence in the first place.

[16] Peak GPR Report, at p. 2.

24. HCHI has not been able to substantiate its concerns related to reliability, nevertheless it takes the position that the Applicant should be forced to use a route for the Transmission Line that crosses privately-owned, undisturbed land that would have a greater impact on landowners (which are also ratepayers of HCHI) and the environment. HCHI neglects to acknowledge that, from a policy perspective, use of disturbed land such as a roadway is preferred precisely to avoid or reduce such impacts.

25. Apart from being the least impactful to the environment and landowners, there are many reasons that a route that attempted to coordinate with the Summerhaven and Port Dover project was not possible, including but not limited to: (i) the risk associated that one of the three projects does proceed; (ii) all three projects have different commercial operation dates, with a spread of more than 18 months between all three projects; (iii) financing issues related to risk, which risk substantially increases when there are elements that are outside of the control of the developer (such as the development of neighbouring projects and transmission lines); (iv) protection and control coordination given that the proponents are using different technologies and different procurement methods, etc.

26. Furthermore, contrary to the suggestions of HCHI, the Applicant is not required to provide evidence that the proposed route is the best alternative from a regional planning perspective.[17] This request is unrealistic since no single private proponent has the capacity, or access to the required information, to carry out such an analysis. Nor have any of the agencies involved, such as Hydro One, the IESO, the Ministry of Energy or the OPA, all of whom were well aware of the Port Dover and Summerhaven projects, required this. Rather, the Applicant must prove that the proposed route is the best route with respect to price, reliability and quality of electricity. The evidence in this proceeding is that this is the case.

Easement Agreement

27. HCHI makes substantive submissions regarding the form of easement agreement. However, the purpose of the Board's review of land owner agreements is to ensure that the affected landowner is protected. In particular, the Filing Guidelines require the Applicant to file materials that demonstrate "compliance with legislative requirements and respects the rights of affected persons."[18] In the present circumstances, the landowner, Haldimand County, has not raised **any** concerns in the proceeding.

[17] HCHI Submissions, at par. 36.

[18] EB-2006-0170: *Filing Guidelines for Transmission and Distribution Applications*, s. 4.3.6., p. 28.

IESO

28. A representative of the IESO states at page 2 of the IESO submissions that "the acceptability of certain metering configurations that have been proposed by the Applicant depends on whether or not the Applicant is a licensed transmitter." The Applicant fails to understand how the metering configuration would be affected by the licensed status of the Applicant. The representative of the IESO does not provide any explanation. Furthermore, the IESO has participated in reviewing the three possible metering configurations put forth by the Applicant and confirmed that all three comply with the Market Rules. As stated earlier, the Applicant sought the IESO's advice since the metering configurations were included in the power purchase agreements entered into between the Applicant and the Ontario Power Authority for the Wind Project and Solar Project.

29. In a meeting with the IESO, the Applicant and Hydro One that took place on September 19, 2011, the IESO metering representatives confirmed again that all three metering configurations are acceptable under the Market Rules. The Applicant is therefore correct in stating that the metering configurations "meet the IESO's approval". This is not to be confused with formal approval, which will be granted during the Facility Registration and Market Entry Process.

30. IESO (Operations) also confirmed at the September 19th meeting that "unbundling" the SIA would not be an issue since the obligations of each of the respective generators (i.e. the Applicant and Grand Renewable Solar, LP) are already distinctly laid out in the current SIA. IESO (Operations) confirmed that separating these obligations into two separate SIAs (traditionally done for financing purposes) would not change the technical findings of the current SIA.

Norm Negus

31. Mr. Negus states that the Applicant is incorrect in saying that none of the landowners are intervenors in the process.[19] As a point of clarification, the Applicant stated that none of the directly affected landowners are intervenors, i.e. those landowners whose land will be used for the purposes of hosting a portion of the Transmission Facility and who have entered into or are negotiating a form of land use agreement with the Applicant. The Applicant agrees with Mr. Negus that other landowners are intervenors and regrets any confusion it may have caused in making the distinction.

32. Mr. Negus has raised several points in his submissions, which the Applicant has responded to below:

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[19] Norm Negus submissions dated September 23, 2011, at p. 3.

a. Overhead lines: The Applicant confirms that, as currently designed, the Transmission Line will not run over or directly above the roof tops of any residential homes. This would be a violation of the CSA Standard by which the installation must be designed and constructed.

b. Highway 3: The Applicant chose to cross Provincial Highway 3 at Nelles Corners because it is the most direct route to the point of connection to the IESO-controlled grid near Hagersville. Alternate routes were considered to bypass Nelles Corners but these routes were not favoured due to longer distances and the need for additional right-of-ways/easements that would further impact landowners. In any of the options considered, in order to connect the power generated by the GREP to the IESO-controlled grid, it is absolutely necessary to cross Provincial Highway 3 at some point within Haldimand County. The crossing will be performed within the existing public right-of-way.

c. Electricity rates: The Applicant confirms that, contrary to Mr. Negus' statement, the construction, operation and maintenance of the Transmission Facilities will not directly affect the electricity rates of Mr. Negus, since the entire cost of design, build and operation of the Transmission Facilities will be borne by the Applicant.

d. Change in Overhead Lines: The Applicant wishes to clarify that the Easter mail out referred to by Mr. Negus was in fact the Leave to Construct Notice and the Application (the "Notice") required by the Board in these proceedings. At the time the Notice was issued, the Transmission Line was a straight route along the Municipal Row. As the natural heritage assessments were conducted, the design of the Transmission Line was altered to avoid certain environmental and landowner homes as much as possible. This has led to the crossing of Highway 3 several times.

e. Highway 6: The Applicant cannot comment on Haldimand County's proposed bypass of Highway #6 to be constructed on the east side of the Hydro One power lines.[20]

33. Additionally, Mr. Negus' submissions included a number of questions.[21] The Applicant has responded in a separate letter to Mr. Negus, a copy of which will be provided to the Board.

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[20] Negus Submissions, at p. 5.

[21] *Ibid.*

Quinn Felker

34. Mr. Felker refers to two examples in his submissions. The Applicant wishes to clarify both. The document in Example 1 is the Notice of Proposal and the Notice of a Public Meeting (#1) for the GREP that was to be issued as part of the Renewable Energy Approval (REA) process. It clearly states that the Applicant is in the planning stages. Nowhere on the map is the Transmission Line shown. This was not the purpose of the map. Rather, the map was required as part of the REA process to notify the public that a project location had been identified.

35. Concerning Example 2, the Applicant showed the collector lines to be aerial along many of the roads in Haldimand County to collect power from the wind turbine generators and deliver it to the Collector Substation, where the voltage is increased to 230,000 volts and transmitted via Transmission Line to the IESO-controlled grid. Discussions with respect to the aerial conductor installation are continuing with HCHI as there are numerous areas where conflict between both facilities exists. It may be determined that the best solution to resolve many of the conflicts with HCHI would be to bury the collector system conductors, a solution to which the Applicant is amenable.

36. Regarding paragraph 4 of Mr. Felker's submissions[22], the Applicant notes that it is designing to accommodate the HCHI Upgrades.

RESPONSE TO BOARD QUESTIONS

37. Before addressing the individual submissions on these questions, it is worth observing, as a general matter that the questions raise a number of generic policy issues. Hydro One, Board staff, HCHI and (apparently) the IESO all provided submissions on both how those policy issues should be addressed and the appropriate process to address them. Those submissions will not be responded to in this Reply. It should suffice here to agree with the recognition by Board staff and Hydro One that the results of any generic policy review would apply on a prospective basis only, and should not delay or otherwise impact the outcome of this Application. As Hydro One noted, "in order to avoid potential adverse impacts, any changes to the policy and planning environment that could arise from an examination of the 4 questions posed by the Board should be applied prospectively and not to current proponents that are already engaged in the planning and approvals process."[23] Board staff put it well as follows:[24]

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[22] Felker submissions filed September 23, 2011.

[23] Hydro One Submissions, p. 2.

> "It is not reasonable to expect that an Applicant should await the outcome of these future proceedings. Indeed, it is not even certain that these proceedings (or other proceedings) would impact the current application even if they were already completed. It is the Applicant's responsibility to file an application in accordance with the current regulatory framework. It has done so, and it would not be reasonable to delay a decision on this matter based on speculative future planning requirements that may or may not arise in the future."

38. Reply submissions on the four questions are set out below.

Question 1: What are the responsibilities, if any, of the Applicant to provide access to its proposed Transmission Facilities?

39. The Applicant's argument in chief is that the Board has no authority to order access to the Transmission Line because the authority to order access only applies to licenced transmitters and the Applicant is exempt from licencing requirements pursuant to s. 4.0.2(1)(d) of Ontario Regulation 161/99.

40. Board staff and Hydro One agree that the issue of access is determined by the issue of licencing. Board staff put it as follows: "Un-licensed transmitters, therefore, do not have any legal obligation to provide non-discriminatory access to their systems."[25] Similarly, according to Hydro One, "access by distributors or transmitters to generator owned distribution and transmission systems would appear to be at this time not achievable under the current legislative scheme and legislative changes are apparently required, if such access were to be a desired outcome."[26]

41. The IESO apparently does not take a position on this issue. It argues that "it would be advantageous to have this matter clarified sooner rather than later." The IESO has not given any reasons why the issue is in need of clarification, especially in light of the clear law on this matter recognized by Board staff and Hydro One. It is disappointing that the IESO did not present a clear and coherent response to this question, especially in light of its submission that it has a mandate to promote non-discriminatory access. If the IESO is going to assert a public interest mandate on a matter of OEB jurisdiction, one would expect that the IESO would take account of the legal requirements that define that jurisdiction.

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[24] Board Staff Submissions, p. 15.

[25] Board Staff Submissions, p. 9.

[26] Hydro One Submissions, p. 3.

42. HCHI appears to acknowledge that the Applicant, as an unlicenced transmitter, is not required to provide non-discriminatory access under s. 26(1) of the *Electricity Act*. However, HCHI points out that s. 25.36 of the *Electricity Act* provides that a transmitter shall connect a "renewable energy generation facility" to its transmission system "in accordance with the regulations, the market rules and any licence issued by the Board". HCHI appears to argue that this section entitles it to access even though it is not a "renewable generation facility" and even though there are no regulations, market rules or licences that prescribe an access entitlement. HCHI provides no reason why this section, which clearly does not apply, is relevant to its position in this application.

43. As indicated, Board staff acknowledged that the issue of access is determined by the issue of licencing. It went on to claim that the application of the Exemption Provision to the applicant "is not certain". Staff submitted that, "Despite this uncertainty, it is Board Staff's submission that this analysis need have little impact on the current proceeding."

> "This is an application for a leave to construct approval, not a licensing proceeding. Both licenced and unlicenced transmitters require section 92 approvals to construct transmission facilities. The tests employed by the Board in both cases are essentially the same; indeed the licensing status of leave to construct applications is seldom even remarked upon."

44. The Applicant agrees that the issue of whether it is required to be licenced is not properly addressed in a leave to construct proceeding particularly where, as here, it is raised for the first time in staff's final argument. However, since staff have raised the issue, the Applicant wishes to put its position on the record.

45. The Applicant agrees with Board staff that the relevant provision is O. Reg. 161/99, s. 4.0.2 (1) I (the "Exemption Provision"), which provides as follows:

> 4.0.2 (1) Clause 57 (b) of the Act and the other provisions of the Act listed in subsection (2) do not apply to a transmitter that transmits electricity for a price, if any, that is no greater than that required to recover all reasonable costs if,
>
> (d) the transmitter is a generator and transmits electricity only for,
>
> (i) the purpose of conveying it into the IESO-controlled grid

46. There are thus 3 conditions that must be in place for s. 4.0.2(1)(d)(i) to apply:

- The transmitter cannot charge more than the recovery of its costs;
- The transmitter is a generator; and

- The transmitter only transmits electricity for the purpose of conveying it to the IESO-controlled grid.

47. All of these conditions are met in this case.

48. Board staff appears to acknowledge that this is the literal interpretation of the exemption. However, staff suggest that it may be more "sensible" to effectively add a fourth condition, namely, that the electricity conveyed to the IESO-controlled grid must only be the electricity generated by the generator. Staff states that this interpretation more closely reflects the purpose of the exemption than the literal interpretation because, otherwise, a generator may transmit electricity without a licence even if "there is no physical connection between its generation facility and transmission facility."

49. The Applicant submits that this approach, as well as being inconsistent with the specific provisions in the exemption regulation, is not consistent with the purpose of the exemption.

50. Before looking at the purpose of the Exemption Regulation, it is helpful to look at the purpose of imposing a licencing obligation on transmitters in the first place. At its most basic, the purpose of regulating transmitters is not to prevent generators from voluntarily coordinating their transmission requirements, but to protect transmission customers, i.e., persons who receive and pay for transmission services.[27]

51. In other words, the main purpose of imposing regulatory obligations on transmitters is to protect transmission customers. The exemption from that obligation should therefore be interpreted by reference to when that protection is not required. Thus, a purposive interpretation of the Exemption Provision requires showing how a proposed interpretation may or may not harm customers.

52. This is what is missing from Board staff's argument. Staff supports its proposed interpretation by positing the scenario of a generator/transmitter that provides access to transmission services to another person where "there is no physical connection between its generation facility and transmission facility." Staff presents this scenario as unacceptable and something which the Exemption Regulation should not permit. It is therefore worth considering this scenario by reference to whether it presents a plausible harm that requires protection against through a licencing requirement.

53. First, for this scenario to apply here, the other person receiving transmission access could not be a transmission customer – under the Exemption Provision, power can only be transmitted to the IESO controlled grid, and not to load customers.

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[27] For example, the Ontario Transmission Rate Schedule defines 'transmission customers" as "the entities that withdraw electricity directly from the transmission system in the province of Ontario." (See: Section A)

54. Second, for the example to apply, the power can only be transmitted at cost, without a profit.

55. As a result, the only scenario that staff can provide of harm that would result if there interpretation is not adopted is where a generator decides that it will build a transmission facility at its cost, and without profit so that it provide a transmission service to other generators. It is almost impossible to conceive of a scenario where any transmitter would have any reason to do this. Even if a transmitter were to do this (that is build a line for an unconnected generator as an act of charity), it is equally impossible to conceive of who would be harmed by this. Thus, applying a purposive approach, it is hardly plausible to argue that this scenario is the type of harm that the Exemption Provision is meant to prevent.

56. It is submitted that the purpose of the Exemption Provision is to exempt persons from the regulatory obligations accompanying the transmission business where there is no public interest reason to impose these obligations. In determining whether these obligations should apply, it is necessary to bear in mind just how considerable these obligations are.

57. If a license is required here, then not only would the non-discriminatory access provisions of s. 26(1) of the *Electricity Act* apply, but so would the other provisions applicable to licenced transmitters. These include:

- The separation of business activities, so that GREP could no longer generate power;
- Compliance with the Affiliate Relationships Code to ensure separate financial requirements and govern all shared services and imposition of strict prohibitions on shared staff; and
- The requirement for Board approved rates.

58. In other words, if the Exemption Provision does not apply here, then GREP would have to establish a stand alone transmission company that engaged only in the transmission business – it would have to engage in an entirely different business than the generation business.

59. There are a number of reasons why this result would not further the purpose of the Exemption Provision.

60. First, sharing transmission facilities by generators is consistent with, and even encouraged by OEB policy. Thus, for example, when establishing changes to the TSC which would, for the first time, allow transmitters to include generator connection lines in rate base, the Board noted that the current policy of generators constructing and paying

for their own facilities "remains appropriate where single proponents (whether one generation facility or of *several that are intended to connect to the same transmission connection facility*) are involved and where coordination issues therefore do not arise."[28] If the Board thought that its current policy violated licencing obligations, presumably it would have said so.

61. Indeed, Board staff's view that generators who coordinate a common transmission facility may run afoul of licencing obligations is a departure from Board staff's previous advice, upon which the Applicant relied in this case. Thus, on October, 20, 2009, Kruger Energy Inc. ("Kruger") wrote a letter to the Board Secretary requesting that the Board confirm that a transmission licence was not required for "generators who convey, at cost, electricity generated by a third party."

62. In response to this letter, the Manager of Licence Applications stated that "after conferring with other Board staff," his recommendation was that a transmission licence would not be required under that circumstance.[29] True, Board staff cannot bind the Board, but it is surprising here that staff, without warning, at the close of proceedings, should start raising questions about the correctness of its previous advice.

63. Parties should be entitled to expect that when Board staff adopts an approach with one party, it will staff consistently follow that approach with other parties and, if staff proposes a change in approach, that it would only do so on a prospective basis and not change its position at the end of a hearing.

Question 2: Are broader transmission planning issues (i.e. beyond the Transmission Facilities proposed in the Application) relevant considerations in this proceeding? What responsibilities does the Applicant have, if any, with respect to broader transmission planning issues?

64. Board staff[30] and Hydro One[31] both agree with the Applicant's submission that this proceeding is not the appropriate forum to address broader transmission planning issues.

65. HCHI makes submissions under this heading, but does not address this point. It argues that the Board should not approve a transmission project that is not in the public interest,

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[28] Notice of Proposal to Amend the Transmission System Code, October 29, 2008, p. 9 (EB-2008-0003) (emphasis added).

[29] This correspondence is attached as Schedule *

[30] Board Staff Submissions, pp. 14-15.

[31] Hydro One Submissions, p. 3

but does not indicate why this project fails to meet that test. As indicated, the Applicant submits that this project is in the public interest as that term is defined in s. 96 of the *OEB Act, 1998*.

Question 3: Does the fact that the proposed facilities will be located largely within a municipal right of way have any bearing on the Applicant's obligation regarding future requests for connection?

66. Board staff[32] and Hydro One[33] both agree with the Applicant's submission that the fact that the proposed facilities will be located largely within a municipal right of way does not have any bearing on the Applicant's obligation regarding future requests for connection.

67. HCHI apparently proposes that the Board introduce usage fees for access to municipal ROWs and that licenced distributors should be given priority access to municipal ROWs. It offers no legal authority for either of these proposals.

Question 4: Does section 96(2) permit the Board to consider the impact of the proposed Transmission Facilities on the reliability of the current or future distribution system owned and operated by HCHI?

68. Board staff responded to this question by noting that, if there was evidence on the impact on consumers with respect to price or reliability then, under s. 96(2) the Board would be expected to take that into account. Staff noted, and the Applicant agrees, that "any such review would have to be based, of course, on clear evidence."34

69. Neither Hydro One nor HCHI refer to any reliability impact resulting from the facilities proposed in application. Both offer up theoretical costs, neither of which provide the type of "clear evidence" to which staff refers.

70. HCHI states that there will be "additional costs which HCHI is unable to quantify at this time."35

71. Hydro One states that if HCHI needs new facilities, and is not entitled to connect to the Applicant's facilities, then its costs will go up.36 While this is true as far as it goes, it is beside the point. If, at some future time, if HCHI seeks to expand its facilities, and if it

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[32] Board Staff Submissions, p. 19.

[33] Hydro One Submissions, p. 4.

[34] Board Staff submission, p. 22.

[35] HCHI Submission, p. 18.

[36] Hydro One Submissions, p.5

seeks access to the Applicant's facilities, that issue can be addressed at that time. Like all private landowners, the Applicant would be expected to be compensated for access to its facilities. This compensation would likely increase HCHI's costs, but it is a cost of doing business; it is not the type of adverse impact on rate payers contemplated in s. 96(2).

SCHEDULE ‘A’

Ministry of Energy and Infrastructure

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Ontario

Chief William Montour
Six Nations of the Grand River First Nation
1695 Chiefswood Rd
P.O. Box 5000
Ohsweken, ON N0A 1M0

August 11, 2010

Dear Chief Montour:

I am writing to let you know about proposed renewable energy projects that may be of interest to or affect your First Nation. On January 21, 2010, Ontario announced an investment, by a consortium led by Samsung C&T Corporation and the Korea Electric Power Corporation [hereafter referred to as Samsung], in wind and solar power in the province.

As you are likely aware, renewable energy projects are subject to the Renewable Energy Approval (REA) Regulation 359/09 under Ontario's *Green Energy Act*. The REA integrates environmental approvals, providing clear provincial rules and requirements, transparent decision-making and certainty for stakeholders and proponents. Included within these streamlined approvals are Aboriginal consultation requirements that a proponent must meet before provincial approval will be granted.

Phase I of Samsung's investment in Ontario includes the Grand Renewable Energy Park, which is proposed to consist of a 140 MW wind project and a 100 MW solar project within Haldimand County. A portion of the project is proposed to be located on Ministry of Energy and Infrastructure (MEI) lands, known as the South Cayuga Land Bank, which is approximately 5,344 acres in size and is located just north of the Lake Erie shore in Haldimand County. Ontario is currently in discussions with Samsung regarding the examination and possible lease of all or portions of these lands for the purposes of renewable energy development, both wind and solar.

The Crown has a constitutional duty to consult with Aboriginal communities when its conduct may have an adverse impact on aboriginal and/or treaty rights. I note that consultation with Aboriginal communities will be required both in the context of the REA and with respect to the proposed lease of MEI lands. While procedural aspects of the duty to consult have been delegated to Samsung, the final determination of the sufficiency of consultation rests with the Crown.

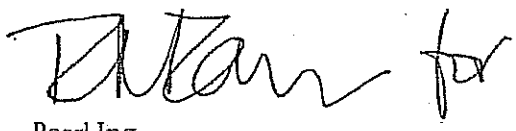
At this stage, it is not clear how the proposed projects may interest or affect your First Nation. The purpose of this letter is to provide you with notice of the proposed wind and solar projects and to identify the parties involved.

If you would like to receive specific information about the project, to provide comments with respect to the project development or design, or to discuss your potential concerns and interests, please contact:

Mr. Hagen Lee
Manager, Business Development and Government Relations
Samsung Renewable Energy Inc.
Telephone: 905-817-6496
Email: hklee@sai.samsung.com

The Ministry of Energy and Infrastructure will be the main point of contact for the Crown on matters relating to consultation on MEI lands and on Aboriginal consultation under the REA for the Samsung Phase I projects. MEI welcomes your comments with respect to the proposed wind and solar projects. If you have any questions, please do not hesitate to contact me by telephone at 416-327-3868 or via e-mail at pearl.ing@ontario.ca.

Sincerely,



Pearl Ing
Director, Renewable Energy Facilitation Office