IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF an application by Hydro One Remote Communities Inc. for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2013;

AND IN THE MATTER OF a Motion to Review the Decision and Order issued on August 22, 2013, filed by the Nishnawbe Aski Nation

SUBMISSION OF HYDRO ONE REMOTE COMMUNITIES INC. ON THE THRESHOLD ISSUE RAISED BY PROCEDURAL ORDER NO. 1

Hydro One Remotes Communities Inc. ("Remotes") submits that the principles underlying the threshold question have been discussed and determined in previous Board decisions, e.g. in the Board's Decision on a *Motion to Review Natural Gas Electricity Interface Review Decision* (the "NGEIR Review Decision", May 22, 2007, EB-2006-0322/0338/0340) and in the Divisional Court's decision *Grey Highlands v. Plateau Wind Inc.* ([2012] O.J. No. 847), as well as in the Board's decision earlier this month (October 10, 2013) in EB-2013-0308 (a Motion by Hydro Ottawa for a review of its Decision and Order in EB-2013-0072).

In the NGEIR Review Decision, the Board stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision. In the NGEIR Review Decision, the Board also stated that "…the review [sought in a motion to review] is not an opportunity for a party to reargue the case." In Grey Highlands v. Plateau, the Divisional Court agreed with this principle. The Divisional Court dismissed an appeal of the Board decision in EB-2011-0053 where the Board determined that the motion to review did not meet the threshold test. In upholding the Board's decision, the Divisional Court stated:

> "The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing."

Additionally, Rule 44.01 of the Board's Rules provides, *inter alia*, that every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall 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.

The grounds listed in the Notice of Motion of the Nishnawbe Aski Nation ("NAN") were already the subject of the written hearing that took place in EB-2012-0137, involving written submissions by NAN, Cat Lake First Nation, Board Staff and Remotes. Even the court case (*Advocacy Centre for Tenants-Ontario v. Ontario Energy Board, Ontario Divisional Court, February 25, 2008*) referred to by NAN in its Notice of Motion was relied upon and explained by NAN in its written submission dated July 12, 2013.

In its submission on the threshold issue (Submissions of NAN dated October 22, 2013), NAN suggests that the Board should review its decision because it raises a serious question or questions about the correctness of the Board's conclusion. On the contrary, Remotes submits that the Board's decision that is sought to be reviewed shows a reasonable approach that has been accepted by the Board in the past, namely, the use of a rate that is the average of all distributors in the same year. The Board's decision was in no way novel. Regarding NAN's submission of error by the Board in its (the Board's) reasoning, Remotes submits that any such error is not material to the outcome of the Board's Decision.

Remotes therefore submits that NAN's Motion to Review does not provide new facts or even additional analysis but is, rather, a not dissimilar presentation of the original evidence that is a reargument of NAN's original submissions. Furthermore, in Remotes' respectful submission, a consideration of NAN's analysis in support of the Motion to Review could not result in a finding by the Board that the Original Decision should be varied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ORIGINAL SIGNED BY MICHAEL ENGELBERG
Michael Engelberg
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