SIX NATIONS COUNCIL

SIX NATIONS LANDS & RESOURCES

P.O. Box 5000 OHSWEKEN, ONTARIO CANADA N0A 1M0
PHONE: 519-753-0665 FAX: 519-753-3449

January 30, 2012

Via EMAIL: boardsec@ontarioenergyboard.ca
and RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Reply Submissions of Six Nations Council
re: Motion to Review and Procedural Order No. 5
(EB-2011-0063)

This letter constitutes the Reply submissions of Six Nations Council pursuant to paragraph 4 of Procedural Order No. 5.

When Six Nations filed its initial submissions with the Board on January 5, 2012 the only request being made to the Board was Six Nations' request that the Board vary Condition 1.6 of the Order so that the condition reflected the actual decision made by the Board on page 12 of the Decision and Order. (The Board's decision (at page 12) was that leave to construct should be conditional on the Applicant obtaining the REA for both the Wind Project and the Solar Project. As set out in Six Nations initial submissions, Condition 1.6 of the Order does not reflect the Board's actual substantive decision.)

Board Staff and the Applicant have both subsequently filed submissions in which they ask that the Board change the substance of its decision with the result that the leave to construct would no longer be conditional on the Applicant obtaining the REA for the

Solar Project.

For the reasons set out below, Six Nations submits that the Board's substantive decision to condition the leave to construct on obtaining the REA for both the Wind and the Solar Projects was the correct decision based on the evidence filed by the Applicant, and there has been no change of circumstances to justify changing the Board's decision on that point. Accordingly, Six Nations submits that the Board should affirm its original substantive decision, and correct the wording of Condition 1.6 in the formal Order so that it clearly states that the Applicant must obtain an REA for both the Wind and the Solar project as a condition of approval.

The Pending Appeal and the Duty to Consult

Board Staff in their submission (adopted by the Applicant on this issue) indicated surprise that Six Nations did not make submissions in this review proceeding relating to the Crown's duty to consult. Board Staff correctly pointed out that this is a subject of a pending appeal by Six Nations to the Divisional Court.

Six Nations did not make submissions on the duty to consult issue as (1) the Board did not indicate in Procedural Order No. 5 that it was prepared to reconsider that issue; and (2) the Board did not invite any submissions from the various parties on that subject.

If the Board is prepared to reconsider issues relating to the duty to consult, Six Nations requests that the Board establish a process to invite such submissions from Six Nations and others.

It is submitted that it would be inappropriate for the Board to consider the Board Staff's submissions on the duty to consult issue, which were adopted by the Applicant, in the absence of a process specifically raising that subject matter as one which the Board was prepared to reconsider, and inviting submissions from Six Nations and the other intervenors.

The Board's Decision to Condition LTC on Obtaining the REA for both the Wind Project and the Solar Project was Correct

Six Nations' position, as set out in its Notice of Appeal, is that the Board did not have jurisdiction to grant the leave to construct and should have deferred consideration of the Application for leave to construct until certain pre-conditions were met. (As stated above, Six Nations is not addressing these issues in this review proceeding.)

However, assuming for the purposes of this review proceeding only that the Board had jurisdiction to grant leave to construct to the Applicant, Six Nations submits that the condition imposed on the bottom of page 12 of the Decision, to require a REA for both the Wind Project and the Solar Project as a condition of approval, was a correct

condition based on the evidence that was submitted by the Applicant and that was available to the Board.

Under subsection 96(2) of the *Ontario Energy Board Act, 1998* the "reliability and quality of electrical service" is one of the issues the Board is required to take into account when determining whether to issue leave to construct. The primary evidence that the Board relied on for determining what impact the Applicant's proposed Transmission Facilities will have on the reliability and quality of electricity service is the System Impact Assessment ("SIA") and the Customer Impact Assessment ("CIA"). This is clear from pages 8-9 of the Decision where the Board specifically reference both reports when considering reliability issues:

> *System Impact Assessment*
>
> System Impact Assessments ("SIA") are conducted by the IESO to assess whether a connection applicant's proposed connection with the IESO-controlled grid would have an adverse impact on the reliability of the integrated power system and whether the IESO should issue a notice of approval or disapproval of the proposed connection under Chapter 4, section 6 of the Market Rules. This is a technical document intended to provide a detailed review of the components of the proposal and its impacts on system operating voltage, system operating flexibility and the implications for other connections to deliver and withdraw power from the transmission system. GRWLP filed the final SIA on August 2, 2011, as required by the Filing Requirements for Transmission and Distribution Applications (the "Filing Requirements") as they relate to leave to construct proceedings. **The SIA Report indicated that the scope of its study focused on the evaluation of the impact of the two sources of generation, from the wind and solar power projects** via the Hydro One owned 230 kV circuit N5M, on the reliability of the IESO-controlled grid. **The SIA Report also included a Protection Impact Assessment Report carried out by Hydro One for the IESO, which confirmed that it is feasible to connect the proposed 154 MW of wind and 100 MW of solar generation to circuit N5M as long as certain proposed changes are implemented.**
>
> ...
>
> *Customer Impact Assessment*
>
> As required by the Filing Requirements for leave to construct proceedings, a final Customer Impact Assessment Report ("CIA") conducted by Hydro One was filed on August 2, 2011. This study is designed to assess the implications of the project for other transmission customers of the transmission system. The assessment confirmed that the project is not

> expected to have any significant negative implications for other specific customers of the transmission system.
>
> (emphasis added, footnotes omitted)

The Applicant filed final copies of the SIA and CIA with the Board on August 2, 2011. Both final reports assessed the impact of connecting both the Wind Project and the Solar Project collectively as one generation project to the IESO-controlled transmission system; the assessments did not assess the impact of connecting the generation from just the Wind Project.

The Introductory paragraph of the CIA described the generation connection that was being assessed as including both Wind and Solar:

> Samsung Renewable Energy Inc. is to develop the 254MW Grand Renewable Energy Park ("GREP") in Haldimand County, Ontario. **The facility consists of 154MW of wind generation and 100MW of solar generation.**

Similarly page 6 of the SIA states:

> Samsung Renewable Energy Inc. is developing a new 254 MW (154 MW wind and 100 MW solar) power generation system, Grand Renewable Energy Park (GREP), in Haldimand County, Nanticoke, Ontario. The project is one of the renewable energy developments resulted from the agreement between Ontario government and the Korean consortium. The new generation facility is expected to start commercial operation in December 2012.
>
> Summary
>
> **This assessment examined the impact of injecting 254 MW of wind and solar power generation to the provincial grid**, via the 230kV circuit N5M, on the reliability of the IESO-controlled grid.
>
> (emphasis added)

The Application and the Applicant's evidence filed in the hearing was all based on the premise that both the Wind and Solar generating facilities would go into operation together. In paragraph 27 of its Argument in Chief, filed September 16, 2011, the Applicant referred to the possibility of "unbundling" the SIA, but that was solely in the context of the Solar Project and Wind Project being owned by different entities. The Applicant referred to these as "administrative issues", but made no mention of the possibility of the Wind Project proceeding without the Solar Project.

There was no evidence before the Board as to what impact the Transmission Facilities would have on the reliability and quality of the electrical system if only the Wind Project was connected without the generation from the Solar Project. The Board recognized this

fact in Procedural Order No. 5 when it specifically asked Hydro One Networks Inc. ("Hydro One") and IESO to provide evidence in this review proceeding on the issue of

> "the extent to which the findings of the Customer Impact Assessment Report and System Impact Assessment Report (which contemplated the Project serving both generation facilities) are still valid if the Project initially serves only the wind project."
>
> (Procedural Order No. 5, page 3)

Accordingly, the Board's decision to grant leave to construct conditional on the Applicant obtaining REAs for both the Wind and Solar Projects was correct on the evidence that had been filed. There was no evidence on which the Board could determine the impact on the reliability and quality of electrical service if the Transmission Facilities only served the Wind Project.

There are no Valid Reasons to Review
the Condition the Board Intended to Impose

If Condition 1.6 in the Order had accurately reflected the condition the Board stated on page 12 of its Decision, the Applicant would have had no justification for bringing a motion to review the condition. It would not have been open to the Applicant or Board Staff to bring a motion for review of the condition requiring REAs for both the Wind and Solar Projects because they would not have been able to meet the threshold test.

As stated in Six Nations' earlier submissions, if the Applicant or Board Staff wanted to initiate their own motion to review the condition imposed by the Board, then they would have had to meet the threshold test as set out in Rules 44.01(a) and 45.01 of the Board's *Rules of Practice and Procedure*. Rule 44.01(a) requires that the grounds set out in support of a Motion for Review must raise questions concerning the correctness of the Order or Decision. The grounds presented must be new arguments, and not the same ones that were before the Board in the leave to construct proceeding. There must be an identifiable error in the Decision as a review is not an opportunity for a party to reargue the case.[1]

Subrules 44.01(a)(iii) and (iv) makes it clear that a party is only entitled to bring a motion for review on the grounds that new evidence raises a question as to the correctness of the Board's decision if that new evidence was not available at the time of the hearing; in other words a party is not entitled to seek a review on the basis of evidence that was available at the time of the hearing:

> 44.01 Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

[1] Motions to Review the Natural Gas Electricity Interface Review Decision (May 22, 2007) EB-2006-0322, p. 17-18, and Township of King Motion for Leave to bring a Motion to Review (March 21, 2011) EB-2011-0024, p. 12

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;

There has been no material change of circumstances since the Applicant filed its evidence to justify the Applicant or Board Staff asking the Board to change its substantive decision. The evidence that Hydro One and IESO filed in this review proceeding as to the extent to which the findings of the CIA and SIA are still valid if the Transmission Facilities initially serves only the Wind Project was available prior to the hearing; the Applicant simply chose not to provide such evidence.

If the Applicant had been required to bring its own review motion and had asked the Board to accept additional evidence from Hydro One and IESO as to validity of the SIA and CIA if the Transmission Facilities only service the Wind Project, it is submitted that the Applicant's request for the Board even to initiate a review would have been denied as the Board's Rules makes it clear that a party is not entitled to seek a review based on evidence that was available at the time of the hearing. The public interest favours that there be finality to the process and discourages re-arguing of cases, unless there has been a material change of circumstances.

The only reason why there is now a review motion is because Condition 1.6 in the Order did not accurately reflect the Board's Decision, and Six Nations asked the Board to correct the obvious mistake in the formal Order. The Applicant should not be allowed to use that mistake to bring about a change to the Board's substantive decision in circumstances where the Board's Decision on this particular issue was correct based on the evidence the Applicant filed. There has been no change of circumstances justifying the filing of additional evidence from Hydro One and IESO.

If it was not open for the Applicant to lead additional evidence in support of a motion for review, then it was not appropriate for the Board on its own initiative to request the filing of additional evidence that was available to the Applicant and that the Applicant chose not to bring forward during the hearing. Such a process undermines public confidence in the Board's procedural fairness.

Six Nations therefore submits that the Board should disregard the new evidence that it received from Hydro One and IESO as to the extent to which the SIA and CIA applies if only the Wind Project is operational, and the Board should confirm its original decision to require REAs for both the Wind Project and the Solar Project as that decision correctly reflected the evidence that was before the Board when it issued its Decision and Order on December 8, 2011.

Variation Requested

Six Nations repeats and relies upon its initial submissions, as set out on pages 3-4 of its January 5, 2012 submissions, as to how the Conditions of Approval should be varied to correctly reflect the Board's decision to require REAs for both the Wind Project and the Solar Project.

However, in the alternative, if the Board decides to revise the substance of the condition so as to only require the Applicant to obtain the REA for the Wind Project, then Six Nations submits that the wording of Condition 1.6 as requested by the Applicant in its submissions of January 23, 2012 should be further amended as follows to make it clear that the Applicant is required to obtain the REA for the Wind Project.

> GRWLP shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, which, for greater certainty, shall **include obtaining the Renewal Energy Approval pursuant to the Environmental Protection Act (Ontario) for the Wind Project, but shall** not include any approvals related to the Solar Project, and shall provide copies of all such written approvals, permits, licenses and certificates upon the Board's request.

Yours truly,

Lonny Bomberry
Director, Lands & Resources
for the Six Nations Council