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Vice President and Chief Regulatory Officer
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BY COURIER

December 14, 2011

Ms. Kirsten Walli
Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street
Toronto, ON.
M4P 1E4

Dear Ms. Walli

**EB-2011-0021– Hydro One Remote Communities’ Application for an Exemption from Sections of the Distribution System Code and Low-Income Energy Assistance Program –
Hydro One Remote Communities’ Reply Submission**

In accordance with Procedural Order 3, issued by the Board in this proceeding on October 12, 2011, and in response to the submissions of Nishnawbe Aski Nation, please find attached two hard copies of Hydro One Remote Communities’ Reply Submission.

An electronic copy of this document has been filed using the Board’s Regulatory Electronic Submission System and the confirmation of successful submission slip is provided with this letter.

Sincerely,

ORIGINAL SIGNED BY SUSAN FRANK

Susan Frank

Attach.

- c. Douglas M. Cunningham (electronic only)
- Grand Chief Stan Berdy (electronic only)
- Mel Stewart (electronic only)

ONTARIO ENERGY BOARD

IN THE MATTER OF *the Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an Application by Hydro One Remote Communities Inc.
For an Order or Orders approving rates for the distribution and generation of electricity

**REPLY OF HYDRO ONE REMOTE COMMUNITIES INC. DATED DEC. 15, 2011,
TO THE SUBMISSIONS OF THE NISHNAWBE ASKI NATION DATED NOV. 30, 2011**

Hydro One Remote Communities Inc. (“Remotes”) makes these reply submissions in accordance with item no. 3 in the Board’s P.O. No. 3, issued in this proceeding on October 12, 2011 (“P.O. No. 3”). These reply submissions are in response to the Submissions of the Nishnawbe Aski Nation (“NAN”) in a letter dated November 30, 2011.

1. Duty to Consult and Accommodate and the Issue of aboriginal title and/or rights

NAN alleges that Remotes has an obligation to engage in substantive consultation with NAN concerning accommodation of the aboriginal or treaty rights and/or title of their member communities that they allege to be adversely affected by Remotes’ Application.

Remotes’ Response

Remotes submits that:

- (a) the aboriginal and/or treaty rights and/or title of the NAN First Nation communities will not be affected by Remotes’ proposed exemptions from the Distribution System

1 Code (“DSC”), and NAN’s submission has not disclosed any rights and/or title that
2 would be affected;

3
4 (b) as will be detailed in section 6 below, Remotes has met or exceeded any obligation to
5 consult with NAN communities concerning this Application;

6
7 (c) NAN has failed to provide information regarding the asserted aboriginal and treaty
8 rights to support its submissions; and

9
10 (d) NAN’s assertions of law regarding the duties owed by Remotes to its communities
11 are neither correct nor applicable to this Application.

12
13
14 **2. General rights under Treaties 5 and 9**

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16 NAN alleges that the exemption currently being sought by Remotes in this Application
17 would affect current benefits and entitlements of First Nations under Treaties 5 and 9,
18 federal and provincial statutes, and/or agreements executed by INAC for First Nations;
19 and NAN alleges that Treaties 5 and 9 confirm that the consent of First Nations is
20 required for activities conducted by non-aboriginal persons on reserves.

21
22 NAN further alleges that pursuant to the NAN Chiefs-in-Assembly resolution (10/23),
23 any proposed government policy that affects any part of NAN territory cannot proceed
24 without first obtaining the “free prior and informed consent” of the affected First Nation
25 communities.

1 **Remotes' Response**

2
3 Remotes states the following:

4
5 (a) NAN's submission does not support NAN's incorrect assertion that the meaning of
6 Treaties 5 and 9 is that Remotes is required to obtain the First Nations' consent to this
7 Application for exemption; and

8
9 (b) the Indian Act, R.S.C., 1985, c. I-5, has standardized procedures not specific to
10 Treaty 5 or 9 addressing the occupation of reserve lands which include, in some
11 instances, consent, but nothing in this application would trigger any such provision.

12
13 (c) In any event, NAN's assertions are irrelevant to the subject matter of the Application
14 because this Application is not related to use or occupation of reserve lands. Rather,
15 this Application pertains to the regulation of contractual arrangements for the
16 provision of electricity to residents of remote communities.

17
18 Furthermore, Remotes submits that "free prior and informed consent" is irrelevant to the
19 Application. The United Nations Declaration on the Rights of Indigenous Peoples does
20 not address, nor is it intended to address, the provision or regulation of electricity services
21 to indigenous peoples. In addition, although the NAN Chiefs-in-Assembly resolution is
22 informative, it does not have binding force and effect in relation to this matter.

23
24 Moreover, the DSC exemption being sought by Remotes does not contravene any rights
25 or benefits conferred by any federal or provincial statutes. The DSC is issued by the
26 Board under the authority of the *Ontario Energy Board Act, 1998*, and is applicable to all
27 transactions and interactions between a distributor and all electricity consumers on that
28 distributor's distribution system. It sets out the minimum conditions that a distributor
29 must meet in carrying out its obligations to distribute electricity. The DSC is not directed
30 at, nor does it confer, any aboriginal or treaty rights or title, nor is the DSC exemption
31 being sought by Remotes directed at any aboriginal or treaty rights or title.

3. Fiduciary responsibilities of the Federal Crown toward members of First Nations communities

NAN alleges that the Crown's fiduciary duty toward First Nation communities and section 35 of the *Constitution Act, 1982*, impose a duty to consult and accommodate First Nation communities regarding this Application.

Remotes' Response

Remotes submits that it has no fiduciary relationship as NAN has alleged, nor has NAN provided any particulars to support its allegation that a fiduciary relationship exists. The fiduciary responsibilities set out in *Guerin v. the Queen* pertain specifically to the Crown and are considerably narrower than NAN alleges. Furthermore, the fiduciary responsibilities set out in *Guerin* do not in any way relate to the matters addressed in this Application. Rather, the *Guerin* decision relates to aboriginal rights and title, and to Crown responsibilities in relation to the surrender of Indian reserve lands as a result of the Crown's role in reserve land surrenders. It has no application whatever regarding the matters addressed in this Application.

4. Rights of NAN communities and residents under the *Constitution Act, 1867*, the *Constitution Act, 1982*, the *Indian Act*, and certain agreements made under that statute

NAN appears to be alleging that the electrification contracts ("Electrification Agreements") entered into between Ontario Hydro (now Remotes) and the Minister of Indian and Northern Affairs Canada ("INAC") confer constitutionally protected rights because the *Indian Act* enacted pursuant to the federal authority [section 91(24) of the *Constitution Act, 1867*] is protected by section 35 of the *Constitution Act, 1982*, and by section 25 of the *Charter of Rights and Freedoms*.

NAN also alleges that NAN communities have the right under Treaties 5 and 9 to control access to and activities on reserves, such that where changes to existing activities are proposed by a service provider, the duty to consult is triggered. Additionally, NAN alleges that the proposed exemptions would have the effect of derogating from the contractual expectations and benefits of First Nation communities under the Electrification Agreements.

Remotes' Response

Remotes submits that NAN's assertions that the Electrification Agreements are protected by the *Constitution Act, 1982*, are incorrect. Contractual service agreements of a generic nature, such as the Electrification Agreements between Ontario Hydro and the Minister of Indian Affairs, are not within the realm of constitutionally protected rights, a fact that has been made clear by a long line of jurisprudence relating to "existing aboriginal and treaty rights" that are recognized and affirmed by section 35. To fall within that category of aboriginal rights requires that the activities be "practices, traditions and customs central to the aboriginal society prior to contact with the Europeans." The Electrification Agreements clearly and obviously do not meet that test.

Remotes submits that the Electrification Agreements do not confer treaty or constitutional rights on aboriginal people, nor are they constitutional documents of any kind. If NAN's assertions were correct, which they are not, each agreement entered into with INAC concerning an aboriginal community, no matter how trivial, would be constitutionally protected, and that is not the case.

Remotes further submits that NAN's arguments pertaining to the *Indian Act* and its relationship to section 25 of the *Charter of Rights and Freedoms* are inaccurate and misleading for the following reasons:

- (a) section 25 protects aboriginal and treaty rights from being eroded by the application of other Charter rights and is not relevant to Remotes' Application for an exemption;

(b) Remotes's Application does not rely on any provision of the Charter, nor does the DSC relate to any provision of the Indian Act or any other statute addressing the rights of Indians qua Indian or lands reserved for Indians within the meaning of s. 91(24) of the Constitution Act 1867; and

(c) NAN has not disclosed any aboriginal right or any provision in Treaties 5 or 9 that would be affected by the proposed exemptions.

Remotes submits that because Her Majesty the Queen in Right of Canada administers reserve lands in accordance with the *Indian Act*, it is proper that in the Electrification Agreements, INAC authorized Ontario Hydro (now Remotes) "to enter upon, use and occupy any reserve land" for the purposes of installation and maintenance of electrical service.

5. The Electrification Agreements

NAN alleges that Remotes, as a successor to Ontario Hydro, is in breach of its contractual obligations to the First Nations by levying system capacity charges to First Nation customers, and that Remotes is further seeking to be relieved of its contractual obligations under the Electrification Agreements. NAN also alleges that the granting of DSC exemptions to Remotes would affect the rights and benefits currently enjoyed by First Nations individuals and communities under the Electrification Agreements.

Remotes' Response

The Electrification Agreements are separate and apart from the DSC, and NAN has failed to demonstrate any manner in which the DSC and the Electrification Agreements are allegedly related or the manner in which a DSC exemption would allegedly affect the First Nations' contractual rights under those agreements. Therefore, Remotes submits

1 that the Electrification Agreements are not relevant to the Application.

2
3 Even though the Electrification Agreements are not relevant to the Application, NAN
4 nevertheless seeks to rely on various clauses of the agreements to allege that Remotes has
5 breached its contractual obligations. As an example, NAN cites the Kingfisher
6 Community Electrification Agreement, executed on March 23, 1989 (the “Kingfisher
7 Agreement”), specifically clauses 6(a), 6(d), 12(a) and 15(a) thereof.

8
9 Clause 6(f) of the Kingfisher Agreement says:

10
11 “Notwithstanding anything contained in this clause 6, Ontario Hydro shall
12 be entitled to collect from any Customer charges for establishing facilities
13 to which INAC has not paid the costs for establishing. Any charges
14 collected shall belong to Ontario Hydro and shall not be applied as a credit
15 to the account payable by INAC.”

16
17 “Customer” is defined in the Kingfisher Agreement as a “user of power supplied through
18 systems constructed or acquired pursuant to this [Kingfisher Agreement]”, which is broad
19 enough to include a First Nation customer. It is clear that clause 6(f) negates clause 6(a),
20 on which NAN seeks to rely, and it is clear that clause 6(f) gives Remotes the right to
21 collect charges from First Nation customers to reconnect residences and other buildings if
22 INAC (now known as Aboriginal Affairs and Northern Development Canada, a
23 department of the federal government) fails to pay such charges.

24
25 As NAN has stated, clause 6(d) of the Kingfisher Agreement provides that the
26 “interpretation of rates and conditions of service shall be governed by the *rules made by*
27 *Ontario Hydro*” [emphasis added]. Remotes submits that it is clear that this clause does
28 not prevent Remotes from seeking an exemption from the DSC, a document issued by the
29 Board, but rather expressly gives Remotes the right to unilaterally change its rules
30 regarding the interpretation of rates and conditions of service.

1 Clause 12(a) of the Kingfisher Agreement does provide that changes to the terms of the
2 Kingfisher Agreement may be implemented by a change order or amending agreement.
3 However, Remotes' Application is for a DSC exemption, not for an amendment of the
4 Electrification Agreements; therefore, clause 12(a) is not applicable to the current
5 situation.

6
7 As NAN correctly points out, Remotes, as a successor of Ontario Hydro, enjoys the rights
8 set out above pursuant to clause 15(a) of the Kingfisher Agreement.

9
10 For the above reasons, Remotes submits that the Electrification Agreements are not
11 relevant to this Application. Even if that were not the case (i.e. if the Electrification
12 Agreements were relevant to the Application), Remotes submits that the proposed
13 exemptions from the DSC would not have the effect of derogating from the contractual
14 expectations and benefits of First Nation communities under the Electrification
15 Agreements.

16 17 18 **6. Hydro One Inc.'s commitment to consultation**

19
20 The First Nations and Métis Relations Policy (the "Policy") of Remotes' parent, Hydro
21 One Inc. does not trigger any duty to consult and accommodate. As indicated in its
22 application (page 4, lines 13-18) Remotes has always worked closely, and continues to
23 work closely, with the leadership in individual First Nation communities in carrying out
24 collection activities. Indeed as stated in the application, Remotes believes that "working
25 with the local community is required" (page 4, lines 14-15). As required by P.O. No. 3,
26 Remotes will continue to discuss its collection practices and the standard practices in the
27 DSC with NAN and with the leadership in the First Nation communities that Remotes
28 serves. Additionally, as required by P.O. No. 3, Remotes will provide the Board with a
29 report on these discussions.

1 All of which is respectfully submitted.

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3

4 DATED at Toronto, Ontario, this 14th day of December, 2011.

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6

7 HYDRO ONE REMOTE COMMUNITIES INC.

8 By its counsel,

9

10 ORIGINAL SIGNED BY CAROLANN BREWER

11 Carolann M. Brewer