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Delivered by Courier
and Email

Kirsten Walli
Board Secretary
Ontario Energy Board
2700 – 2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Submissions of the Nishnawbe Aski Nation ("NAN") on a Threshold Question under Rule 45.01 arising from NAN's request for a review of the 22 August 2013 decision of the Board / EB-2013-0331 /DMC File No. 10068

Pursuant to the Board's Procedural Order No. 1, dated 11 October 2013, NAN hereby provides its submission on a Threshold Question under Rule 45.01 whether the Board should conduct a review of its 22 August 2013 decision. NAN has requested such a review in an oral hearing in its Notice of Motion dated 11 September 2013.

Given that the Board has not articulated a specific threshold question under Rule 45 but rather the Board seems to be requesting NAN to articulate reasons why the Board should undertake a review, NAN has treated this request as being akin to a leave application to the Board.

As such, NAN would invite the Board to review the grounds that NAN has outlined in its Notice of Motion, dated 11 September 2013, because NAN offers the submissions below in the context of those grounds.

First, the Board should conduct a review of its decision because it raises a *serious question* or, alternatively, *questions of general public interest* about the *correctness* of the Board's conclusion

that Regulation 442/01 requires the Board to approve a rate increase for Hydro One Remote Communities Inc. ("Remotes") which is the "average for all distributors in the same year". The Board's conclusion on this point has significant implications for any future rate increase applications for the consumers and communities served by Remotes. The proposed review also raises questions about the *scope and subject matter* of such future rate increase applications.

The Board has suggested in its 22 August 2013 decision that it has no authority in applications by Remotes to approve a proposed rate increase *other than* the "average for all distributors in the same year". The binding effect of *stare decisis* in Board proceedings is therefore one reason why the Board should review its own decision.

Second, the Board should be conducting a review because the conclusion that the Board is "bound by Regulation 442/01" and that rate increases must be the "average for all distributors in the same year" raises the issue of the Board *fettering its own discretion and decision-making powers as they relate to proposed rate increases.*

As NAN has indicated in its Notice of Motion, the Divisional Court has previously confirmed that the Board's mandate to fix just and reasonable rates "is unconditioned by directed criteria and is broad: the board is expressly allowed to adopt any method it considers appropriate". This Divisional Court decision is at odds with if not contrary to the Board's determinations in its 22 August 2013 decision. The Board has indicated that, in the case of rural and remote communities subject to Regulation 442/01, the Board has *no* discretion when it comes to fixing just and reasonable rates for the customers of Remotes. Indeed, one might very well ask whether the Board would have approved a 3.45% increase if Remotes itself had proposed a 2% rate increase. Would the Board have determined that it had no alternative but to approve a higher rate increase than that being requested because it was "bound by Regulation 442/01" ?

Further, pursuant to the principles of administrative law, the Board cannot choose a method of fixing rate increases which has the effect of *fettering its discretion in future applications.* Discretion, once conferred on a board or tribunal, may not be restricted or fettered in scope. For this reason alone, the Board should be conducting a review of its 22 August 2013 decision and stated reasons.

Third, the Board should be reviewing its 22 August 2013 decision because administrative law principles make it clear that statutory tribunals and boards cannot *refuse to exercise their discretionary powers*, including deal with matters over which such bodies have a power of decision. The Board should review its decision to ensure that it has not made a decision in which it has *refused* to exercise its discretionary powers relating to a rate increase application before it. It is NAN's contention that the Board has indeed refused to exercise its discretion relating to Remotes' application for a 3.45% rate increase.

Fourth, the broad statutory objectives of the Board under the *Ontario Energy Board Act, 1998* include *protection of the interests of consumers with respect to prices* and the adequacy, reliability and quality of electricity service. The Board is obliged to carry out its functions and render rate increase decisions in accordance with its statutory mandate. For this reason, the Board should be conducting a review of its decision on the issue of the 3.45% rate increase to determine whether its statutory objectives have been properly met, especially given the Board's conclusion that it had no choice or alternative but to approve the proposed 3.45% increase.

Fifth, a review of the Board's decision is warranted because the Board's decision has potentially created two different regimes for electricity regulation in Ontario: one for consumers who receive electrical power from the grid and who are not eligible for RRRP assistance and another regime for consumers who receive RRRP assistance.

There are serious reasons to doubt the correctness of the Board's decision that it has no discretion to consider "ability to pay" issues in communities or for consumers who receive RRRP assistance. The reality is that consumers served by Remotes are among the poorest residents in the province. The communities served by Remotes are also geographically isolated and they lack the alternative energy resources enjoyed by communities connected to the grid and/or which live in larger urban centres.

The Board has made a pronouncement and determination in its 22 August 2013 decision that "ability to pay" criteria have already been taken into account by the Legislature in Regulation 442/01. This conclusion effectively creates two regulatory regimes in Ontario. According to the

Board, it need not and should not consider ratepayer "ability to pay" issues in communities receiving RRRP assistance.

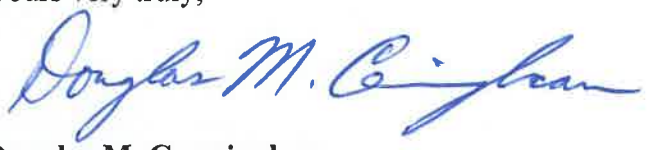
In NAN's submission, the Board's determination that ability to pay issues need not be considered in respect of RRRP communities raises the issue of discriminatory treatment which is contrary to the principles articulated by the Divisional Court.

For the reasons outlined above, NAN believes that there is ample reason for the Board to conduct a review of its 22 August 2013 decision. The relatively low review threshold of "correctness" would also indicate the appropriateness of such a review by the Board.

Finally, NAN submits that the grounds identified in its Notice of Motion also provide ample reason for the proposed review of the Board's 22 August 2013 decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF NAN.

Yours very truly,



Douglas M. Cunningham
(Legal counsel for NAN)

DMC/am